

# Family Property and Succession in EU Member States National Reports on the Collected Data

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**Edited book / Urednička knjiga**

*Publication status / Verzija rada:* **Published version / Objavljena verzija rada (izdavačev PDF)**

*Publication year / Godina izdavanja:* **2019**

*Permanent link / Trajna poveznica:* <https://urn.nsk.hr/urn:nbn:hr:118:265546>

*Download date / Datum preuzimanja:* **2024-08-28**

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Co-funded by the  
Justice Programme  
of the European Union  
(2014-2020)



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Eds.

**Family Property  
and Succession in  
EU Member States**  
National Reports on  
the Collected Data

**Publisher** Sveučilište u Rijeci, Pravni fakultet/University of Rijeka, Faculty of Law, Hahlic 6, Rijeka, Croatia, [www.pravri.uniri.hr](http://www.pravri.uniri.hr)

**Title** Family Property and Succession in EU Member States: National Reports on the Collected Data

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**Cover Picture** Mohamed Hassan

**Publication Year** 2019

**ISBN** 978-953-8034-25-1

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## Foreword

With great pleasure, I present the results of the first period of the team's work on the PSEFS Project. This Project is designed as a sequence of stages of progressive research leading to better appreciation and understanding of the European Union legislation on family property. In the course of the first stage of our journey together we have collected national reports which provide an updated insight into the current situation in each EU Member State emphasising the most important issues in the context of property relations in family and succession law and the existing social structures. In defining the list of the EU Member States to be included in our research we have been guided by the idea of offering as extensive overview as possible. Hence, we took into account also the Member States such as Denmark, which is *a priori* excluded from the judicial cooperation in civil matters with an opt-in alternative, not exercised in the areas of research in this Project. Likewise, we decided to include the United Kingdom regardless of the ongoing process of withdrawal from the EU and its reserved approach towards the unification of the European private international family law. All Member States are considered essential partners in handling the topics of European family and succession law, because opposing positions and criticism by different Member States may actually add to the overall discussion and indirectly improve the Europeisation in these areas of law.

Proudly, we may present this collection of reports which is exhaustive, both in terms of European geopolitics and in terms of its contents. We believe that this publication is a great achievement and for this we owe gratefulness to the European Commission which, by virtue of its Justice Programme, facilitates results that otherwise would be difficult to accomplish. We also need to acknowledge the work of the national reporters who readily accepted this challenge and contributed to this immense resource of information on family and succession law and social realities in the Member States. However, projects such as this one create new scientific synergies enabling all the participating researchers to step out of their national borders. This publication provides an updated overview of the legal and social framework for property relations in the family, and perhaps also the only one encompassing all 28 Member States.

Already the Vienna Action Plan of 1998 intended to put in place the policies enhancing the lives of EU citizens by means of simplifying legislation and procedures regarding cooperation and communication among competent authorities. Removing these barriers is attained by adoption of a common legal instrument at the EU level. Since that moment, EU encroached on a long and thorny path to adoption of many legal instruments, including the Succession Regulation No. 650/2012, Matrimonial Property Regulation No. 1103/2016 and Registered Partnership Property Regulation No. 1104/2016. In between 1998 and today, however, social structure in the European Union is considerably changed, with particular highlights in different Member States. The number of citizens married or in partnership with a person of different nationality is in continuous increase. Likewise, the growing number of families, which are moving and migrating within the EU, mostly for the economic reasons, now lives in the Member State different from their home State. Not less important from the perspective of the private international law is the rise in the number of citizens with double (or even multiple) nationality. Social awareness about the protection of the same-sex relationships is spreading as well and reflected in the recent legislative changes.

The amendments introduced by the Lisbon Treaty have brought about the possibility of an enhanced cooperation, which was exercised quite intensively in the area of family law, first in relation to the law applicable to divorce and later with regard to the property relations between spouses and registered partners. This possibility triggered the transition from the system demanding unanimity in adopting the legal instruments towards the possibility to legislate various matters in different intensities within the EU, and is shaping the present-day EU family law. There is a complex system of

property relations with cross-border elements since 18 out of 28 Member States are participating in the regulations, while merely one additional Member State has notified its intention to join. The most sweeping novelty, reflected in the title of or Project, is that the spouses or registered partners, regardless of whether they are of opposite or same sex, may choose the national law which they consider the most appropriate to regulate their property relations. The same is true for the situations that arise following the death of a family member. Citizens may arrange their relations *mortis causae* by availing themselves of the limited option to choose the applicable law. This, of course, is expected to improve the quality of life of the EU citizens. In order for the citizens to responsibly choose the law governing property relations in their family, they need to be properly informed.

Disseminating information is the main aim of this collection of national reports, which should enable finding the needed information on matrimonial property, registered partnership property and succession in the laws of each Member State. Added value of these national reports is that they facilitated the creation of a new tool intended for citizens having no specialised legal knowledge. We have named this tool Atlas, which just as this e-book is published in open access and may be consulted via the Project webpage <https://www.euro-family.eu/>. A truly large number of researchers with experience in legal research and practice and united in their desire to spread the word about these new rules and options in their local and wider communities, have been engaged in producing this e-book and the Atlas.

The Atlas and the Collection of National Reports are indeed valuable resources which were produced owing to the tenacity, knowledge and dedication of the Rijeka team. The Faculty of Law in Rijeka is leading this stage of the Project and hence the Rijeka team deserves praise and appreciation for valuing the contents of this e-book to include it in their publishing activity. To me, this book is a gift received thanks to the generosity and efforts of many professionals, with different background and culture, some of which I had the privilege to work with for the first time. I am particularly grateful for this opportunity to the European Commission. Team building, cooperation with law professionals and academics, interchange between experts and communities, and dissemination of the results entail dialogue with the aim of improving the quality of life of persons, who by choosing the lifestyles characterised by the cross-border element, enforce the idea of the EU as a single area of diverse cultures and traditions. My huge thanks go to Sandra Winkler and Ivana Kunda because they spend many sleepless nights and together with me overcame all the difficulties, but above all for daring to accept this challenge which, as this e-book and Atlas show, has been successfully overcome. I am sorry that the Rijeka team member Nada Bodiroga-Vukobrat could not see the final results due to her passing away, but her valuable contributions to the Project are sincerely appreciated. The synergy of academic and professional expertise coupled with the overall constructive team atmosphere created in the course of the first six months of the PSEFS Project make me confident in the effective realisation of the Project.

Lucia Ruggeri

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**Federico Pascucci** graduated from the Faculty of Law, University of Perugia, (2001). He got a Doctor's degree in Economy's law in University of Ancona (2012) and Specialization's degree in Civil law in Specialization's School of Civil law in University of Camerino (2018). He has been Subject expert in Labour law in University of Perugia until 2016 and Subject expert in I. T. Labour law, I. T. Labour law class in Engineering College "Enzo Ferrari" in University of Modena and Reggio Emilia. He had also the role of Teaching assistant in Labour law, Labour law class, in University of Ancona until 2017. He is currently a Research Fellow in Labour law at the Faculty of Law, University of Camerino, Italy. He is a speaker at conferences and seminars and author of various publications in labour law.

**Bronislava Pavelková** is currently one of the Slovak country specialists on Family Law. She teaches Family law and Civil law at Pan-European University, Bratislava, Slovakia. She is a private barrister and solicitor, as well as a supervisor. JUDr Pavelková has published many books including *Law between spouses*, (2004), *How to get divorce* (2006), *Minors in Slovak family law* (2009), *Family law Comments* (2011, 2013, 2019), *Civil Non Dispute Code Comments* (2017) and many others in Slovak language. In English she wrote *Family and succession law* for IEL (International Encyclopaedia of Law, Belgium). She was a co-founder of the law television advisory service on Slovakian television JOJ from 2008-2016. From 2006 to 2008, she was the Slovak coordinator of *Asser Institute* in Haag for the project '*Study on the Enforcement of Family Law Judgements*'. Currently she takes a part in few comparative projects of Family law.

**Fátima Pérez Ferrer** earned the title Doctor in Law from the University of Almería in 2004. She is also a Lawyer. She authored many publications related to the general and special part of Criminal Law. Member of various national research projects on topics related to road safety, gender violence, minors, drug trafficking, criminal law and the environment, crimes against consumers, urbanism and corruption. Member of the Criminal Policy Study Group and of the Council of Universities of the Andalusian Regional Government. Visiting Professor at the Institut für Die Gesamten Strafrechtswissenschaften, Germany. As a part of the University of Almeria team, she conducts research within the project "Personalized Solution in European Family and Succession Law PSEFS" (800821-JUST-AG-2017/JUST-JCOO-AG-2017).

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**Tereza Pertot** studied law at the University of Trieste. She completed her PhD at the University of Verona (Italy) in a joint program with the University of Regensburg (Germany). During her PhD she did multiple study visits at the University of Regensburg, the University of Bayreuth and the Max-Planck-Institute for Comparative and International Private Law, Hamburg (Germany). She is attorney-in-law, postdoc at the Chair for German and European Consumer Law, Private Law and Comparative Law (of the University of Bayreuth) and at the Research Center for Consumer Law at the University of Bayreuth (Germany), and research assistant at the Chair for Civil Law as well as the Chair for Private Law at the University of Trieste (Italy). She regularly publishes and participates as speaker in conferences. She speaks Italian, Slovene, German and English.

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**Paolo Quacquarelli** has studied law at the Alma Mater Studiorum University of Bologna, where he graduated in 2017. He is studying at the Specialization School for Legal Professions at the University of Macerata and Camerino (since 2017). He is also cooperating with the team of the PSEFS project at the University of Camerino, jointly with other PhD students and research fellows, under the supervision of the Professor Lucia Ruggeri. He speaks Italian and English and knows French and Spanish.

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**Giovanni Russo** has studied Law at the University of Camerino, Italy. He graduated in April 2018 with full marks. Currently, he is a PhD student, Eureka scholarship holder, in Civil Law and Constitutional Legality at the University of Camerino, Italy. He is a member of editorial team to the treaty of arbitration directed by Daniele Mantucci. He is a member of editorial team of proceedings of the Conference about Emilio Betti directed from Giovanni Perlingieri and Lucia Ruggeri. In August 2018 he went in Oxford at the Bodleian Libraries and he did researches about blue economy, green economy, sustainable developments and environmental damage. His PhD research is the e-mobility, and at the same time he collaborates in researches in sustainable developments, property regimes in Italian and European Family Law. He speaks Italian, English and he knows French.

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**Freek Schols** is full professor of Private Law, in particular Notarial Law at the Centre for Notarial Law at the Faculty of Law at Radboud University (Nijmegen, Netherlands). Until November 2008 he was professor of Estate Planning at this faculty. In August 2016 Freek was also appointed as extraordinary professor of Family (property) Law and Inheritance law at the Faculty of Law of the University of Curaçao. Freek worked in notarial practice for many years and is currently associated with ScholsBurgerhartSchols estate planners. He is, among other things, editor of the WPNR (Weekblad voor Privaatrecht, Notariaat en Registratie), co-author of the Handbook Succession Law, co-author of the Asser International Family and inheritance law and editor-in-chief of EstateTip Review. He is, among other things, senior lecturer at the Professional Training for civil law Notaries (Family Property Law and inheritance law) and the Professional Training for Lawyers (divorce law and inheritance law). In December 2005 he obtained his doctorate in Law on the dissertation entitled 'Pseudo-succession law with binding elements'. Freek advises, publishes and gives lectures in various fields of law.

**Elisa Sgubin** has studied law at the University of Trieste (Italy) and has gained a PhD in “Diritto privato europeo dei rapporti patrimoniali, civili e commerciali” at University of Verona (Italy). She has also obtained the title of Doktor der Rechte at University of Regensburg (Germany). Currently she practices as lawyer in Udine (Italy) and cooperates with the Chair of Private and Civil Law at the University of Trieste. She regularly publishes on specialized legal topics. She speaks and works in Italian, English and German.

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**Sandra Winkler** is an Assistant Professor of Family Law of the University of Rijeka, Faculty of Law (Croatia). Before she joined the Faculty of Law University of Rijeka in 2006, she collaborated as an external researcher with the Chair of Private Law and the Chair of Civil Law at the Faculty of Law University of Trieste (Italy). In 2009, she received her PhD degree in Law from the Faculty of Law, University of Verona (Italy). She was awarded a research grant at the Max Planck Institut für ausländisches und internationales Privatrecht in Hamburg (Germany) on three occasions. Her research interests include Family Law and European Family Law. She actively participates in international and national seminars and conferences and publishes scientific papers and articles in

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**Lucie Zavadilová** graduated from the Faculty of Law of Masaryk University, the Czech Republic, in 2015. In 2018, she defended her doctoral thesis (JUDr.). She is a fourth year Ph.D. student at the Department of International and European Law, Faculty of Law, Masaryk University. In her research, she focuses on Private International Law and International Civil Procedure, particularly on the issue of matrimonial property regimes having cross-border implications. She is also an external lecturer at the Department of International and European Law. She has participated in several projects. Currently, she is involved in the project "Cross-border litigation in Central-Europe: EU private international law before national courts (CEPIL)", which is supported by the European Union. She regularly publishes and participates as speaker in conferences in the Czech Republic and abroad. Besides, she works as an in-house lawyer.

**Stefano Zordan** works and researches at the intersection of geography and political theory. He got his Bachelor's degree from the National University of Ireland, Maynooth, and his Master's in Ethics and Politics from Harvard University. He is the curator of the Italian edition of "The Practice of Adaptive Leadership" by Harvard professors Heifetz and Linsky.

**Mirela Župan** is a Professor at the Department of Public and Private International Law, and the Head of the PhD Programme in Law of the Josip Juraj Strossmayer University of Osijek, Faculty of Law. Her professional orientation towards EU law derives from her Postgraduate Scientific Master Study on the Law of European Integration at the Faculty of Law Rijeka (2004) and her PhD on EU private international law on child maintenance (2009). Her main professional interests include cross-border family relations, child protection and human rights within EU acquis. She was awarded with Max-Planck Society Doctoral (2007) and Postdoctoral (2011) Grant to conduct research at the Max-Planck Institute for Foreign and Comparative Law, Hamburg, Germany. She was a Visiting Professor at the Faculties of Law in Pécs, Budapest, Maribor, and Verona; and teaches EU law at the Master's Programme and the PhD Program. Currently, she is a holder of the Jean Monnet Chair on Cross-Border Movement of a Child within EU awarded to the Josip Juraj Strossmayer University of Osijek. Župan is a head researcher for the Croatian project partner in Facilitating Cross-Border Family Life: Towards a Common European Understanding (EuFams II), head researcher for the Croatian project partner in the Protection of Abducting Mothers in Return Proceedings: Intersection between Domestic Violence and Parental Child Abduction (POAM). She is actively participating in judicial training for ERA Trier, EJTN and Croatian Judicial Academy. Mirela Župan is a Croatian INCADAT data base reporter.



## Austria

Tereza Pertot

### 1. Social perspective.

- 1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without *affectio maritalis*).**

In Austria the traditional, more generational family is not as frequent as in the past. Most families in Austria are small, nucleus families, consisting of two parents, not necessarily married to each other, and their child or children. One-parent families also exist. Family formations consisting of only two spouses or partners are frequent too. Patchwork families (stepfamilies or reconstituted families<sup>1</sup>) are a common phenomenon in Austria as well.<sup>2</sup> The most frequent family formation is still the nucleus family, based on the marriage and with children. However, the number of other formations is growing.<sup>3</sup>

- 1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.**

In 2018 45.455 marriages were entered into in Austria.<sup>4</sup> In the same year 450 civil partnerships were registered.<sup>5</sup> In 2018 2.436.000 families lived in Austria. 1.731.000 were spouses (married to each other), 394.000 cohabitants (*Lebensgemeinschaften*), 257.000 mothers and 48.000 fathers living alone with their children.<sup>6</sup> In the same year there were 85.000 stepfamilies or reconstituted families with children under 25.<sup>7</sup>

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<sup>1</sup> *i.e.* families with at least one child descending from a former marriage or other form of partnership: see [https://www.statistik.at/web\\_en/statistics/PeopleSociety/population/households\\_families\\_living\\_arrangements/families/index.html](https://www.statistik.at/web_en/statistics/PeopleSociety/population/households_families_living_arrangements/families/index.html) (15.5.2019).

<sup>2</sup> Kerschner, F., 2013, 1, 1/2; [https://www.statistik.at/web\\_en/statistics/PeopleSociety/population/households\\_families\\_living\\_arrangements/families/index.html](https://www.statistik.at/web_en/statistics/PeopleSociety/population/households_families_living_arrangements/families/index.html) (15.5.2019).

<sup>3</sup> [https://www.statistik.at/web\\_en/statistics/PeopleSociety/population/households\\_families\\_living\\_arrangements/families/index.html](https://www.statistik.at/web_en/statistics/PeopleSociety/population/households_families_living_arrangements/families/index.html) (15.5.2019).

<sup>4</sup> [https://www.statistik.at/web\\_en/statistics/PeopleSociety/population/marriages/index.html](https://www.statistik.at/web_en/statistics/PeopleSociety/population/marriages/index.html) (15.5.2019).

<sup>5</sup> [www.statistik.at/web\\_en/statistics/PeopleSociety/population/registered\\_partnerships/120328.html](http://www.statistik.at/web_en/statistics/PeopleSociety/population/registered_partnerships/120328.html) (15.5.2019).

<sup>6</sup> [www.statistik.at/web\\_en/statistics/PeopleSociety/population/marriages/index.html](http://www.statistik.at/web_en/statistics/PeopleSociety/population/marriages/index.html); [http://www.statistik.at/web\\_en/statistics/PeopleSociety/population/registered\\_partnerships/120328.html](http://www.statistik.at/web_en/statistics/PeopleSociety/population/registered_partnerships/120328.html); [http://www.statistik.at/web\\_en/statistics/PeopleSociety/population/households\\_families\\_living\\_arrangements/families/index.html](http://www.statistik.at/web_en/statistics/PeopleSociety/population/households_families_living_arrangements/families/index.html) (15.5.2019).

<sup>7</sup> [http://www.statistik.at/web\\_en/statistics/PeopleSociety/population/households\\_families\\_living\\_arrangements/families/index.html](http://www.statistik.at/web_en/statistics/PeopleSociety/population/households_families_living_arrangements/families/index.html) (15.5.2019).

**1.3. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.**

In 2017 there were 16.180 divorces in Austria.<sup>8</sup> 96 civil partnerships were dissolved in the same year.<sup>9</sup>

**1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).**

The abovementioned statistical data concerning marriages and registered partnerships also includes marriages and registered partnerships of people with the habitual residence in Austria that concluded a marriage or that registered their union abroad.<sup>10</sup> E.g. in 2018 2.569 (of 45.455) marriages were concluded abroad. In the same year 41 (of 450) partnerships of people with residence in Austria were registered out of the country.<sup>11</sup> On the contrary, the marriages and registrations of people with the main residence abroad are not taken into account (for statistical purposes), even if they took place in Austria.<sup>12</sup>

## 2. Family law.

### 2.1. General.

**2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?**

The main legal source of the Austrian family law is the Austrian Civil Code – *Allgemeines Bürgerliches Gesetzbuch* from 1811 (hereafter ABGB). The core of the matrimonial property law is contained and regulated in §§ 1217 et seq. of the ABGB. Relevant dispositions are also §§ 40 et seq. of the ABGB (which deal with the matrimonial and the child law) and §§ 98 et seq. of the ABGB (concerning the compensation for the help given in the profession of the other spouse).

Another important source is the marriage act or *Ehegesetz* (hereafter EheG), which deals e.g. with the division of the matrimonial property (see §§ 81 et seq.). Some rules are provided also by the *Wohnungseigentumsgesetz* of 2002 (hereafter WEG) concerning the housing law and especially the ownership partnership for apartments (see especially §§ 2, 5 and 13). The *Außerstreitgesetz* (hereafter AußStrG) contains dispositions applying to the non-litigious proceedings in family matters.

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<sup>8</sup> [https://www.statistik.at/web\\_en/statistics/PeopleSociety/population/divorces/index.html](https://www.statistik.at/web_en/statistics/PeopleSociety/population/divorces/index.html) (15.5.2019).

<sup>9</sup> [https://www.statistik.at/web\\_en/statistics/PeopleSociety/population/registered\\_partnerships/dissolution\\_of\\_partnerships/index.html](https://www.statistik.at/web_en/statistics/PeopleSociety/population/registered_partnerships/dissolution_of_partnerships/index.html) (15.5.2019).

<sup>10</sup> [www.statistik.at/web\\_en/statistics/PeopleSociety/population/marriages/index.html](http://www.statistik.at/web_en/statistics/PeopleSociety/population/marriages/index.html) (15.5.2019); [http://www.statistik.at/web\\_en/statistics/PeopleSociety/population/registered\\_partnerships/120328.html](http://www.statistik.at/web_en/statistics/PeopleSociety/population/registered_partnerships/120328.html) (15.5.2019).

<sup>11</sup> [http://www.statistik.at/web\\_de/statistiken/menschen\\_und\\_gesellschaft/bevoelkerung/eheschliessungen/120327.html](http://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/bevoelkerung/eheschliessungen/120327.html) (15.5.2019).

<sup>12</sup> [http://www.statistik.at/web\\_de/statistiken/menschen\\_und\\_gesellschaft/bevoelkerung/eheschliessungen/120327.html](http://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/bevoelkerung/eheschliessungen/120327.html) (15.5.2019).

The *Eingetragene Partnerschaft-Gesetz* (hereafter EPG) applying to the registered partnerships (of same-sex and now also of opposite-sex partners: see 2.1.2).

Two other sources are the *Zivilprozessordnung* (hereafter ZPO) and the *Jurisdiktionsnorm* (hereafter JN), dealing with litigious proceedings and with the jurisdiction. To be mentioned is also § 1 of the *Notariatsaktsgesetz* (hereafter NotaktsG), i.e. Notarial Deed's Law.<sup>13</sup> Furthermore, Austria ratified many international Conventions and Treaties concerning family law. European Regulations are applicable as well (reducing the importance of the Austrian private international law rules, contained in the *Internationales Privatrechtsgesetz*, hereafter IPRG).

### 2.1.2. Provide a short description of the main historical developments in FL in your country.

The Austrian Civil Code (ABGB) was enacted in 1811. In the 19<sup>th</sup> century there were discussions between the State and the Church concerning their competence in the field of family and marriage law. In 1938 the German EheG entered into force in Austria. After 1945 the Austrian law was "depurated" from the influences of the National Socialism. In the 70ies some reforms took place in order to adapt the Austrian family and marriage law to the social development. In 1975-1976 the principle of partnership was introduced in the marriage law. The legislator recognized equal rights (and duties) to both spouses. He also straightened the rights of the children born out of wedlock.

In 1989 the *Kindschaftsänderungsgesetz* (concerning the child law) was adopted. To be mentioned is also the *Namenrechtsänderungsgesetz* of 1995, an amendment regarding the right to a name, which recognized to the spouses the possibility to take a decision concerning their name(s) after the conclusion of the marriage (special rules are then foreseen for children). In 1999 the *Eherechts-Änderungsgesetz* modified the law of divorce, amending the regulation of the spouses' financial support after the dissolution of the marriage. Another reform, the *Kindschaftsrechtsänderungsgesetz*, followed in 2001 (changing the rights of children, already modified in 1970 and in 1989). In 2002 the housing law of 1975 was reformed. A new *Wohnungseigentumsgesetz* (WEG) was adopted, which introduced the so called "ownership partnership" for apartments (*Eigentümergeinschaft*) – "a community of two natural persons that have shares in the joint ownership of an apartment" (see § 2, paragraph 10 and §§ 13 et seq. of the WEG 2002).<sup>14</sup>

To be mentioned is then the AußStrG 2003 (see point 2.1.1), which also applies to family matters.

The *Familien- und Erbrechtsänderungsgesetz* 2004 dealt with the law of descent (*Abstammungsrecht*).

Two important reforms took place in 2009: the *Familienrechts-Änderungsgesetz* and the EPG (see point 2.1.1). The latter recognized and regulated registered same-sex partnerships. Another relevant reform concerning the child law (especially the name law and the law of custody or *Obsorge*) was adopted in 2013 with the *Kindschafts- und Namensrechts-Änderungsgesetz*. In 2013 the EheG (see point 2.1.1) was modified. In the same year the *Bundes-Kinder- und Jugendhilfegesetz* (aiming to protect the children against family violence) and the new *Personenstandsgesetz* 2013 (concerning the personal status) entered into force. In 2014 the legislator extended the possibility of adoption to registered partners. The *Erbrechtsreform* 2015-2017, which introduced many changes in the field of succession law will be analyzed below (see point 3.1.2). In 2017 the *Erwachsenen-Schutzgesetz* was adopted, entering into force in 2018.

An important change was introduced by the Austrian Constitutional Court in its decision of 4 December 2017.<sup>15</sup> According to this decision the Austrian law was changed (see § 44 ABGB, §§ 1 et

<sup>13</sup> For a list of legal sources (dealing with and relevant for the matrimonial property law), see: Roth, M., 2008, 2; Rechberger, W., 2003, 5; Ganner, M., 2013, 6 et seq. Some other legal sources are then listed by Kerschner, F., 2013, 7, 1/16.

<sup>14</sup> The translation is of Rechberger, W., 2003, 5.

<sup>15</sup> See *Verfassungsgerichtshof* of 4th December 2017 – G 258-259/2017-9.

seq., § 5, paragraph 1, 1, EPG) and from 1 January 2019 registered partnerships and marriages are allowed for both, heterosexual and same-sex partnerships.<sup>16</sup>

### 2.1.3. What are the general principles of FL in your country?

The following main principles characterize the Austrian family law:

- the non-interference of the State in the family matters (the personal rights arising from the marriage cannot be enforced);
- the centrality of the child's interest;
- the equality of spouses and the principle of partnership;
- the principle of formality (or *Typenzwang*);
- the principle of transparency;
- the possibility of divorce and remarriage.<sup>17</sup>

### 2.1.4. Define “family” and “family member” in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?

§ 40 ABGB provides a legal definition of “family”. This one is intended as (the union of) predecessors (ancestors or progenitors) and their descendants (they're relatives). The relation between one spouse and the relatives of the other one is named *Schwägerschaft* (affinity).

The family is based on a marriage contract (*Ehevertrag*, § 44 of the ABGB). However, in the today's life the family is to be intended in a broader sense, *i.e.* as comprehensive of relationships with children born out of wedlock and between registered partners as well.<sup>18</sup> Thus, some legal dispositions, aiming to protect the family, have now a wider application than in the past. At the same time, there're also some rules that continue to apply only to a family intended in a more restricted sense.

### 2.1.5. Family formations.

#### 2.1.5.1. Define the “spouse” in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?

There's no definition of the “spouse” under the Austrian law. However, § 44 of the ABGB contains a definition of the term “marriage” (see point 2.1.4.). As arises from this disposition, family relationships are based on a marriage contract. Marriage is defined as a contract of two persons, which assume reciprocal obligations: “to live in a joint community, to procreate, to raise children and to support each other”.<sup>19</sup> Religious marriages do not have the same effects as the civil one (celebrated before a registrar and recorded in the register, *Ehebuch*).<sup>20</sup>

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<sup>16</sup> The reformed ABGB can be found at the following link: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622> (15.5.2019). For the “new” EPG see: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20006586> (15.5.2019). The historical development has been described by: Rechberger, W., 2003, 5 et seq. See also Roth, 2008, 3 et seq. and Ganner, M., 2013, 9. An analysis is offered by: Kerschner, F., 2013, 13, 1/25 et seq.

<sup>17</sup> Ganner, M., 2013, 10. The main principles are listed by Kerschner, F., 2013, 11, 1/20 et seq.

<sup>18</sup> Kerschner, F., 2013, 3, 1/4.

<sup>19</sup> See Roth, M., 2008, 2.

<sup>20</sup> Cfr. Rechberger, W., 2003, 40.

Originally the marriage was only possible between persons of different gender. However, this is not the case anymore. After the abovementioned decision of the Austrian Constitutional Court (and the modification of the ABGB as well as of the EPG: see point 2.1.2) marriages and registered partnerships are allowed for heterosexual and for homosexual couples.

The legal age for the marriage is 18. Nevertheless, a marriage between an 18-year-old and a 16-year-old spouse may be concluded as well. The consent of the parents or legal representative(s) of the minor spouse (or an authorization of the court) is needed (see §§ 1 et seq. of the EheG).<sup>21</sup> The law provides some form requirements, which should be met (see §§ 15 and 17 EheG).<sup>22</sup> Only monogamous marriages are allowed, as there's a prohibition of bigamy in Austria (see § 8 of the EheG and § 192 of the StGB). This means, that one person cannot be married to more than another one at the same time. Moreover, a marriage between some relatives is prohibited (§ 6 of the EheG and § 211 of the StGB).<sup>23</sup>

**2.1.5.2. What types of relationships/unions between persons are recognised in FL of your country? In particular, formal (registered) and informal (*de facto*) unions, heterosexual and same-sex unions, unions with and without *affectio maritalis*. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

The relationships between couples recognised under the Austrian law are:

- the marriage (between same-sex and opposite-sex couples);
- the (registered) civil partnership or *eingetragene Partnerschaft* between same-sex and (now also) heterosexual couples (regulated in the EPG: see point 2.1.1);
- the cohabitation, which is considered only in some dispositions of the secondary law and after the reform of the inheritance law of 2015-2017 also in the field of the succession law (see points 2.1.6, 3.2.1 and 3.2.4).<sup>24</sup>

**2.1.6. What legal effects are attached to different family formations referred to in q 2.5.?**

Effects attached to the marriage

In Austria only a civil marriage has legal effects (see point 2.1.5.1). These are regulated in §§ 89 et seq. of the ABGB. § 90 of the ABGB foresees the rights and duties of the spouses (so-called primary regime). According to this disposition the spouses should have a matrimonial relationship (which also comprehends the duty to live together, *i.e.* the duty to matrimonial cohabitation). They have to behave loyally (*Treuepflicht*), respect and support each other (*respektvolle Begegnung* and *gegenseitige Beistandspflicht*). These duties are mandatory. In other cases (*i.e.* with regard to other provisions), spouses can agree to depart from the default rules. The possibility for one spouse to act without the consent of the other one is foreseen under certain conditions. According to § 90, paragraph 2 of the ABGB, each spouse has to assist the other in his or her profession (if reasonable, necessary and unless agreed otherwise). The spouses may agree on their *Ehewohnung* (*i.e.* the marital home). § 97 of the ABGB provides some restrictions concerning its disposition. Both spouses have the same duties to each other. Spouses don't necessarily have the same name<sup>25</sup> (for details, see §§ 93 et seq. of the ABGB).

<sup>21</sup> Kerschner, F., 2013, 25, 2/10.

<sup>22</sup> Kerschner, F., 2013, 26, 2/12.

<sup>23</sup> Kerschner, F., 2013, 26, 2/11.

<sup>24</sup> For an analysis of the regulation of the informal relationships in Austria, see: Roth, M., Reith, C., 2015, 1 et seq.

<sup>25</sup> The answer on this question is based on: Rechberger, W., 2003, 7, 11 et seq.

For the so-called *Schlüsselgewalt*, which applies independently of the property regime of the spouses, see: § 96 of the ABGB and, for more details, point 2.2.2.

#### Effects attached to the registered partnership

The effects of the registered partnership coincide with them arising from the marriage.<sup>26</sup> However, there're also some differences. *E.g.* registered partners are not obliged to mutual faithfulness (*Treuepflicht*), but only have a duty to (live in) a relationship of reciprocal trust (*Pflicht zur Vertrauensbeziehung*). Furthermore, it's easier to dissolve a registered partnership as to obtain a divorce (see §§ 13 et seq. of the EPG).<sup>27</sup>

#### Effects attached to the non-married and non-registered couples

There's no general regulation of the non-married and non-registered couples under the Austrian law.<sup>28</sup> On the contrary, there're only some dispositions (not only in the field of private law), which applies to *de facto* partnerships. The most important private law provision is § 14 of the *Mietgesetz* (Rent Law Act), which foresees the partner's right to enter into the tenancy (and to become part of it) after the other partner's death.<sup>29</sup> To be mentioned are also §§ 2, 13 et seq. of the WEG 2002, which extend the possibility of an ownership partnership for apartments (see points 2.1.1. and 2.1.2.) to unmarried couples.<sup>30</sup> For the new succession's rights of the surviving non-married partner, see point 3.2.1. Partners also have the possibility to meet partnership agreements within some limits.<sup>31</sup>

#### Effects attached to the engagement

*Verlöbnis* or engagement (see §§ 45 et seq. of the ABGB) is a (mutual) promise of two persons to marry each other. If one of the them doesn't want to enter into marriage after such a promise, the other has only a compensation right (and no claim for marriage).<sup>32</sup>

### **2.1.7. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/*de facto* family formations? Explain briefly.**

After the abovementioned decision of the Austrian Constitutional Court and the consequent legislative changes (see point 2.1.2), homosexual partners can enter into a marriage and heterosexual couples can register they partnership. The possibility to increase the rights of the non-married partners is discussed in the literature. The same is for the opportunity to reform the divorce and its consequences.<sup>33</sup>

## **2.2. Property relations.**

### **2.2.1. List different family property regimes in your country.**

The family property regimes in Austria are:<sup>34</sup>

<sup>26</sup> See <http://www.coupleseurope.eu/en/austria/topics/8-what-does-the-law-provide-for-the-property-of-registered-and-non-registered-partners/> (15.5.2019).

<sup>27</sup> Kerschner, F., 2013, 152 et seq.

<sup>28</sup> <http://www.coupleseurope.eu/en/austria/topics/8-what-does-the-law-provide-for-the-property-of-registered-and-non-registered-partners/> (15.5.2019). For an analysis, see: Roth, M., Reith, C., 2015, 1 et seq.

<sup>29</sup> Roth, M., Reith, C., 2015, 30 et seq.

<sup>30</sup> For a list of dispositions applying to the unmarried and non-registered partners see: Kerschner, F., 2013, 158 et seq.; Roth, M., Reith, C., 2015, 1 et seq. See also Rechberger, W., 2003, 39 et seq., 47 et seq.

<sup>31</sup> Kerschner, F., 2013, 161.

<sup>32</sup> Rechberger, W., 2003, 46.

<sup>33</sup> Kerschner, F., 2013, 22.

<sup>34</sup> Rechberger, W., 2003, 7 et seq.

- the separation of property (*Gütertrennung*) (as the statutory or default regime: see § 1233, 1237 of the ABGB);
- the community of property (*Gütergemeinschaft*, see § 1233 et seq. of the ABGB). This one can be: general (*allgemeine Gütergemeinschaft*), comprising all the existing property of the spouses as well as the property they are going to acquire during the marriage; or limited (*beschränkte Gütergemeinschaft*), where only certain assets are jointly owned, e.g. the property currently existing (§§ 1233, 1177 of the ABGB) or the property that is going to be acquired or inherited in future.<sup>35</sup>

Another distinction can be made between the community of property during life (*Gütergemeinschaft unter Lebenden*) and community of property after death (*Gütergemeinschaft auf den Todesfall*).<sup>36</sup>

Spouses can also opt for a conventional property regime.<sup>37</sup>

**2.2.2. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?**

The default or statutory family property regime under the Austrian law is the separation of property (*Gütertrennung*) (see §§ 1233 and 1237 of the ABGB).<sup>38</sup> During the marriage<sup>39</sup> each spouse has the exclusive ownership of the assets brought into and acquired during the marriage.<sup>40</sup> Each spouse manages his or her property (however, a common administration can also be agreed) and is free to dispose of his or her assets. A limitation of this freedom through an agreement is possible (see § 364c of the ABGB). Such an agreement is opposable to third parties after the registration in the land register (§ 364c of the ABGB). Some limitations (contained in the *Wohnungseigentumsgesetz*: see § 13 of the WEG; confront § 97 of the ABGB) are foreseen with regard to the disposition of the family residence (or *Wohnungseigentum*).

Under the default property regime, each spouse is liable for his or her own debts. On the contrary, he is not liable for the debts incurred by the other spouse. On the contrary, he or she is the sole debtor of his or her creditors.<sup>41</sup> Only if an obligation was entered into by both spouses, there's a joint and several liability of both of them (*Solidarhaftung*). Each of the spouses has the right to be compensated for the assistance of the other one in his or her profession (§ 98 of the ABGB).<sup>42</sup> A possible exception from the principle of separation could be so called *Schlüsselgewalt*, which allows the spouse who runs the household and has a low income (or no income at all) to oblige the other one, concluding legal transactions for domestic purposes of daily life for him or her (§ 96 of the ABGB).<sup>43</sup>

There's also the possibility for the spouses to acquire assets jointly. The provisions on the joint property of apartments apply too (see point 2.1.6).

<sup>35</sup> Rechberger, W., 2003, 13 et seq.; Roth, M., 2008, 14, 17 et seq.

<sup>36</sup> Rechberger, W., 2003, 14.

<sup>37</sup> For a first information, see: <http://www.coupleseurope.eu/en/austria/topics/2-is-there-a-statutory-matrimonial-property-regime-and-if-so-what-does-it-provide> (15.5.2019); <http://www.coupleseurope.eu/en/austria/topics/3-how-can-the-spouses-arrange-their-property-regime> (15.5.2019).

<sup>38</sup> For an analysis see Kerschner, F., 2013, 48, 2/57 et seq.; Roth, M., 2008, 12 et seq. For a first information, see: [www.coupleseurope.eu/en/austria/topics/2-is-there-a-statutory-matrimonial-property-regime-and-if-so-what-does-it-provide](http://www.coupleseurope.eu/en/austria/topics/2-is-there-a-statutory-matrimonial-property-regime-and-if-so-what-does-it-provide) (15.5.2019).

<sup>39</sup> For the consequences of its dissolution, see e.g. Scherpe, J. M., 2016, 162.

<sup>40</sup> Roth, M., 2008, 38.

<sup>41</sup> Rechberger, W., 2003, 13; Roth, M., 2008, 13; Ferrari, S., 2012, 52.

<sup>42</sup> Rechberger, W., 2003, 9.

<sup>43</sup> Rechberger, W., 2003, 12 et seq.

**2.2.3. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a “new regime just for them”?**

A property regime different from the default one can be chosen by the spouses through an *Ehepakt* or marriage contract (§§ 1217 et seq. of the ABGB). A definition of marriage contract can be found in § 1217 of the ABGB. It's defined as “a contract concluded over the property of the spouses with regard to marriage”.<sup>44</sup> The marriage contract must be concluded in the form of a notarial deed (§ 1 NotaktsG). However, according to the Supreme Court, it's still valid if it's (factually) enforced.<sup>45</sup> The contract law rules apply. Minors (*i.e.* the ones who haven't reached the age of majority) need the approval of their parents in order to conclude the marriage contract.<sup>46</sup>

Spouses may *e.g.* choose the family property regimes of community of property or *Gütergemeinschaft* (§§ 1233-1236 of the ABGB). This one can be: general, *allgemeine Gütergemeinschaft*; or limited, *beschränkte Gütergemeinschaft*, where only certain assets are jointly owned. A distinction can be made between the community of property during life (*Gütergemeinschaft unter Lebenden*) and community of property after death (*Gütergemeinschaft auf den Todesfall*) (see point 2.2.1).

The spouses can also meet an advanced agreement on the division of their property in in case of a divorce. The judge may depart from such an agreement pursuant to § 97, paragraph 2 of the EheG. Advanced agreements concerning the division of the marital savings and/or home has to be made in form of a notarial deed. On the contrary, the written form is required for the agreements dealing with the division of other assets (see § 97, paragraph 1 of the EheG).<sup>47</sup>

**2.2.4. Explain briefly the rules on the administration of family property and compare if there are difference for different property regimes.**

Under the default matrimonial property regime of separation of property each spouse manages his or her property (a common administration of the property can be agreed) and is free to dispose of it. A limitation of this freedom through an agreement is possible (see § 364c of the ABGB). Such an agreement is opposable to third parties after the registration in the land register.<sup>48</sup> Some limitations (contained in the *Wohnungseigentumsgesetz*: see § 13 of the WEG; confront § 97 of the ABGB) are foreseen with regard to the disposition of the family home (or *Wohnungseigentum*).

If the spouses live under the property regime of community of property during life (*Gütergemeinschaft unter Lebenden*), they are jointly owner of the common property (*Gesamtgut*) according to their shares. However, some assets may also be retained by each spouse (*Eigentum*). Especially, the spouses can agree that some assets are excluded from the common property and belong to each of them (*Vorbehaltsgut*). There're also some rights, which cannot be part of the joint property of the spouses (*Sondergut*).<sup>49</sup> The latter may dispose over the common property by mutual agreement. Nevertheless, if one of them disposes over his or her share individually (without being instructed by the other spouse to manage the common property), the transaction is to be considered valid and he is only responsible against the other spouse. The spouses can also agree on some management's rules in the marriage contract.

<sup>44</sup> For the translation in English see: Rechberger, W., 2003, 13.

<sup>45</sup> OGH 23.11.1972 SZ 127/72 = EvBl 1973/178. See Ferrari, 2012, 59 et seq.; Rechberger, W., 2003, 9.

<sup>46</sup> Rechberger, W., 2003, 17.

<sup>47</sup> Ferrari, S., 2012, 61.

<sup>48</sup> Ferrari, S., 2012, 60; Rechberger, W., 2003, 14.

<sup>49</sup> Rechberger, W., 2003, 14; Roth, M., 2008, 15 et seq.



In case of a community of property after death (*Gütergemeinschaft auf den Todesfall*), during the marriage the assets of the two spouses remain separated and each spouse can freely dispose of his or her property. This only changes at the time of the death of one spouse, when the property of both spouses is put together and divided in two parts (after deduction of debts). One of the two parts goes to the surviving spouse, while the other is transferred in accordance with the inheritance law rules to the heirs (§ 1234 of the ABGB).<sup>50</sup>

**2.2.5. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

There's no register for the publication of the matrimonial property regime under the Austrian law.<sup>51</sup> Thus, there's no obligation to register the marriage contracts or the advanced agreements. In case of a marriage with an entrepreneur there's the possibility to apply for a registration of the marriage contract in the *Unternehmensgesetzbuch* (Register of Companies). This allows the spouse married to an entrepreneur to invoke his or her rights arising from the marriage contract against the company's creditors (see § 36 *Unternehmensgesetzbuch*, hereafter UGB). Furthermore, if one of the spouses is an individual entrepreneur, the marriage contracts is entered into the commercial register (*Firmenbuch*) (§ 4 of the *Firmenbuchgesetz* or Commercial Register Code). Prohibitions of alienation are registered in the land register according to § 364c of the ABGB. The same is for the ownership partnership for apartments pursuant to § 5 WEG 2002.<sup>52</sup>

**2.2.6. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

Under the default property regime, each spouse is liable for his or her own debts.<sup>53</sup> On the contrary, he's not liable for the debts incurred by the other spouse. Only if an obligation was entered into by both spouses, there's a joint and several liability of both of them (*Solidarhaftung*).<sup>54</sup> Special rules apply to the *Schlüsselgewalt* (see point 2.1.6). In this case the employed spouse may make the third party know that he doesn't want to be represented by the other spouse (in the legal transactions concerning the daily life and made for domestic purposes).<sup>55</sup> If the spouses live under the general community of property, both, *i.e.* the (entire) common property and the individual property of the acting spouse, are liable for spouses' personal debts. In case of a limited community, for the debts incurred by one spouse are only liable his or her personal assets and his or her share of the common assets. Hence, the liability of the other spouse is excluded (see § 1235 of the ABGB).<sup>56</sup> Both spouses are then jointly liable (with their personal and common property) for the debts that they entered into jointly (community debts).<sup>57</sup>

<sup>50</sup> Rechberger, W., 2003, 14; Ferrari, S., 2012, 60; Roth, M., 2008, 14.

<sup>51</sup> <http://www.coupleseurope.eu/en/austria/topics/4-can-or-must-the-matrimonial-property-regime-be-registered> (15.5.2019).

<sup>52</sup> Rechberger, W., 2003, 16. See Roth, M., 2008, 55.

<sup>53</sup> For a first information see: <http://www.coupleseurope.eu/en/austria/topics/2-is-there-a-statutory-matrimonial-property-regime-and-if-so-what-does-it-provide> (15.5.2019).

<sup>54</sup> Rechberger, W., 2003, 17; Roth, M., 2008, 40.

<sup>55</sup> Roth, M., 2008, 11 et seq. Rechberger, W., 2003, 12.

<sup>56</sup> Rechberger, W., 2003, 14; Roth, M., 2008, 9 et seq.

<sup>57</sup> Roth, M., 2008, 20 et seq.

### 2.2.7. Describe allocation and division of property in case of divorce, separation or dissolution of the union.

#### Marriage

In case of a dissolution of the union (by invalidation, cancellation or divorce), the property (savings and consumable property<sup>58</sup>) is divided between the spouses (according to §§ 81 et seq. EheG).<sup>59</sup>

If there's no consent of the spouses, the court provides in a non-contentious legal proceedings (*Ausserstreitverfahren*).<sup>60</sup> The division doesn't take place for the goods brought into the marriage by one spouse. The same is for the assets, that a spouse inherited or received by donation from a third person. Also the assets of personal or professional use of one spouse or belonging to a company (the same is for the company's shares) are not included in the division (see § 82 of the EheG).<sup>61</sup> The marital home is subject to the division if the conditions listed in § 82, paragraph 2, of the EheG exist, unless an exclusion was agreed (§ 87, paragraph 1 of the EheG). When the property is divided, the spouses' contribution to its acquisition and the children's interest (especially their well-being) are to be taken into account (§ 83, paragraph 1 of the EheG). Debts have to be considered in the division too (see § 81, paragraph 1 and § 83, paragraph 1 of the EheG).<sup>62</sup> Spouses can also conclude advanced agreements in order to divide their matrimonial property in case of a divorce (see point 2.2.3). If the allocation of the assets doesn't lead to a just result, an equalization payment may be ordered by the court in favor of the disadvantaged spouse (§ 94, paragraph 1, EheG).<sup>63</sup>

#### Registered partnership

The consequences of the dissolution of a registered partnership are regulated in the §§ 24 et seq. of the EPG, which provide for a division of the property of daily use and of the savings. The regulation of the division is modeled on §§ 81 et seq. EheG.<sup>64</sup>

#### De facto relationship

There is no specific regulation of the consequences arising from the dissolution of a *de facto* partnership. General obligation and property law rules apply.<sup>65</sup>

### 2.2.8. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?

No, similar rules don't exist under the Austrian law. Provisions concerning the marriage portion, the bride price and the morning gift (*Heiratsgut, Widergabe* and *Morgengabe*)<sup>66</sup> were repealed in 2009. Also the rules providing a children's dowry claim, were modified in order to abolish the former residual discriminations.<sup>67</sup>

<sup>58</sup> For a definition, see: Roth, M., 2008, 11.

<sup>59</sup> For a short description, see: <http://www.coupleseurope.eu/en/austria/topics/5-what-are-the-consequences-of-divorce-separation> (15.5.2019).

<sup>60</sup> Rechberger, W., 2003, 19. See Rešetar, B., 2008, 5.

<sup>61</sup> See Roth, M., 2008, 36.

<sup>62</sup> For a translation in English of these dispositions see <http://coupleseurope.eu/en/austria/topics/5-what-are-the-consequences-of-divorce-separation/> (15.5.2019).

<sup>63</sup> See [http://coupleseurope.eu/en/austria/topics/5-what-are-the-consequences-of-divorce-separation/\(15.5.2019\)](http://coupleseurope.eu/en/austria/topics/5-what-are-the-consequences-of-divorce-separation/(15.5.2019)). For an analysis of the consequences of divorce, see: Ferrari, S., 2012, 52 et seq.

<sup>64</sup> <http://www.coupleseurope.eu/en/austria/topics/8-what-does-the-law-provide-for-the-property-of-registered-and-non-registered-partners/> (15.5.2019).

<sup>65</sup> Roth, M., Reith, C., 2015, 4.

<sup>66</sup> See more in Roth, M., 2008, 139.

<sup>67</sup> See Kerschner, F., 2013, 52, 2/63; 139, 3/49.

## 2.3. Cross-border issues.

### 2.3.1. Is your country participating in the enhanced cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?

Yes, Austria is participating in the enhance cooperation with regard to the two abovementioned Regulations.

### 2.3.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as “marriage”, “matrimonial property agreement”, “partnership property agreement” etc.?

The Regulations are going to apply also to some aspects of matrimonial law, which are not defined as matrimonial property regimes under the Austrian law (see *e.g.* §§ 81 et seq. of the EheG<sup>68</sup> and § 98 of the ABGB, dealing with the compensation of the spouse helping in the business of the other one).<sup>69</sup>

### 2.3.3. Are you expecting any problems with the application of the rules on jurisdiction?

Considering the existing information, no bigger issues seem to arise regarding the application of these rules. Some problems could arise with regard to the accessory jurisdiction foresee in the European Regulations (Art. 4 and 5) and the proceedings concerning the division of the property which is only possible after the dissolution of the marriage.<sup>70</sup>

### 2.3.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?

Under the Austrian law, marriages and registered partnerships are allowed for couples of different and of same sex. Thus, problems could arise, if the applicable law doesn't know the same-sex marriage or restricts the registration of partnerships to same-sex couples.

### 2.3.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?

Forced, polygamic marriages and marriages between children are basically considered as against the public policy.<sup>71</sup> However, the number of polygamic marriages (involving people leaving in Austria) is increasing as a result of the migration phenomenon. Thus, it could be expected that the question, whether a polygamic marriage is against the *ordre public* or not, is going to be discussed in the future.

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<sup>68</sup> For the possibility to include §§ 81 and 82, paragraph 1 of the ABGB in the scope of the Regulations, see Henrich, D., 2016, 172.

<sup>69</sup> Henrich, D., 2016, 172.

<sup>70</sup> Meisinger, A., 2018, 48.

<sup>71</sup> Rechberger, W., 2003, 50; <http://www.allesroger.at/artikel/polygamie-hinter-dem-vorhang-des-gesetzes> (15.5.2019).

### 2.3.6. Are there any national rules on international jurisdiction and applicable law (besides the Regulations) concerning the succession in your country?

In Austria the international private law rules are provided by the IPRG, which contains provisions on the applicable law. The JN contains then provision on the international jurisdiction (see also point 2.1.1).

## 3. Succession law

### 3.1. General.

#### 3.1.1. What are the main legal sources of Succession Law (SL) in your country? What are the additional legal sources of SL?

The main legal source of the Austrian succession law is the ABGB (see point 2.1.1). Inheritance law is regulated in §§ 531 et seq. of the ABGB.<sup>72</sup>

Other relevant legal sources are:

- the federal *Anerbengesetz*, containing special rules for farmers (which doesn't apply in Carintia and Tyrol as these have their own *Hofenrechte*, i.e. special rules concerning farmsteads);
- the *AußStrG* (see point 2.1.1), which contains the provisions on the voluntary jurisdiction;
- the *Notariatsordnung* (hereafter NO), containing provisions on public wills and on wills deposited by notaries and attorneys;
- the *Privatstiftungsgesetz* (hereafter PSG), containing provisions on the law of foundations;
- the *Notariatstarifgesetz*, dealing with the notarial fees;
- the *Mietrechtsgesetz*, i.e. the Tenancy Act (hereafter MRG), stipulating the assignation of the tenancy contract to some persons (spouse, cohabiting partner, descendants), unless they don't want to enter in it and they therefore notify the lessor their disagreement (§ 14);
- the WEG (see points 2.1.1 and 2.1.2) concerning the ownership of a *Wohneigentum*, i.e. of a residential apartment (according to the WEG only two natural persons may share the property of a *Wohneigentum*: Thus, if one of them dies, the share of the other one is going to increase, § 14);
- the *Angestelltengesetz* (hereafter AngG) and the *Betriebliches Mitarbeitervorsorgegesetz* (hereafter BMVG) which contain provisions applying in case of the employee's death (see § 23, paragraph 6 of the AngG and § 14, paragraph 5 of the BMVG);
- the JN (see point 2.1.1), determining the competent Court;
- the *Gerichtskommissärgesetz* (hereafter GKG), containing rules applying to Court commissioners.

In Austria there're no inheritance or gift taxes.<sup>73</sup>

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<sup>72</sup> The sources of the testamentary and intestate succession are analysed by: Wendehorst, C., 2011, 233 et seq.; Wendehorst, C., 2015, 164 et seq.

<sup>73</sup> Loewenthal, M., Schwank, F., 2010, 39. See also <https://www.cesifo-group.de/ifoHome/facts/DICE/Public-Sector/Public-Finance/Taxes/Succession-law-in-Europe-inheritance-tax/fileBinary/Succession-law-in-Europe-inheritance-tax.pdf> (15.5.2019), 25.

### 3.1.2. Provide a short description of the main historical developments in SL in your country.

The ABGB was amended many times in the course of time. The most important changes in the field of succession law can be summarized as follows. In 1914 some discriminatory provisions were modified and partly repealed. In the field of intestate succession, relatives of 5<sup>th</sup> and 6<sup>th</sup> classes were excluded from the succession and the rights of the 4<sup>th</sup> class relatives were limited. The survived spouse received a fix share and a special advance legacy (*Vorausvermächtnis*) on the dwelling house and the movables forming part of it. In 1916 other provisions were amended (*e.g.* in order to avoid a discrimination of disabled persons). Some other modifications were also adopted in the field of intestate succession. Minor changes followed in 1938 and 1970. Later, in 1989 the differences existing in the field of succession law between children born to parents married to each other and children born out of wedlock were repealed. In 1999 some changes were adopted in order to avoid discriminatory terminology regarding disabled persons.

Important changes were introduced by the reform of family and succession law in 2004 (FamErbRÄG), with the incrementation of the succession right of the surviving spouse. The oral will was abolished and a new (single) form of emergency will replaced the former privileged forms. In 2009 the succession rights of the spouse were extended to the registered same sex partner.<sup>74</sup> The largest reform of the Austrian succession law occurred in 2015 with the *Erbrechts-Änderungsgesetz* (hereafter ErbRÄG 2015).<sup>75</sup> This one was aimed to adapt the language used by the legislator of 1811 (modernizing it) and to implement some doctrine and Courts' orientations regarding the intestate and the testamentary succession as well as the rights protecting the compulsory heirs. One of the aims of the ErbRÄG 2015 was also the implementation of the European Regulation.

### 3.1.3. What are the general principles of succession in your country?

The Austrian legal system distinguishes between the universal and the singular succession. The legacy has obligatory effects (*Damnationslegat*). Heirs do not become such automatically. On the contrary, an inheritance proceeding (*Verlassenschaftsverfahren*) and a court decision are necessary for this purpose (see point 3.1.4). The succession can be legitimate or testamentary. Intestate succession follows the parentelic system<sup>76</sup> and only takes place, if the deceased didn't dispose otherwise *mortis causa* (through a will or a succession agreement). Compulsory heirs are protected by the law. However, they're only entitled to claim a sum of money. Joint wills are admitted. The same is for the succession agreements and the donations *mortis causa*. Disinheritance is possible and a substitution in form of a *Nacherbschaft* (consisting in the provision of a subsequent heir or *Nacherbe*) is also allowed.<sup>77</sup>

### 3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.

In Austria the quality of heir isn't acquired automatically. On the contrary, a special proceeding is foreseen for the acquisition of heirship (so called *Verlassenschaftsverfahren*) (§§ 143 et seq. of the AußStrG; see point 3.1.3). The competent court is the district court (*Bezirksgericht*) of the deceased's last residence (see §§ 65 et seq., 105 of the JN). Within the abovementioned procedure (which begins once the court becomes aware of the deceased's death: § 143, paragraph 1 of the AußStrG),

<sup>74</sup> For the historical development, see: Wendehorst, C., 2011, 228 et seq.; Wendehorst, C., 2015, 164 et seq.

<sup>75</sup> For the last reform see *e.g.*: Eccher, B., 2016; Christandl, G., Nemeth, K., 2016; Rabl, C., Zöchling-Jud, B., 2015.

<sup>76</sup> See more in Eccher, B., 2014, 31, 3/6; Wendehorst, C., 2015, 167.

<sup>77</sup> For an overview in English, see: [http://www.notaries-of-europe.eu/files/training-new/2014-05-09/Beer\\_EN.docx](http://www.notaries-of-europe.eu/files/training-new/2014-05-09/Beer_EN.docx) (15.5.2019); [https://e-justice.europa.eu/content\\_succession-166-at-en.do](https://e-justice.europa.eu/content_succession-166-at-en.do) (15.5.2019).

the heir declares the acceptance of the estate (*Erbantrittserklärung*, § 157 of the AußStrG). At the end of the proceeding the court issues the so called *Einantwortung* (i.e. a decision on the transfer of the succession), assigning the estate to the heirs (§ 797 of the ABGB; § 177 et seq. of the AußStrG). The procedure mostly takes place before a public notary. This one acts as a court commissioner (*Gerichtskommissär*) (see § 1 of the GKG). In case of a dispute, he transmits the case to the judge (*Erbrechtsstreit*) (§ 160 AußStrG). A registration in the land register follows in case of rights *in rem*. The devolution order (*rectius*: an official copy of it) has to be submitted in order to unblock the funds held at a credit institution (§ 179 AußStrG).<sup>78</sup>

**3.1.5. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?**

The Austrian law distinguishes between the intestate (§§ 727 et seq. ABGB)<sup>79</sup> and testamentary or testate succession (§§ 552 et seq. ABGB).<sup>80</sup> The rules governing the intestate succession only apply, if there're no disposition *mortis causa* (i.e. the testator has not made a will or concluded a succession agreement) or if the heirs designated by the deceased don't want or cannot accept the inheritance. A cumulative application of legal and testamentary succession is possible. Thus, if the testator didn't dispose of the entire estate, the rules of the intestate succession apply. Succession agreements are also allowed in the Austrian legal system within some limits (§§ 602 et seq. ABGB and §§ 1249 et seq. ABGB). The contractual title prevails over the testamentary one.<sup>81</sup>

**3.1.6. What happens with the estate of inheritance if the decedent has no heirs?**

In absence of heirs, the estate goes to the legatees (according to the value of the assets they are receiving, § 749 ABGB). If there're no heirs and no legatees, an appropriation right is foreseen in favour of the State (*Heimfallsrecht*) (§ 750 ABGB; § 184 AußStrG). The State has an *Aneignungsrecht* and does not respond for the deceased's debts over the extent of the estate.<sup>82</sup>

**3.1.7. Are there special rules or limitations concerning succession with reference to the deceased's (or heir's) culture, tradition, religion or other characteristics?**

There are no more discriminatory rules based on the abovementioned characteristics in Austria.

<sup>78</sup> For a brief description in English, see: Loewenthal, M., Schwank, F., 2010, 38, 41 et seq.; [https://e-justice.europa.eu/content\\_succession-166-at-en.do](https://e-justice.europa.eu/content_succession-166-at-en.do) (15.5.2019); [http://www.notaries-of-europe.eu/files/training-new/2014-05-09/Beer\\_EN.docx](http://www.notaries-of-europe.eu/files/training-new/2014-05-09/Beer_EN.docx) (15.5.2019); <https://www.cesifo-group.de/ifoHome/facts/DICE/Public-Sector/Public-Finance/Taxes/Succession-law-in-Europe-inheritance-tax/fileBinary/Succession-law-in-Europe-inheritance-tax.pdf> (15.5.2019), 20.

<sup>79</sup> See Wendehorst, C., 2015, 160 et seq.; Loewenthal, M., Schwank, F., 2010, 35; Eccher, B., 2014, 29, 3/1 et seq.

<sup>80</sup> Wendehorst, C., 2011, 223 et seq.; Loewenthal, M., Schwank, F., 2010, 33 et seq.; Eccher, B., 2014, 44, 4/1 et seq.

<sup>81</sup> See also [https://e-justice.europa.eu/content\\_succession-166-at-en.do](https://e-justice.europa.eu/content_succession-166-at-en.do) (15.5.2019); [http://www.notaries-of-europe.eu/files/training-new/2014-05-09/Beer\\_EN.docx](http://www.notaries-of-europe.eu/files/training-new/2014-05-09/Beer_EN.docx) (15.5.2019); <https://www.cesifo-group.de/ifoHome/facts/DICE/Public-Sector/Public-Finance/Taxes/Succession-law-in-Europe-inheritance-tax/fileBinary/Succession-law-in-Europe-inheritance-tax.pdf> (15.5.2019), 2.

<sup>82</sup> See Wendehorst, C., 2015, 170; Eccher, B., 42, 3/30 et seq. See also [https://e-justice.europa.eu/content\\_succession-166-at-en.do](https://e-justice.europa.eu/content_succession-166-at-en.do) (15.5.2019).

### 3.2. Intestate succession.

#### 3.2.1. Are men and women equal in succession? Are domestic and foreign nationals equal in succession? Are decedent's children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?

Men and women, domestic and foreign nationals, children born in and out of wedlock are equal in succession. Adopted children<sup>83</sup> are equal in succession as well. However, they don't succeed to the adoptive grandparents and other relatives (§ 197 of the ABGB). Adopted children also have the right to inherit from their biological parents and other relatives (§ 197, 199, paragraph 1 of the ABGB). This means, that they may inherit from both families, *i.e.* the adoptive and the biological one.<sup>84</sup> According to § 22 of the ABGB a child conceived before and not born at the time of opening of succession is entitled to succeed as well. However, he will inherit only on the condition that he is born alive.<sup>85</sup> Since 2009 spouses and extra-marital registered same-sex partners have been equal in succession. Now, the so called *Lebensgefährte* (non-registered partner) can also be intestate heir, but only if there're no other eligible heirs (§ 748 of the ABGB). Additionally, the law recognizes him a special succession right (§ 745 of the ABGB), *i.e.* the right to stay in the family house and to use the chattels therein. This right normally belongs to the non-registered partner only if the partnership lasted at least 3 years. The partnership should not be an extra marital one. The special right recognized to the non-registered partner has a duration of only 1 year from the deceased's death (§ 745, paragraph 2 of the ABGB). On the contrary, the analogous right of the spouse has no time-limit.<sup>86</sup>

#### 3.2.2. Are legal persons capable of inheriting? If yes, on which basis?

Yes, legal persons which exist or are in process of being founded (think about the foundations created by a *mortis causa* disposition)<sup>87</sup> are capable of inheriting. However, they only can inherit on the basis of the deceased's disposition.<sup>88</sup>

#### 3.2.3. Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.

Yes, the institute of unworthiness or *Erbunwürdigkeit* is present in the Austrian legal system. It is regulated in §§ 539 et seq. of the ABGB.

Unworthy to inherit is who:

- a) caused an emotional affliction in a reprehensible way to the deceased or committed a crime against the latter or his or her spouse, registered or non-registered partner or their descendants or ascendants (intent is required; the minimum penalty should be of 1 year of imprisonment), unless the deceased had forgiven him or her;
- b) grossly overlooked the obligations that must be observed in the relationship between parents and children, unless the deceased had forgiven him or her;
- c) has forged or suppressed a will (since 2015 an attempt is enough);
- d) has unlawfully avoid the deceased making or changing a will.<sup>89</sup>

<sup>83</sup> See Wendehorst, C., 2015, 169.

<sup>84</sup> Wendehorst, C., 2015, 169.

<sup>85</sup> Wendehorst, C., 2015, 168; Eccher, B., 2014, 15, 2/8.

<sup>86</sup> Eccher, B., 2016, 110 et seq.

<sup>87</sup> Loewenthal, M., Schwank, F., 2010, 35; Wendehorst, C., 2011, 223.

<sup>88</sup> Eccher, B., 2014, 15, 2/8.

These grounds apply by operation of law (*ex lege*) and don't extend to the unworthy person's descendants.<sup>90</sup>

**3.2.4. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?**

The ABGB follows the parentelic system (*Parentalsystem*).<sup>91</sup> Intestate heirs are the deceased's relatives (divided in 4 classes), his or her spouse or registered partner and (with a different position) also the non-registered partner (§§ 731 et seq. and 748 of the ABGB). Relatives up to the 4<sup>th</sup> class succeed in a certain order:

- the next class excludes the other ones;
- a single member of a previous class excludes the ones of other, more distant classes;
- an ascendant excludes from the inheritance his or her descendants.

The distribution of the estate occurs per stirpes. The *Eintrittsprinzip* applies within the first three classes. Thus, within a stirps, descendants take place to their predeceased parents. In absence of descendants, the portion of another stirps or belonging to the other parent grows (*Anwachsung*). The estate is distributed according to the principle of equal shares. This means that in each generation each stirps receives an equal share. Some special rules apply then within the different classes.<sup>92</sup>

Eligible heirs are the following (§ 730 of the ABGB):

1. the deceased's children (also the adopted ones) and descendant (first class: see §§ 731 et seq. of the ABGB);
2. the deceased's parents (also the adoptive ones) and their descendants (§§ 731, paragraph 2 and 735 et seq. of the ABGB, second class).

Note that:

- if one of the parents died without leaving descendants, the other one receives the entire estate (§ 737 of the ABGB);
- biological parents are excluded from the succession by the adoptive ones; in case that only one biological parent had been substituted by an adoptive one, the adoptive parent (and his or her descendants) receives ½ of the estate and the other ½ goes to the biological one (and his or her descendant): see § 199, paragraphs 2 and 3 of the ABGB;

3. grandparents and their descendants (§§ 731, paragraph 2 and 738 et seq. of the ABGB, third class).

Note that:

- if one of the grandparents died without leaving descendants, the other grandparent of the same site receives his share;
- if both grandparents from one site died (without leaving descendants), the other site gets their share (§ 740 of the ABGB);
- in case of adoption, only the biological grandparents will inherit (§ 197 of the ABGB).

4. great grandparents (not their descendants) (§§ 731, paragraph 4 and 741 et seq. of the ABGB, fourth class).

<sup>89</sup> Wendehorst, C., 2015, 172.

<sup>90</sup> Wendehorst, C., 2015, 172.

<sup>91</sup> Eccher, B., 2014, 31, 3/6; Wendehorst, C., 2015, 160 et seq., 167. See [https://e-justice.europa.eu/content\\_succession-166-at-en.do](https://e-justice.europa.eu/content_succession-166-at-en.do) (15.5.2019); <https://www.lexology.com/library/detail.aspx?g=c3872cb3-e7d5-414e-973d-bf183aad7655> (15.5.2019).

<sup>92</sup> Wendehorst, C., 2015, 167 et seq. See [https://e-justice.europa.eu/content\\_succession-166-at-en.do](https://e-justice.europa.eu/content_succession-166-at-en.do) (15.5.2019).



The survived spouse is an intestate heir too (§§ 730, 744 et seq. of the ABGB). If there're relatives belonging to the first class, he or she receives 1/3 of the estate. If the deceased left his parents, the spouse gets 2/3. The spouse's rights have been increased through the reform from 2015 as, if there're no deceased's descendants, he or she only inherits together with the deceased's parents (§ 744 of the ABGB). If one of the deceased's parents dies, the spouse gets his or her share. The size of the share belonging to the spouse depends on which relatives co-exist and will inherit. He or she may additionally continue to live in the dwelling house (§ 745 of the ABGB) and to use the chattels contained therein. The special attribution represents an advance legacy. The spouse also has a maintenance claim (§ 747 of the ABGB). He or she has no succession rights in case of divorce or if the marriage was annulled (§ 746, paragraph 1 of the ABGB).<sup>93</sup> The survived registered partner has the same succession rights as the survived spouse (§§ 744 et seq. of the ABGB).<sup>94</sup>

Since 2015 the non-registered partner has been an intestate heir too (see point 3.2.1). However, he or she only inherits, if there are no other eligible heirs (§ 748 of the ABGB). He or she also has the right to stay in the family house and to use the house chattels. These rights apply only to the cohabitant partner, if the relation with the deceased lasted at least 3 years and it wasn't an extramarital one. Furthermore, the abovementioned rights have the maximal duration of one year (see § 745, paragraph 2 of the ABGB).

In 2015 the legislator introduced also a new legacy for the intestate heirs (and their spouses, registered partners, cohabitant partners and descendants) that took care of the deceased:

- i) in the 3 years before his or her death;
- ii) for a period of at least 6 months;
- iii) without receiving a payment; and
- iv) unless the care was irrelevant (§ 677 et seq. of the ABGB).<sup>95</sup>

### 3.2.5. Are the heirs liable for deceased's debts and under which conditions?

If the heirs accept the inheritance unconditionally (§ 800 et seq. of the ABGB), they're fully liable for the deceased's debts (§ 801 of the ABGB) This isn't the case, when the acceptance of the succession has been conditional (§ 800 and 802 of the ABGB) and an inventory has been made. In fact, the one who declares a conditional acceptance is liable for debts only up to the value of the estate.<sup>96</sup>

### 3.2.6. What is the manner of renouncing the succession rights?

A renunciation is possible by way of an agreement (in the form of a public deed) between an heir and the *de cuius*. The renunciation extends to the descendants of the one who renounced (unless provided otherwise: § 551 of the ABGB).<sup>97</sup>

The heir can also disclaim the estate after the deceased's death, during the inheritance proceedings.<sup>98</sup>

<sup>93</sup> See Wendehorst, C., 2015, 168.

<sup>94</sup> Wendehorst, C., 2015, 168.

<sup>95</sup> For an analysis in English (till 2015), see Wendehorst, C., 2015, 167 et seq. For the development after the publication of the Author's national report, see: Eccher, B., 2016.

<sup>96</sup> Eccher, B., 2014, 119, 8/1 et seq. For an English text, see: [https://e-justice.europa.eu/content\\_succession-166-at-en.do](https://e-justice.europa.eu/content_succession-166-at-en.do) (15.5.2019); [http://www.notaries-of-europe.eu/files/training-new/2014-05-09/Beer\\_EN.docx](http://www.notaries-of-europe.eu/files/training-new/2014-05-09/Beer_EN.docx) (15.5.2019).

<sup>97</sup> Wendehorst, C., 2015, 172.

<sup>98</sup> Wendehorst, C., 173. See also [https://e-justice.europa.eu/content\\_succession-166-at-en.do](https://e-justice.europa.eu/content_succession-166-at-en.do) (15.5.2019).

### 3.3. Disposition of property upon death.

#### 3.3.1. Testate succession.

##### 3.3.1.1. Explain the conditions for testate succession.

The Austrian succession law is based on the principle of freedom of testation.<sup>99</sup> However, the testator cannot freely dispose of the reserved portion (*i.e.* the portion reserved to the compulsory heirs). The testator may decide the content and the beneficiaries of his or her will. Wills can't be drawn up by a representative. The one who makes a will has to be capable and he also must have the volition to dispose.

The Austrian law recognises certain types of will. The will has to be compliant with the mandatory legal requirements. Specific formal requirements provided by law must therefore be observed by the testator.<sup>100</sup> Since 2015, the former difference between the *Kodizil* and the *Testament* exist no longer. The Austrian law admits joint wills. They can be set up by spouses or same-sex registered partners (see § 602 of the ABGB).<sup>101</sup>

##### 3.3.1.2. Who has the testamentary capacity?

In the Austrian legal system the testator must be at least 14 years old. However, only the one who is already 18 is fully capable to testate (§§ 569 of the ABGB). People between 14 and 18 can make an oral will before (a notary or) the court or an emergency one (§ 569 of the ABGB).

The testator must also be capable to understand the content and the consequences of his or her will (§ 566 of the ABGB). The capacity to testate is excluded in case of an intoxication at the time of the will or when the testator set up his or her will in the state of a psychological illness ("*in einem die Testierfähigkeit ausschließenden Zustand (...) etwa unter dem Einfluss einer psychischen Krankheit oder im Rausch*": § 567 of the ABGB). Note, that according to § 568 of the ABGB the existence of a *lucidum intervallum* ("*lichter Augenblick*") can avoid the invalidity of a will, even if made by an incapable testator.<sup>102</sup>

##### 3.3.1.3. What are the conditions and permissible contents of the will?

Provisions on wills may be of patrimonial and of non-patrimonial nature. The testator can appoint heirs (§§ 554 et seq. of the ABGB) or disinherit them (§ 769 of the ABGB). He also may reduce the compulsory share of one beneficiary (§ 776 of the ABGB) or under certain conditions deprive him or her from his or her portion (see point 3.3.4). Furthermore, he can appoint a legatee (§§ 535 and 647 et seq. of the ABGB). A substitutive heir can be indicated as well (§ 604 et seq. of the ABGB). Instructions for the apportioning or distribution of the estate as well as an assignment of shares can also be made. Moreover, the testator may impose a restriction, *e.g.* a condition (§§ 696 et seq. of the ABGB), a term (§ 705 et seq. of the ABGB) or a burden (§§ 709 et seq. ABGB). According to § 816 of the ABGB the testator can then indicate a *Testamentvollstrecker*, who has to give execution to his or her final dispositions. According to the PSG the testator can then set up a foundation.<sup>103</sup> Provisions concerning the sepulture of the *de cuius* can be contained in a will as well.<sup>104</sup>

<sup>99</sup> Loewenthal, M., Schwank, F., 2010, 35. For the general issues related to the testamentary formalities in Austria, see Wendehorst, C., 2011, 248 et seq.

<sup>100</sup> See Wendehorst, C., 2011, 223 et seq.

<sup>101</sup> Eccher, B., 2014, 44, 4/1 et seq.; Wendehorst, C., 2011, 223 et seq., 248 et seq.; Loewenthal, M., Schwank, F., 2010, 33 et seq. For the development after the publication of these texts, see: Eccher, B., 2016.

<sup>102</sup> Eccher, B., 2014, 49, 4/16 et seq. For an analysis in English, see: Wendehorst, C., 2011, 237 et seq.

<sup>103</sup> See point 3.2.2.

<sup>104</sup> Eccher, B., 2014, 4/74 et seq.

**3.3.1.4. Describe the characteristics of will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a will?**

The most popular form of will in Austria is the holographic one. This type of will is entirely written and signed by the testator's hand. Indication of date and place are not required for its validity (§ 578 of the ABGB).<sup>105</sup> Another form of will is the witnessed or allograph one (§§ 579 et seq. of the ABGB), drawn up entirely or partially by a third party or not handwritten by the testator. It is signed by the latter in presence of three witnesses. The testator has to declare in writing, that the document contains his last will. The witnesses' signature is also needed. There're some persons (legatees, heirs, close relatives, people under 18, incapable persons as well as the ones who don't speak the deceased's language) that cannot have the role of witnesses.<sup>106</sup> There're special rules in case that the testator can't write or read (§ 580 of the ABGB). Wills can be made also before a notary or the district court (§§ 581-583 of the ABGB; §§ 70 et seq. of the NO).

Judicial wills (§§ 581 et seq. of the ABGB) can be oral (recorded by a court, *i.e.* a judge and a court officer or the first one and two witnesses); or written (*i.e.* handed over the court). Notarial wills (§§ 67 and 70 et seq. of the NO) can be oral (recorded by two public notaries or before a public notary and two witnesses); or written (handed over to the same subjects).<sup>107</sup>

Oral wills made before a court or a public notary are public wills and can be also made by persons under guardianship or minors over the age of 14 too (§ 569 of the ABGB). Written wills handed before a court or a public notary are to be considered public wills as well. However, the documents are private.<sup>108</sup>

The will can also have the form of a notarial act (§§ 52 et seq. and 67 of the NO). A formalisation of a written will by notarial act is possible too (§§ 52 et seq. and 54 of the NO). In these cases, the will is not public (only in the first case the document as such is considered as a public one).<sup>109</sup> Public wills are deposited with the court or a notary.<sup>110</sup>

Merely oral wills are not allowed. However, oral wills (consisting in an oral declaration before three witnesses) made before the 1 January 2005 are valid.<sup>111</sup> Austrian law also admits emergency wills (§ 584 of the ABGB). These can be made by a testator in fear of dying or losing his or her capacity. It consists in an oral declaration or in a witnessed will. The presence of only two witnesses is requested. An emergency is no longer valid after 3 months from the end of the danger.<sup>112</sup> The Austrian law admits joint wills, which can be set up by spouses or same-sex registered partners (§ 586 of the ABGB). The distinction between testaments and codicils was abolished by the legislator.<sup>113</sup>

**3.3.1.5. Is there a (public) register of wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

Wills deposited with a notary must be registered in the Central Register (*Österreichisches Zentrales Testamentregister*) of wills managed by the *Österreichische Notariatskammer* (the Austrian Chamber of Notaries) (§ 140c, paragraph 2 of the NO). For private wills deposited with a lawyer the

<sup>105</sup> Wendehort, C., 2011, 225, 237 et seq.

<sup>106</sup> Wendehorst, C., 2011, 225, 240 et seq., 249.

<sup>107</sup> Wendehorst, C., 2011, 226.

<sup>108</sup> Wendehorst, C., 2011, 226 et seq.

<sup>109</sup> Wendehorst, C., 2011, 226 et seq.

<sup>110</sup> Wendehort, C., 2011, 227.

<sup>111</sup> Wendehort, C., 2011, 236.

<sup>112</sup> See Wendehorst, C., 2011, 245 and [https://e-justice.europa.eu/content\\_succession-166-at-en-do](https://e-justice.europa.eu/content_succession-166-at-en-do) (15.5.2019).

<sup>113</sup> For an analysis, see: Wendehorst, C., 2011, 237 et seq. For the innovations in this field after the Author's publication, see: Eccher, B., 2016.

registration is optional (§ 140c, paragraph 2 of the NO). In the succession process a certificate from the Register is requested. Succession agreements are registered too.<sup>114</sup>

**3.3.2. Succession agreement (*negotia mortis causa*). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.**

In the Austrian legal system succession agreements are not generally prohibited (§§ 602 et seq. of the ABGB). In fact, spouses (or registered partners or partners engaged) can conclude an agreement in order to dispose of their inheritance in favour of a third party. Additionally, they may conclude an agreement by which each of them disposes of his or her succession in favour of the other (§ 1249 of the ABGB). The succession agreement must take the form of a public deed (§ 1249 of the ABGB). With a succession agreement spouses can only dispose of a certain amount of the estate (3/4 of it: see § 1253 of the ABGB). A succession agreement cannot be changed or revoked unilaterally. Agreements by which one renounces to his succession rights are allowed, if they are done by a public deed (§ 551 of the ABGB). Donations *mortis causa* are allowed too (§ 603 of the ABGB). They require the form of a public deed.<sup>115</sup>

**3.3.3. Are conditions for validity of wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

The conditions for validity of wills and other dispositions *mortis causa* are governed by general civil law dispositions, unless the succession law provides special rules (§§ 565 et seq. and §§ 878 et seq. of the ABGB). The conditions for validity should exist at the time the will is drawn up (§§ 575 et seq. ABGB).<sup>116</sup>

**3.3.4. Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

The Austrian law reserves to certain family members a compulsory share of the succession (§§ 756 et seq. of the ABGB).<sup>117</sup> Compulsory heirs are the deceased's descendants and his or her spouse (as well as the registered partner). Until the reform 2015 parents were compulsory heirs too (in absence of descendants). This is no more the case.

The compulsory share amounts to ½ of the intestate portion (§ 759 of the ABGB). However, if the beneficiary never had a closer relationship with the deceased, his share may be reduced (§ 776 of the ABGB). Compulsory heirs whose rights were infringed by a disposition *mortis causa* or a gift may claim for a sum of money (§§ 761 et seq. of the ABGB) only after one year from the deceased death (§ 765 of the ABGB). They can exercise their rights within 30 years from deceased's death. Additionally, a short term of 3 years has been stipulated, starting from the knowledge of the existence of the compulsory heirs' right (§ 1487a of the ABGB). There's a possibility of suspension for 5 (and exceptionally for 10) years. The possibility to pay the credit in instalments is also foreseen (§§ 766 et seq. of the ABGB; § 790, paragraph 2 of the ABGB).

<sup>114</sup> Wendehorst, C., 2011, 227 et seq.; [https://e-justice.europa.eu/content\\_succession-166-at-en.do](https://e-justice.europa.eu/content_succession-166-at-en.do) (15.5.2019).

<sup>115</sup> Eccher, B., 2014, 89, 5/1 et seq.; [https://e-justice.europa.eu/content\\_succession-166-at-en.do](https://e-justice.europa.eu/content_succession-166-at-en.do); Loewenthal, M., Schwank, F., 2010, 35; [http://www.notaries-of-europe.eu/files/training-new/2014-05-09/Beer\\_EN.docx](http://www.notaries-of-europe.eu/files/training-new/2014-05-09/Beer_EN.docx) (15.5.2019); [https://e-justice.europa.eu/content\\_succession-166-at-en.do](https://e-justice.europa.eu/content_succession-166-at-en.do).

<sup>116</sup> See Eccher, B., 2014, 49, 4/16.

<sup>117</sup> For first information see [https://e-justice.europa.eu/content\\_succession-166-at-en.do](https://e-justice.europa.eu/content_succession-166-at-en.do). See also Wendehorst, C., 2015, 178.

The compulsory heir can be deprived of his or her compulsory share by the deceased (*Enterbung*; §§ 769 et seq. of the ABGB), if one of the grounds for the disinheritance exists, *i.e.* the compulsory heir:

- a) is the deceased's child, parent or spouse and he or she abandoned him or her when he or she would have needed his or her assistance;
- b) he or she has been condemned to 20 years of (or to a life) imprisonments;
- c) he or she leads a life which is against good morals (see § 770 of the ABGB).<sup>118</sup>

The possibility of a renunciation through the conclusion of an agreement (in form of a public deed) with the *de cuius* is foreseen (§ 551 of the ABGB).<sup>119</sup>

### 3.3.5. Cross-border issues.

#### 3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?

In 2015 a reform was adopted in Austria (ErbRÄG 2015) which was aimed to implement the Succession Regulation 650/2012 (see point 3.1.2). There are also some court decisions dealing with the abovementioned Regulation:

- OGH 17. 3. 2016 – 2 Nc 27/15s (NZ 2016/62, 198 = Zak 2016/319, 174 = ZfRV-LS 2016/28) established that Austrian courts aren't allowed to initiate a proceeding, if the deceased had his or her last residence in another State. Protective measures according to § 147 Abs 4 of the AußStrG may be issued by Austrian Courts only in accordance with Article 19 of the EuErbVO.
- OGH 27. 10. 2016 – 2 Ob 162/15k (2 Ob 170/16p) (JBl 2017,201 = NZ 2017/10, 22 = Zak 2017/17, 16) stated that § 150 of the AußStrG 2005 doesn't apply in relation with other EU member states. In fact, the European Certificate of Succession is to be considered a sufficient proof.
- OGH 29. 8. 2017 – 5 Ob 108/17v (AnwBl 2018/98, 331 (Wittwer/Maier) = iFamZ 2018/27, 31 (Mondel) = JBl 2017, 789 = JEV 2017/12, 159 (Weber) = NZ 2018/4, 13 = Zak 2017/604, 354 = ZfRV-LS 2017/45) dealt with the aim of application of Article 23, paragraph 1 of the Regulation. According to the Austrian Supreme Court the *lex successionis* applies to decide:
  - i) if real rights are to be considered as an object of the succession;
  - ii) how and when the heir acquires the estate;
  - iii) if the ownership is transferred by operation of law.
- In the same decision, the Court stated, that a registration in the land register may also occur by presentation of a European Certificate of Succession (Article 69 of the Regulation), which shall contain the information laid down in Article 68 of the Regulation.
- OGH 21. 12. 2017 – 5 Ob 186/17i (EvBl 2018/96, 663 (Verweijen) = Zak 2018/170, 94 = ZfRV 2018/16) decided that the proof of the quality of heir can also be given *e.g.* by a German Certificate of Succession. In fact, as stated in Article 62, paragraph 2 of the Regulation, the European Certificate of Succession shall not be mandatory. In the view of the Court the decision on the effects of a German Certificate of Succession must be made according to Article 23 of the Regulation and, therefore, in the case submitted to the attention of the Court, to the German law.

<sup>118</sup> Wendehorst, C., 2015, 172.

<sup>119</sup> Eccher, B., 2014, 143, 11/1; <https://www.cesifo-group.de/ifoHome/facts/DICE/Public-Sector/Public-Finance/Taxes/Succession-law-in-Europe-inheritance-tax/fileBinary/Succession-law-in-Europe-inheritance-tax.pdf> (15.5.2019).

### 3.3.5.2. Are there any problems with the scope of application?

It is *e.g.* discussed, which is the relation between Austrian family property law and German succession law, on the one side; and between German property law and Austrian succession law, on the other side. The question should be now evaluated in the light of CJEU decision of 1 March 2018, Mahnkopf (C-558/16), ECLI:EU:C:2018:138.

Some questions arising from the scope of application have been decided by the Austrian Supreme Court in the case OGH 29. 8. 2017 – 5 Ob 108/17v (AnwBl 2018/98, 331 (Wittwer/Maier) = iFamZ 2018/27, 31 (Mondel) = JBl 2017, 789 = JEV 2017/12, 159 (Weber) = NZ 2018/4, 13 = Zak 2017/604, 354 = ZfRV-LS 2017/45) concerning the interpretation of Article 23, paragraph 1 of the Regulation. As stated by the Court, the *lex successionis* shall govern the following questions:

- i) if real rights are to be considered as an object of the succession,
- ii) how and when the heir acquires the estate;
- iii) if the ownership is transferred by operation of law.

### 3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country had experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?

There is one known decision concerning this point,<sup>120</sup> which established that the Austrian authorities' jurisdiction should be denied if the deceased's last habitual residence was in another State.

### 3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?

There are no known decisions on this topic.

### 3.3.5.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?

It was argued that § 14 of the WEG is to be considered mandatory also if the applicable law is a foreign one. Thus, after coming in force of the European Regulation, land registers will have to deny the registration if more than two heirs are indicated in the European Certificate of Succession in regard to a residential apartment as, pursuant to the WEG, only two natural persons may share the ownership of such an apartment.<sup>121</sup>

### 3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?

In Austria European Certificate of Succession is issued by court commissioners (§ 1, paragraph 1, No. 1, letter d of the GKG).

<sup>120</sup> See OGH 17.3.2016 – 2 Nc 27/15 s, NZ 2016, 198.

<sup>121</sup> See Wendehorst, C., 2015, 166 et seq.

### 3.3.5.7. Are there any national rules on international jurisdiction and applicable law (besides the Succession Regulation) concerning the succession in your country?

§§ 28 to 30 of the IPRG were repealed through Article 8 of the ErbRÄG. Austrian Law is the applicable law, when *Anerbenrecht*, *Hoferrechte* and WEG apply (as *lex rei sitae*).<sup>122</sup> To be considered are then: §§ 406-416 of the EO (which apply to the execution of decisions from a 3<sup>rd</sup> State) and § 106 of the JN (which finds application when the Austrian authorities have jurisdiction according to article 75 of the EuErbVO). Finally, there are also the bilateral Conventions ratified by Austria.

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<sup>122</sup> For these acts, see: Wendehorst, C., 2015, 165 et seq.

<https://www.cesifo-group.de/ifoHome/facts/DICE/Public-Sector/Public-Finance/Taxes/Succession-law-in-Europe-inheritance-tax/fileBinary/Succession-law-in-Europe-inheritance-tax.pdf> (15.5.2019)

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## Belgium

Maria Virginia Maccari and Tereza Pertot

### 1. Social perspective.

- 1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without *affectio maritalis*).**

According to the data provided by BISA (*Brussels Institute for Statistics and Analysis*) and by Directorate-General of Statistics of the FPS Economy (Statistics Belgium) the Belgian private households are divided by the following types<sup>1</sup>:

- unattached persons (living alone),
- persons married without children,
- persons married with child(ren),
- cohabitants without children,
- cohabitants with child(ren),
- single-parents' families,
- other types of households.

On 1 January 2018, there were 4.911.973 private households in Belgium, of which approximately 35 % or 1.7 million were **single-person households**<sup>2</sup>. These one-person households have increased by 1.3 % compared to the previous year. They are most common in the Brussels-Capital Region, where 46 % of the 547.679 private households are composed of only one person. In the same Region the increase is the least significant (+0.5 %).

In the same year, approximately one million households consisted of **married couples** with children living at home, whereas another 950.000 married couples had no children living at home. Relatively few households consisted of **unmarried couples** without children living at home. The number of households in Belgium is constantly increasing (from 4.7 million in 2011 to 4.9 million in 2018). This number is therefore expected to slowly grow also in the future, with ever more single-person households. Because of the ageing population, the number of collective households could also increase in the future<sup>3</sup>.

- 1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.**

In 2017, 44.319 marriages took place in Belgium (0,9% less than in 2016). 2,5 % of them were entered into by same-sex partners.<sup>4</sup> Additionally, ca. 40.000 declarations of legal cohabitation are signed every year (39.038 in 2017, 2,5 % less than in 2016). 73,3 % of them are done by singles, 96,6 % between persons of different sex and 83,3 % by Belgians<sup>5</sup>.

<sup>1</sup> <http://statistics.brussels/publications/headings/in-the-spotlight/october-2015-private-households-in-brussels-per-type-on-1-january-2015#.XNndtKLONPY> (17.5.2019).

<sup>2</sup> <https://www.statista.com/statistics/518152/number-of-households-in-belgium-by-type/> (17.5.2019).

<sup>3</sup> <https://statbel.fgov.be/en/themes/population/structure-population#news> (17.5.2019).

<sup>4</sup> <https://statbel.fgov.be/en/themes/population/marriages-and-divorces/marriages> (17.5.2019).

<sup>5</sup> <https://statbel.fgov.be/en/themes/population/marriages-and-divorces/declarations-legal-cohabitation> (17.5.2019).

**1.3. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).**

In Belgium, there were 23.059 divorces in 2017 (2,2% less than in 2016). In the same year, 24.764 legal cohabitations have been terminated. However, 55% of them ended because of a marriage between cohabitants, *i.e.* because of a transformation of the legal cohabitation in a marriage<sup>6</sup>.

**1.4 Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).**

According to statistics provided by Statbel<sup>7</sup> (the Belgian statistical office) in 2017, 17,4 % of the marriages were performed between people of Belgian nationality and foreigners. These marriages are called "les mariages mixtes". There are geographical differences:

- 41.7% of marriages contracted abroad are mixed marriages (in 2016, this percentage was 44.9%);
- 31.1% of marriages celebrated in the Brussels-capital region are mixed marriages (in 2016, this percentage amounted to 32.7%);
- 27.4% of marriages celebrated in the German-speaking community are mixed marriages (in 2016 this percentage amounted to 25.5%).

On the divorce side, 15.1% of registered divorces concern mixed couples.

From a geographical point of view:

- 35.1% of divorces abroad concern mixed couples (in 2016 this percentage amounted to 36.7%);
- 32.2% of the Brussels divorces concern mixed couples (in 2016 this percentage amounted to 34.4%);
- 23.4% of divorces in the German-speaking community concern mixed couples (in 2016 this percentage amounted to 20.5%).

## 2. Family law.

### 2.1. General.

**2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?**

The main legal source of the Belgian family law is the Civil Code (*Burgerlijk Wetboek* or *Code civil*, hereafter BW).

Other relevant legal sources are:

- the Belgian Constitution (see Article 21, paragraph 2);
- the International Private Law Act (*Loi du 16 juillet 2004 portant le Code de droit international privé*);
- the Judicial Code (*Gerechtelijk Wetboek* or *Code judiciaire*), concerning the administration of justice.<sup>8</sup>

<sup>6</sup> <https://statbel.fgov.be/en/themes/population/marriages-and-divorces/divorces> (17.5.2019).

<sup>7</sup> <https://statbel.fgov.be/fr/themes/population/mariages-et-divorces/divorces> (17.5.2019).

### 2.1.2. Provide a short description of the main historical developments in FL in your country.

The Belgian (family) law has developed from the French one. The French *Code civil* was introduced in Belgium too.<sup>9</sup> The reform of the 14 July 1976 repealed the provisions of the *Code Napoléon* and stated the principle of equality in the field of the family property regimes.

In 1987 the Belgian legislator repealed the differences existing between children born in and out of wedlock (Act of 31 March 1987). In 1998 (Act of 23 November 1998) the possibility of a declaration of legal cohabitation was recognized (Articles 1475 et seq. of the BW). On 21 May 2001 Act of 27 March 2001 (abolishing the impediment of a marriage by affinity in collateral line) entered in force. In 2003 Article 143 of the BW was modified providing for the possibility of a marriage between same-sex spouses (Act of 13 February 2003). In the same year the law on adoption was modified (see Acts of 24 April 2003 and of 13 March 2003).

In 2004 the Belgian International Private Law Act of 16 July 2004 (see point 2.1.1) entered in force.

The Act of 18 July 2006 (*Loi tendant à privilégier l'hébergement égalitaire de l'enfant dont les parents sont séparés et réglant l'exécution forcée en matière d'hébergement d'enfant*) was then aiming to guarantee an equal accommodation for the child whose parents are separated and to regulate the forced enforcement in the field of the child's accommodation. In 2007 a reform modified the Belgian rules on divorce (see Act of 27 April 2007). In the same year the Act of 10.5.2007, dealing with transsexuality, was enacted. In 2008 the necessity of a Court's authorization in order to modify or change the matrimonial property regime was repealed (see Act of the 18 July 2008). In 2010 a modification concerning the conclusion of the marriage and its modalities was adopted (see Act of 21 June 2010).

Another reform took place in 2013. According to the Act of 14 January 2013, amending the Civil Code, marriage contracts concluded after the 1 September 2015 require the registration in the central register of marriage agreements only in order to be opposable against third parties (see article 1391 of the Civil Code; see point 2.2.5). In the same year another Act (of 30 July 2013) assigned the competence to decide in matters concerning the divorce to the Family Courts. In 2014 the law governing naming rights was reformed (see Act of 25 December 2016). In 2017 a reform concerning the legal status of foster care givers was adopted (see Act of 19 March 2017, which provided for the possibility of a transfer of parental custody from parents to foster care givers in certain cases). In the same year, the Act of 19 September 2017, concerning the descent law, was enacted (in force since 1 April 2018). Furthermore, the Act of 25 June 2017 reformed the former regulation of the transsexuality. Two other Acts (Act of the 30 February 2017 and Act of 13 July 2017), dealing with children's recognition, were enacted.

In 2018 the legislator adopted an act dealing with the competence for the name change was adopted (Act of 1 August 2018). Furthermore, a modernization of the organization of the registry offices' occurred (Act of 18 June 2018). The Act of 25 Mai 2018 reformed the divorce by mutual agreement.<sup>10</sup> In the same year the family property law was reformed through the *Loi modifiant le Code civil et diverses autres dispositions en matière de droit des régimes matrimoniaux* of 22 July 2018 that took effect (together with the reform of the inheritance law, Act of 31 July 2017: see point 3.1.2) on 1 September 2018. The reform:

- modified, *i.e.* developed, the regime of the separation of property (see Articles 1469/1 et seq. of the BW);

<sup>8</sup> For the main legal sources in different fields of the family law (property relationships, parental responsibility and informal relationships), see: Pintens, W. et al., 2008, 1; Sosson, J., 2002, 35; Pintens, W., Pignolet, D., 3 et seq.; Swennen, F., Mortelmans, D., 2015, 1 et seq.

<sup>9</sup> A description of the historical development in different areas of family law (property relationships, parental responsibility and informal relationships) is provided by: Pintens, W. et al., 2008, 2; Pintens, W., Pignolet, D., 4 et seq.; Swennen, F., Mortelmans, D., 2015, 6 et seq.

<sup>10</sup> Pintens, W., 2018, 1384.

- gave some clarifications concerning the default property regime (see Articles 1400 et seq., 1430, 1432 of the BW);
- repealed the prohibition of sales between spouses;
- introduced the possibility for couples not yet married to state in the purchase's deed regarding an immovable, that it is going to be part of their common estate in case of a future marriage.<sup>11</sup>

Some innovations concerning the inheritance law were introduced too (see point 3.1.2.).<sup>12</sup>

### **2.1.3. What are the general principles of FL in your country?**

Under the Belgian law the civil marriage has a advantaged position.<sup>13</sup> According to Article 21, paragraph 2 of the Belgian Constitution "a civil wedding should always precede the blessing of the marriage, apart from the exception to be established by the law if needed".<sup>14</sup> Children born in and out of wedlock are equal under the Belgian law.

Another principle to be mentioned is the equality of spouses within the marriage. The latter is opened to persons of opposite as well as of same sex (Article 143 of the BW). There is a prohibition of polygamy in Belgium (see Article 147 of the BW and Article 391 of the Belgian criminal code). Marriage between relatives is also prohibited (confront Article 161 of the BW). The affinity is an impediment too (an exception was introduced in 2001, with the Act of 27 March 2001: see point 2.1.2).

Under the Belgian law the marriage may be dissolved through a divorce.<sup>15</sup>

### **2.1.4. Define "family" and "family member" in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

The Belgian civil law does not provide a legal definition of "family". Article 22 of the Belgian Constitution stipulates that "everyone has the right to respect his" or her "private and family life, except in the cases and conditions laid down by law. The law, federate laws and rule referred to in Article 134 guarantee the protection of this right".<sup>16</sup> However, the Belgian Constitution does not specify what family means.<sup>17</sup> There is a broad notion of family in the field of social law. For example, Article 14 of the Act of 26 May 2002 on the right to social integration provides that "family means the spouse, the unmarried partner, the unmarried minor child or several children among whom at least one unmarried minor child".<sup>18</sup>

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<sup>11</sup> <https://dekeyser-associes.com/the-reform-of-the-matrimonial-property-regime/> (17.5.2019).

<sup>12</sup> For a synthetic presentation of the most relevant innovations: Pintens, W., 2018, 1383 et seq. In English: <https://dekeyser-associes.com/the-reform-of-the-matrimonial-property-regime/> (17.5.2019).

<sup>13</sup> Sosson, J., 2002, 37.

<sup>14</sup> For this translation, see: Wattier, 2015, 161.

<sup>15</sup> For information in English: [http://e-justice.europa.eu/content\\_divorce-45-be-be-maximizeMS\\_EJN-en.do?member=1](http://e-justice.europa.eu/content_divorce-45-be-be-maximizeMS_EJN-en.do?member=1) (17.5.2019).

<sup>16</sup> A translation of the Belgian Constitution in English, see: [https://www.dekamer.be/kvvcr/pdf\\_sections/publications/constitution/GondwertUK.pdf](https://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/GondwertUK.pdf) (17.5.2019).

<sup>17</sup> For the question, what family is, see: [http://www.dei-belgique.be/IMG/pdf/module\\_pedagogique\\_no2012-09\\_-\\_le\\_droit\\_a\\_la\\_vie\\_familiale.pdf](http://www.dei-belgique.be/IMG/pdf/module_pedagogique_no2012-09_-_le_droit_a_la_vie_familiale.pdf) (17.5.2019).

<sup>18</sup> [http://www.dei-belgique.be/IMG/pdf/module\\_pedagogique\\_no2012-09\\_-\\_le\\_droit\\_a\\_la\\_vie\\_familiale.pdf](http://www.dei-belgique.be/IMG/pdf/module_pedagogique_no2012-09_-_le_droit_a_la_vie_familiale.pdf) (17.5.2019).

## 2.1.5. Family formations.

### 2.1.5.1. Define the “spouse” in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?

Spouses must be 18 years old (Article 144 of the BW). However, in some serious cases (“motifs graves”, e.g. pregnancy) the Family Court can provide for an exception (Article 145 of the BW). Minors, i.e. people under 18, need the consent of their parents in order to get married (Article 148 of the BW). If the parents deny their consent unlawfully, the Family Court can still allow the marriage (Art. 148 of the BW). Persons declared incapable to enter into a marriage according to Article 492/1 need an authorization of the “Juge de paix” to marry (Art. 145/1 of the BW). Homosexual partners can get married under the Belgian law (Article 143 of the BW).

In case of an existing marriage, a second marriage can only be concluded after the dissolution of the first one (see Article 147 of the BW and Article 391 of the Criminal Code).

Marriages between relatives are forbidden within some degrees (Article 161 of the BW). The same is for people in an affinity relationship (in straight line: see points 2.1.2 and 2.1.3).

### 2.1.5.2. What types of relationships/unions between persons are recognised in FL of your country? In particular, formal (registered) and informal (*de facto*) unions, heterosexual and same-sex unions, unions with and without *affectio maritalis*. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?

#### Marriage

In Belgium marriages can be concluded between people of different and same sex (Article 143 of the BW).<sup>19</sup>

#### Legal cohabitation

The Belgian law also regulates the legal cohabitation (Articles 1475 et seq. of the BW). The declaration of legal cohabitation can be made by persons of opposite and of same sex who have reached the age of majority (see Articles 1475 et seq. of the BW).<sup>20</sup>

#### De facto cohabitation and informal relationship

The *de facto* cohabitation is not explicitly regulated by the law. The rules applying to the marriage are not applicable to the cohabitants.<sup>21</sup> There is only the possibility to apply general civil law rules. Partners may e.g. regulate the patrimonial aspects of the partnership through an agreement.<sup>22</sup>

## 2.1.6. What legal effects are attached to different family formations referred to in q 2.5.?

#### Marriage

The effects attached to a marriage can be divided in two categories:

<sup>19</sup> Swennen, F., Mortelmans, D., 2015, 1. For the requirements see also: [https://diplomatie.belgium.be/en/services/services\\_abroad/registry/marriage](https://diplomatie.belgium.be/en/services/services_abroad/registry/marriage) (17.5.2019).

<sup>20</sup> Swennen, F., Mortelmans, D., 2015, 1 et seq.; Pintens, W. et al., 2008, 1.

<sup>21</sup> Pintens, W. et al., 2008, 1. A broader analysis is offered by Swennen, F., Mortelmans, D., 2015, 2.

<sup>22</sup> For a first information in different languages, see: <http://www.coupleseurope.eu/en/belgium/topics/8-what-does-the-law-provide-for-the-property-of-registered-and-non-registered-partners/> (17.5.2019). For an analysis in English: Swennen, F., Mortelmans, D., 2015, 2.

- the general effects (*régime primaire*);
- the effects concerning the applied property regime (*régime secondaire*).<sup>23</sup>

The general effects of the marriage (*régime primaire*) includes rights and duties of economic and personal nature (Article 212 et seq. of the BW). The primary regime applies irrespective of the matrimonial property regime and cannot be excluded by spouses. Spouses are obliged to assist each other and to contribute to the household expenses according to their ability (Articles 213 and 221 of the BW). The law provides some restrictions concerning the conclusion of transactions (see Articles 215 and 224 of the BW). *E.g.* the disposition of the family home requires the consent of both spouses (Article 215 § 1 of the BW). Both spouses can exercise the tenancy rights, even if only one of them has concluded the tenancy contract on the family home (see Article 215 § 2 of the BW). Debts entered into for some finalities (education and care of children; household) oblige both spouses (Article 222 of the BW). Personal effects of the marriage (the fixation of a common residence, the reciprocal duty of fidelity, support and assistance) are regulated in Articles 213 et seq. of the BW.<sup>24</sup>

#### Legal cohabitation

The general effects of the legal cohabitation are similar to them of the *régime primaire*. However, only property rights and obligations (and no personal duties) arise from the legal cohabitation (Article 1477 of the BW). Cohabitants live under the property regime of separation of property. They can provide otherwise through an agreement, e.g. opting for a regime of joint ownership (Article 1478 of the BW).<sup>25</sup>

#### Informal relationship

There is no general regulation of the effects of an informal relationship (*e.g.* a *de facto* cohabitation) under the Belgian law. There're only some dispositions (not only in the field of the private law), which applies to non-registered and non-married partners. General rules in the field of property law and law of obligation also apply. Partners may conclude an agreement in order to regulate their relationship.<sup>26</sup>

### **2.1.7. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/*de facto* family formations? Explain briefly.**

After The Belgian family law has been recently modified through the reform of the matrimonial property regime's rules.<sup>27</sup> In this field no other big reforms are expected in the near future. Some changes concerning the parental responsibility could be introduced through the prospected reform of the law of responsibility (*réforme du droit de la responsabilité*).<sup>28</sup>

## **2.2. Property relations.**

### **2.2.1. List different family property regimes in your country.**

Under the Belgian law different family property regimes are possible:

<sup>23</sup> For such distinction, see: Pintens, W. et al., 2008, 1.

<sup>24</sup> Pintens, W. et al., 2008, 1, 4 et seq. The legal consequences of marriage are also described by: Sosson, J., 2002, 38 et seq.

<sup>25</sup> Swennen, F., Mortelmans, D., 2015, 1 et seq.; Pintens, W. et al., 2008, 1, 4 et seq. See <http://www.coupleseurope.eu/en/belgium/topics/8-what-does-the-law-provide-for-the-property-of-registered-and-non-registered-partners/> (17.5.2019).

<sup>26</sup> For a first information in different languages, see: <http://www.coupleseurope.eu/en/belgium/topics/8-what-does-the-law-provide-for-the-property-of-registered-and-non-registered-partners/> (17.5.2019). An analysis in English is offered by: Swennen, F., Mortelmans, D., 2015, 2.

<sup>27</sup> See Pintens, W., 2018, 1383 et seq.

<sup>28</sup> [https://iode.univ-rennes1.fr/sites/iode.univ-rennes1.fr/files/asset/document/grerca\\_2018\\_f\\_george.pdf](https://iode.univ-rennes1.fr/sites/iode.univ-rennes1.fr/files/asset/document/grerca_2018_f_george.pdf) (17.5.2019), 6.

- the community of the property acquired during the marriage (or *communauté réduite aux acquêts*) as the statutory or default regime (see point 2.2.2);
- the separation of property (Articles 1466 et seq. of the BW; however, also in this case the assets purchased jointly are part of the common ownership, unless the spouses provided otherwise in their contract);
- the universal community of property (rarely used in Belgium) (if the spouses have chosen this regime, they are common or joint owners of all their assets; for some exceptions, see Article 1401 of the BW: *e.g.* strictly personal assets aren't part of the common property).<sup>29</sup>

**2.2.2. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?**

The default property regime under the Belgian law is the community of property acquired during the marriage (*i.e.* the community of acquets) (see also point 2.2.1). Thus, the assets acquired after the conclusion of the marriage are commonly owned by the spouses (Article 1405 of the BW)<sup>30</sup>. On the contrary, the assets owned prior to the marriage by each of them are part of the spouse's separate property. Part of the latter are also some assets acquired during the marriage (the assets inherited or received by donation and some other assets listed in the Civil Code, *e.g.* the ones of personal use) (personal assets are enumerated in Articles 1399 et seq. of the BW). However, there's a presumption that the assets are to be considered as common, if it cannot be proven that they belong to only one spouse (Article 1405 § 2 of the BW). The reform of 2018 provided for a more clarity with regard to the classification of some goods (*e.g.* life insurance, spouse's shares financed by common property: see Articles 1400 et seq. of the BW).<sup>31</sup>

Normally, each spouse is free to manage and dispose of his or her own property (some restrictions are foreseen, *e.g.* for the disposition of the dwelling house, which requires the consent of both spouses: see point 2.1.6). Regarding the common property, the concurring management applies. However, there're also some acts, which require the consent of both spouses (acts demanding the joint administration are listed in Articles 1417 et seq. of the BW).

The debts that each spouse got into prior to the marriage, the ones arising from an inheritance or a gift also during the marriage (as well as some other debts listed by law: see Articles 1406 et seq. of the Civil Code) are to be considered personal debts of each spouse. A (non-exhaustive) list of common debts, which can be recovered from separate and common property of the spouses, is provided by law.<sup>32</sup>

**2.2.3. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a "new regime just for them"?**

<sup>29</sup> Confront: Pintens, W. et al., 2008, 1 et seq. and 8 et seq.; Sosson, 2002, 38 et seq.; Swennen, F., Mortelmans, D., 2015, 1; <http://www.coupleseurope.eu/en/belgium/topics/2-is-there-a-statutory-matrimonial-property-regime-and-if-so-what-does-it-provide> (17.5.2019); <http://www.coupleseurope.eu/en/belgium/topics/3-how-can-the-spouses-arrange-their-property-regime> (17.5.2019).

<sup>30</sup> See <http://www.coupleseurope.eu/en/belgium/topics/2-is-there-a-statutory-matrimonial-property-regime-and-if-so-what-does-it-provide> (17.5.2019).

<sup>31</sup> Pintens, W., 2018, 1383.

<sup>32</sup> For first information in different languages, see: <http://www.coupleseurope.eu/en/belgium/topics/2-is-there-a-statutory-matrimonial-property-regime-and-if-so-what-does-it-provide> (17.5.2019). For a study in English, see: Pintens, W. et al., 2008, 9, 11 et seq.

### Marriage

A marriage contract may be concluded in order to choose a different property regime or to modify the statutory one within some limits (see Articles 1392 et seq. of the BW). Pre- and postnuptial agreements are allowed. The form required by law is the notarial deed (Article 1392 of the BW). Additionally, a registration is needed in order to rely the agreement against third parties (see Articles 1391 and 1395 of the BW).

Other matrimonial property regimes, different than the statutory one, that may be chosen are: the separation of property (Articles 1466 et seq. of the BW) and the universal community of property (Articles 1454 et seq. of the BW)<sup>33</sup>. The regime of separation of property was recently developed by the Belgian legislator. Thus, if the spouses included a specific clause in their marriage contract, the assets acquired during the marriage are going to be compensated at its end (Articles 1469/1 et seq. of the BW). The notary gives the information concerning this possibility (Article 1469 § 3 of the BW). Furthermore, the spouses may recognize to the (financially) weaker of them the right to claim for a compensation (of max 1/3 of the assets) of the acquets if some circumstances arise (*i.e.* if unforeseen circumstances, leading to an unequal situation, occurs; 2) a divorce based on inconsolable differences determines the end of the marriage) (see Article 1474/1 of the BW).<sup>34</sup>

### Legal cohabitation

Legal cohabitants live under the property regime of separation of property (unless they provide otherwise). Each of them keeps the assets for which he or she can prove his or her ownership. If none of the two partners can prove the ownership of an asset, this one is going to be part of an undivided estate (Article 1478 of the BW).<sup>35</sup>

Both partners are jointly and severally liable for debts that one of them incurred for the purpose of the cohabitation (see Article 1477 of the BW). Registered partners can then conclude an agreement (in form of a notarial deed: see Article 1478 of the BW) in order to regulate their relation otherwise.<sup>36</sup>

### De facto cohabitants

The possibility to regulate the relationship through an agreement is also recognized to the *de facto* cohabitants.<sup>37</sup>

#### **2.2.4. Explain briefly the rules on the administration of family property and compare if there are difference for different property regimes.**

According to Article 1425 of the BW each spouse is free to dispose of his or her own assets (see also, under the regime of the separation of property, Article 1466 of the BW). An exception is foreseen for the disposition of the family home, as in this case the consent of the other spouse is needed (see point 2.1.6).

Regarding the common property, each spouse is free to take separately the everyday acts. The exclusive administration by one spouse is also possible in some other cases, as *e.g.*, when he or she exercises a profession (Article 1417, paragraph 1, of the BW). Joint administration of both spouses is

<sup>33</sup> See Pintens, W. et al., 2008, 1 et seq. and 8 et seq.; <http://www.coupleseurope.eu/en/belgium/topics/3-how-can-the-spouses-arrange-their-property-regime> (17.5.2019).

<sup>34</sup> Pintens, W., 2018, 1384 et seq. For a brief analysis in English, see: <https://dekeyser-associes.com/the-reform-of-the-matrimonial-property-regime/> (17.5.2019).

<sup>35</sup> <http://www.coupleseurope.eu/en/belgium/topics/8-what-does-the-law-provide-for-the-property-of-registered-and-non-registered-partners/> (17.5.2019).

<sup>36</sup> <http://www.coupleseurope.eu/en/belgium/topics/8-what-does-the-law-provide-for-the-property-of-registered-and-non-registered-partners/> (17.5.2019). See also Pintens, W. et al., 2008, 3.

<sup>37</sup> <http://www.coupleseurope.eu/en/belgium/topics/8-what-does-the-law-provide-for-the-property-of-registered-and-non-registered-partners/> (17.5.2019).



required for other matters. In these cases, the consent of the other spouse is required for the validity of the act(s) (Article 1417, paragraph 2 and Article 1418 et seq. of the BW)<sup>38</sup>.

**2.2.5. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

In Belgium there is a (digital) central register of marriage contracts, foreseen by the law and managed by the Royal Federation of Belgian Notaries. The register also comprises registrations of the legal cohabitation contracts. The registration is required in order to oppose the contract against third parties (see Article 1395 § 2 of the BW)<sup>39</sup>.

**2.2.6. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

Under the statutory property regime, the debts that each spouse entered into prior to the marriage, the ones arising from an inheritance or a gift also during the marriage (as well as some other debts listed by law: see Articles 1406 et seq. of the BW) are to be considered personal debts of each spouse<sup>40</sup>. For his or her separate debts the spouse is liable with his or her own property (Article 1409 of the BW; for some exceptions, see Articles 1410 et seq. of the BW). Article 1413 of the BW provides then a special rule for the debts entered into by both spouses. In this case spouses are liable with their separate property and the common estate too (see also Article 1414, paragraph 1 of the BW; *dette commune ordinaire*). Some exceptions (in which only the estate of the spouse, who acted, is liable in addition to the common one) are listed in Article 1414, paragraph 2 of the BW (*dette commune imparfaite*).<sup>41</sup> A (non-exhaustive) list of common debts, which can be recovered from separate and common property of the spouses (Article 1414 of the BW), is provided by law (Article 1408 of the BW). Common debts are e.g. the ones entered for the purpose of housekeeping.<sup>42</sup> The responsibility for debts after the end of the statutory property regime is regulated in Articles 1439 et seq. of the BW: see also point 2.2.7).<sup>43</sup>

**2.2.7. Describe allocation and division of property in case of divorce, separation or dissolution of the union.**

In case of divorce, the division of the property takes place according to the rules provided by the law (see Articles 1205 et seq. of the Judicial Code). However, spouses may deviate from the consequences deriving from the application of the legal rules.<sup>44</sup> If the spouses lived under the statutory regime, the matrimonial property regime ends (see Article 1427 of the BW). Their common

<sup>38</sup> <http://www.coupleseurope.eu/en/belgium/topics/2-is-there-a-statutory-matrimonial-property-regime-and-if-so-what-does-it-provide> (17.5.2019). In the literature, see also: Pintens, W. et al., 2008, 18 et seq.

<sup>39</sup> <http://www.coupleseurope.eu/en/belgium/topics/4-can-or-must-the-matrimonial-property-regime-be-registered> (17.5.2019).

<sup>40</sup> <http://www.coupleseurope.eu/en/belgium/topics/2-is-there-a-statutory-matrimonial-property-regime-and-if-so-what-does-it-provide> (17.5.2019).

<sup>41</sup> <http://www.coupleseurope.eu/en/belgium/topics/2-is-there-a-statutory-matrimonial-property-regime-and-if-so-what-does-it-provide> (17.5.2019).

<sup>42</sup> <http://www.coupleseurope.eu/en/belgium/topics/2-is-there-a-statutory-matrimonial-property-regime-and-if-so-what-does-it-provide> (17.5.2019). See also, in the literature: Pintens, W. et al., 2008, 16 et seq. and 30.

<sup>43</sup> <http://www.coupleseurope.eu/en/belgium/topics/5-what-are-the-consequences-of-divorce-separation> (17.5.2019).

<sup>44</sup> <http://www.coupleseurope.eu/en/belgium/topics/5-what-are-the-consequences-of-divorce-separation> (17.5.2019).

assets will be part of a co-ownership and then divided (see Article 577-2 of the BW). The division (in equal parts) also takes place, when the universal community of property ends. If the spouses lived under the matrimonial property regime of separation of property, the division and liquidation of common assets takes place. If the spouses recognized the possibility of a compensation, this one takes place, when the property regime ends. After the division each spouse is liable for his or her remaining debts. For the residual common debts of spouses, they're jointly liable (Articles 1439 et seq. of the BW).<sup>45</sup> In case of divorce spouses are no more heirs of each other and lose their right to the reserved portion (see point 3.3.4).<sup>46</sup>

The separation (see Articles 308 et seq. of the BW) doesn't dissolve the marriage. The reciprocal duties of fidelity and (material) support continue to exist. Nevertheless, spouses are allowed to live separately. The legal matrimonial property regime dissolves (Article 1427 of the BW).<sup>47</sup>

**2.2.8. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?**

No, such rules seem not to exist under the Belgian law.

**2.3. Cross-border issues.**

**2.3.1. Is your country participating in the enhanced cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?**

Belgium is participating in the enhance cooperation with regard to the two abovementioned Regulations.

**2.3.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as "marriage", "matrimonial property agreement", "partnership property agreement" etc.?**

Problems could arise regarding the definition of property relationships. In fact, the notion of property relationships contained in the European Regulation(s) is broader than the Belgian one and includes also some effects of the "primary regime" of the marriage (see point 2.1.6). The European idea of "property relationships" also encompasses the "primary regime" rules. Furthermore, in Belgium the marriage can be entered into also by same-sex couples. Problems could arise, when the applicable law does not know a homosexual marriage.

**2.3.3. Are you expecting any problems with the application of the rules on jurisdiction?**

There is no known court decision showing such problems. However, as the Regulations only apply since 29 January 2019, this does not exclude, that problems could arise in the future.

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<sup>45</sup> <http://www.coupleurope.eu/en/belgium/topics/5-what-are-the-consequences-of-divorce-separation> (17.5.2019).; [https://e-justice.europa.eu/content\\_divorce-45-be-maximizeMS\\_EJN-en.do](https://e-justice.europa.eu/content_divorce-45-be-maximizeMS_EJN-en.do) (17.5.2019).

<sup>46</sup> [https://e-justice.europa.eu/content\\_divorce-45-be-maximizeMS\\_EJN-en.do](https://e-justice.europa.eu/content_divorce-45-be-maximizeMS_EJN-en.do). For the consequences of divorce, see also Sosson, J., 2002, 51 et seq.

<sup>47</sup> [https://e-justice.europa.eu/content\\_divorce-45-be-maximizeMS\\_EJN-en.do](https://e-justice.europa.eu/content_divorce-45-be-maximizeMS_EJN-en.do) (17.5.2019).

**2.3.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

As stated above (see point 2.3.2), some problems could arise, if a same-sex couple enter into a marriage, the applicable law however doesn't know homosexual marriages.

**2.3.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

Discriminatory rules (*e.g.* rules discriminating based on sex) could be against the public policy. It's not excluded that additional problems arise in future (as a result of the application of the European Regulations).

**2.3.6. Are there any national rules on international jurisdiction and applicable law (besides the Regulations) concerning the succession in your country?**

Yes, they are contained in the Belgian International Private Law Act of 2004. Furthermore, in the Civil Code there are some rules on the international adoption (Articles 357 et seq. of the BW).

### *3. Succession law*

#### **3.1. General.**

**3.1.1. What are the main legal sources of Succession Law (SL) in your country? What are the additional legal sources of SL?**

The main legal source of the Belgian succession law is the Belgian Civil Code. The Succession Law is regulated in Articles 718 et seq. of the BW.

Other relevant sources are, *e.g.*:

- the Act of Notaries;
- the Judicial Code, containing some dispositions dealing with the inheritance proceeding;
- the Act of 11 January 1983 (completed by the Act of 2 February 1983), introducing the international will (as foreseen in the Washington Convention on the Form of an International Will of 1973);
- the European Regulation on Succession Law (and, for the successions opened before 17 August 2015, the Belgian International Private Law Act: see point 2.1.1).

Each of the three regions (Walloon Region – Flemish Region – Brussels Region) has a code governing the inheritance taxes.<sup>48</sup>

Additionally, the Hague Convention on the Conflicts of Law Relating to the Form of Testamentary Dispositions of 1961 was ratified in Belgium (Act of 29 July 1971).

**3.1.2. Provide a short description of the main historical developments in SL in your country.**

The Belgian succession law has developed from the French one. The French *Code Civil* was introduced in Belgium as well. Despite the similarities which still exist, there're also many differences between the two systems due to the different developments in the last 200 years.<sup>49</sup>

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<sup>48</sup> See Bolle, M. J., 2010, 59, 70.

<sup>49</sup> See Pintens, W., 2011, 52 et seq.

Only the most recent reforms will be mentioned here. The succession rights of the survived spouse were reformed and straightened with the Act of 14 May 1981. In 1983 the international will was introduced in Belgium (see point 3.1.1). A reform took place then in 1987, providing the equalization of the children born in and out of wedlock as well as of the adopted ones (Act of 31 March 1987 respective of 6 June 1987). In 2003 the possibility for the spouses to exclude some inheritance rights through a marriage contract was foreseen, if children from a former relationship of one or both spouses exist. In 2004 the Belgian International Private law Act of 16 July 2004 (in force since 1 October 2004) was enacted (see point 2.1.1). In 2007 the legislator recognized some succession rights to the survived legal cohabitant (see Act of 18 Mai 2007). In 2012 the former Article 787 of the BW (concerning the substitution) was modified (see the new Article 739 of the BW). In 2013 the Belgian legislator introduced the homosexual marriage (see point 2.1.2). The homosexual survived spouse has the same inheritance rights as the heterosexual one. The last big reform of the Belgian inheritance law is the one from 2017/2018. Adopted on 31 July 2017, the reform came in force on 1 September 2018. The most important changes introduced by the reform are:

- the strengthening of the deceased's freedom to dispose;
- the introduction of a new mechanisms in order to calculate the reduction (providing that the estimations on the day of the donation must be used for both, movable and immovable property, Article 858 § 3 of the BW; furthermore, the general presumption of a donation being an advance portion of the succession was repealed; the former rule now only applies in case of a donation to children or descendant: see Article 843 of the BW);
- the introduction of some allowed inheritance agreements.

Some additional modifications were introduced through the reform of the family property law (see point 2.1.2). Especially, the surviving spouse's rights were strengthened.<sup>50</sup>

### 3.1.3. What are the general principles of succession in your country?

The general principles of the Belgian inheritance law<sup>51</sup> are the following. The Belgian law knows the principle of the universality of succession. The transmission of the estate occurs directly. No special authority should be accessed, unless there's a disagreement between the heirs: in this case, the *Tribunal de Première Instance* is the competent authority.<sup>52</sup> The legitimate heirs have, by the mere fact of the deceased's death, the possession of all the assets (but also the rights and shares) depending on the estate (see Article 724 of the BW). They have the "saisine" of the deceased's property irrespective of the decision to accept or renounce the succession. Only the acceptance of the inheritance gives a right of ownership on the deceased's property, while the "saisine" confers to its beneficiary only a right to take possession of the property.<sup>53</sup>

Under the Belgian law, the succession can be testate or intestate. The principle of testamentary freedom and freedom to dispose is limited through the protection of compulsory heirs.<sup>54</sup> Generally, succession agreements and joint wills are not allowed under the Belgian law. However, the new Belgian inheritance law foresees some forms of permitted inheritance agreements (see point 3.3.2). Also a substitution consisting in the obligation for the first designated heir to preserve the assets and to transfer them to another person who will be the subsequent heir is forbidden.<sup>55</sup> Trusts cannot be created under the Belgian law. However, foreign trusts are admitted if some conditions exist (see Articles 122-5 of the Belgian Private International Code). Nevertheless, they cannot deprive the heirs of their reserved portion.

<sup>50</sup> See Pintens, W., 2018, 1385.

<sup>51</sup> For an analysis, see: Bolle, M. J., 2010, 59 et seq.; [https://e-justice.europa.eu/content\\_succession-166-be-en.do](https://e-justice.europa.eu/content_succession-166-be-en.do) (17.5.2019).

<sup>52</sup> [https://e-justice.europa.eu/content\\_succession-166-be-en.do](https://e-justice.europa.eu/content_succession-166-be-en.do) (17.5.2019).

<sup>53</sup> [https://e-justice.europa.eu/content\\_succession-166-be-en.do](https://e-justice.europa.eu/content_succession-166-be-en.do) (17.5.2019).

<sup>54</sup> [https://e-justice.europa.eu/content\\_succession-166-be-en.do](https://e-justice.europa.eu/content_succession-166-be-en.do) (17.5.2019).

<sup>55</sup> Bolle, M. J., 2010, 68.

### 3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.

Under the Belgian law, after the deceased's death the estate passes to the heirs as stated in point 3.1.4. Thus, the legitimate heirs have, by the mere fact of the deceased's death, the possession of all the assets (but also the rights and shares) depending on the estate (see Article 724 of the BW). However, there are also certain heirs (as *e.g.* the state and, under certain conditions, the universal legatee) that need an order of possession from a court. Furthermore, the court is required to act *e.g.* if a person without legal capacity is going to inherit. The same happens is, when: i) the inheritance is accepted subject to or under the benefit of inventory; ii) in case of vacancy of the succession or; iii) if there's a disputation of the partition and a notary must be appointed. In case of an amicable settlement, the notarial instrument is needed only for the partition of immovables.<sup>56</sup> Individual legatees and legatees by general title must apply for a delivery of their legacy (see Articles 1014 and 1011 of the BW; see also Article 1004 of the BW, applying to the universal legatees).<sup>57</sup>

Heirs can decide, whether they want to accept the inheritance unconditionally (the acceptance can be express or tacit: see Article 778 of the BW; the right to accept expires in 30 years: see Article 789 of the BW) or subject to inventory (according to Articles 793 et seq. of the BW: in this case, a declaration before a notary or at the registry of the court of 1<sup>st</sup> instance of the district where the succession opened is needed).<sup>58</sup> They can also waive the inheritance (see Articles 784 et seq. of the BW).

Different documents may be used to prove the status of an heir: an affidavit (*acte de notoriété/akte van bekendheid*), a certificate of inheritance (*certificat d'hérédité/attest van erfopvolging*) or a deed of inheritance (*acte d'hérédité/akte van erfopvolging*). The deed of inheritance is issued only by a notary, whereas the certificate is issued by the notary or by the receiver at the registry office (*Bureau compétent de l'Administration générale de la documentation patrimoniale*) (Article 1240bis of the Civil Code).<sup>59</sup>

The *acte notarié/notariële akte*, made by a notary (who attests certain facts by stating the identity of the persons appearing before him or her and certifying the information they are requesting to be recorded), also has a probative value. There's a presumption of accuracy of the declaration made by the notary. Although the *acte notarié/notariële akte* "is authentic evidence of its content", the statements covered by such authenticity can be proven false. For this purpose, a proceeding (*inscription de faux/betichting van valsheid*) is needed.<sup>60</sup>

### 3.1.5. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?

The succession can be testate or intestate, and – as stated in the recent reform of the law of inheritance (see point 3.1.2) – in certain cases the inheritance can also be regulated by an agreement. If there is no disposition of property upon death (will or agreement on succession, if allowed), the legal rules apply. Intestate succession only takes place in the absence of a will or when the dispositions upon death are partial (*i.e.* don't comprehend the entire estate). In the latter case intestate succession will only apply to the part of the estate not covered by the will.<sup>61</sup>

<sup>56</sup> [https://e-justice.europa.eu/content\\_succession-166-be-en.do](https://e-justice.europa.eu/content_succession-166-be-en.do) (17.5.2019).

<sup>57</sup> [https://e-justice.europa.eu/content\\_succession-166-be-en.do](https://e-justice.europa.eu/content_succession-166-be-en.do) (17.5.2019).

<sup>58</sup> [https://e-justice.europa.eu/content\\_succession-166-be-en.do](https://e-justice.europa.eu/content_succession-166-be-en.do) (17.5.2019).

<sup>59</sup> [https://e-justice.europa.eu/content\\_succession-166-be-en.do](https://e-justice.europa.eu/content_succession-166-be-en.do) (17.5.2019).

<sup>60</sup> [https://e-justice.europa.eu/content\\_succession-166-be-en.do](https://e-justice.europa.eu/content_succession-166-be-en.do); <http://www.successions-europe.eu/Answers.aspx?c=be&l=en&q=21> (17.5.2019); [https://e-justice.europa.eu/content\\_succession-166-be-en.do?idTaxonomy=166&idCountry=be&plang=en&removebanner=true](https://e-justice.europa.eu/content_succession-166-be-en.do?idTaxonomy=166&idCountry=be&plang=en&removebanner=true) (17.5.2019).

<sup>61</sup> See [https://e-justice.europa.eu/content\\_succession-166-be-en.do](https://e-justice.europa.eu/content_succession-166-be-en.do) (17.5.2019).

### 3.1.6. What happens with the estate of inheritance if the decedent has no heirs?

If there're no heirs, the State is going to inherit according to Articles 768 et seq. of the BW. Pursuant to Article 769, in this case seals have to be affixed and an inventory drawn up in the forms foreseen for the acceptance of estates under the benefit of inventory.

### 3.1.7. Are there special rules or limitations concerning succession with reference to the deceased's (or heir's) culture, tradition, religion or other characteristics?

There are no special rules or limitations concerning succession with reference to the deceased's or heir's culture, tradition or religion. However, the last reform of the law of inheritance stated that the children can sign a succession agreement with their parents. This offers parents the opportunity to leave more *e.g.* to a disabled child, if all their children agree. This agreement must be examined carefully and must take into account the capacity of each heir (his or her needs and resources) and the benefits and gifts that each heir has already received (see point 3.3.2).

## 3.2. Intestate succession.

### 3.2.1. Are men and women equal in succession? Are domestic and foreign nationals equal in succession? Are decedent's children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?

There is no distinction between male and female heirs. Domestic and foreign nationals are equal in succession. Children born in and out of wedlock have been equal in succession since 1987 (see points 2.1.2 and 3.1.2). Adopted children are equal too in case of a full adoption (Article 356/1 of the BW). Adopted children are equal too in case of a simple adoption (Article 356/1 of the BW). In case of a simple adoption the child inherits from his or her blood relatives and from the adoptive parent(s) according to Article 353-15 of the BW. Capable to succeed are also children conceived (if they born alive: see Articles 725 and 906, paragraph 2 of the BW).

Homosexual couples are equal in succession. However, there're some differences between the succession rights of the surviving spouse, the surviving legal cohabitant and the surviving *de facto cohabitant*. The spouse is intestate heir and has a right to a reserved share too: he or she inherits at least 1/2 of the estate in usufruct and his or her reserve must include at least the usufruct of the family home and its furniture.<sup>62</sup>

According to Article 745 *octies* of the BW the legal cohabitant has a usufructuary or a tenancy right on the house of the main residence as well as a usufructuary right on its furniture. However, the deceased can disinherit him or her or limit his or her right by means of a will.<sup>63</sup> There are no specific succession law rules dealing with the inheritance rights of *de facto* cohabitants.<sup>64</sup>

### 3.2.2. Are legal persons capable of inheriting? If yes, on which basis?

Yes, they are. Especially, they can be beneficiaries of a will. The provisions *inter vivos* or contained in a will, for the benefit [...] of the poor of a municipality, or of establishments of public utility, have

<sup>62</sup> [https://e-justice.europa.eu/content\\_succession-166-be-en.do](https://e-justice.europa.eu/content_succession-166-be-en.do) (17.5.2019).

<sup>63</sup> Swennen, F., Mortelmans, D., 2015, 2; Bolle, M. J., 2010, 63.

<sup>64</sup> For the legal condition of the survived *de facto* partner, see: Swennen, F., Mortelmans, D., 2015, 28 et seq.

effect only as far as they are authorized. On the contrary, the authorization is not required for bequests to non-profit associations, international non-profit associations and foundations, governed by the law of 27 June 1921 (Article 910 of the BW).

**3.2.3. Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.**

Yes, it is at the Articles 727 et seq. of the BW. These rules were reformed in 2013 (by law of 20 January 2013). An heir is unworthy and loses therefore his right to inherit, when: (i) he was convicted of having murdered (or of trying to do it: an attempt is enough) the deceased; (ii) he murdered (or tried to murder) the deceased, without being convicted, as he died before or; (iii) he was accused of having committed against the deceased a crime foreseen in Articles 375, 398 until 400, 402, 403, 405 §§1-3 and 5, and 422bis of the Belgian Criminal Code) (Article 727 of the BW).

**3.2.4. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?**

Under the Belgian law the heirs *ex lege* are: the surviving spouse, the deceased's children, his ascendants and collateral (see Articles 731 et seq. of the BW). Relatives are divided into 4 classes. First class heirs are the deceased's descendants. Second class heirs are the deceased's parents and siblings. Other ascendants are heirs of third class. Other collateral (up to the 4<sup>th</sup> grade) are heirs of fourth class.

There're some principles governing the intestate succession, which can be summarized as follows:

- relatives of a next class exclude from the succession the ones of a subsequent one (Articles 745 et seq. of the BW);
- next relatives exclude the farther ones according to the *règle de la proximité* (Articles 734 et seq. of the BW);
- relatives of the same grade get equal shares (Articles 733 et seq. of the BW);
- within the intestate succession the principle of substitution applies (Articles 739 et seq. of the BW);
- the representation applies as well (however, not between cousins).

The spouse (whose rights have been incremented through the last reform of the inheritance law)<sup>65</sup> gets (irrespective of the matrimonial property law consequences: he or she receives ½ of the common property as result of its distribution) the usufruct of the entire estate if there are children; the usufruct of the personal assets of the deceased and, in addition, the full ownership of deceased's part of the common assets (and also the ownership of the exclusive joint property), if there are no children, but only other heirs (ascendants, sibling or their descendants: see Article 754/1 of the BW); the full ownership of the entire estate, if there're no other heirs (Article 745 *bis* of the BW).

If the deceased only left children, they get the ownership of the entire estate (receiving equal shares: see Article 745 of the BW). If a child cannot or doesn't want to accept the estate, he or she will be replaced by his or her descendants. There is no difference between children born in or out of wedlock.

If there are no children and no surviving spouse, the ascendants and the closest collaterals inherit. The parents receive ½ each if there're no sibling; and 1/4 each in presence of deceased's siblings. These ones (or their descendants) get the rest. The siblings also get the share of the predeceased

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<sup>65</sup> Pintens, W., 2018, 1385.

parent(s). By lack of ascendants and siblings, the relatives of each parent's side receive ½ of the estate.<sup>66</sup>

According to Article 745 *octies* of the BW the legal cohabitant has a usufructuary or a tenancy right on the house of the main residence as well as a usufructuary right on its furniture (see point 3.2.1).

*De facto* cohabitants are not intestate heirs (see point 3.2.1).

Note that according to Article 205 *bis* § 1 and § 2 of the BW the surviving spouse and the parents of the deceased's spouse may also benefit from a maintenance under certain circumstances. Furthermore, pursuant to Article 203 § 2 of the BW, a maintenance may be claimed by the children of the deceased's spouse, which are not children of the surviving one.<sup>67</sup>

### 3.2.5. Are the heirs liable for deceased's debts and under which conditions?

If the heirs accept the estate unconditionally, they are liable for debts and charges of the estate. On the contrary, if the heirs do not accept the estate unconditionally, but subject to or under the benefit of inventory, they're liable for the estates' debts only up to the size of the assets inherited (Article 802 of the BW). If one decides to reject the estate (see point 3.2.6), he or she is not liable for the estate's debts. Legatees (unlike the universal ones and the ones by general title: see point 3.3.1.3) are not liable for the estates' debts (Article 1024 of the BW).<sup>68</sup>

### 3.2.6. What is the manner of renouncing the succession rights?

The possibility of renouncing the inheritance (see Articles 784 et seq. of the BW) within 30 years (Article 789 of the BW) is foreseen. The declaration is made before a notary. It takes the form of an authentic deed. There is no possibility of renunciation of the inheritance during the deceased's life (see Articles 791 of the BW).

## 3.3. Disposition of property upon death.

### 3.3.1. Testate succession.

#### 3.3.1.1. Explain the conditions for testate succession.

Firstly, a will is needed. This one is a solemn act and must be compliant with the formalities provided by law.<sup>69</sup> The testator must have the capacity to testate (Articles 901 et seq. of the BGB). All capable persons may receive by will.<sup>70</sup> The legatee must be alive at the time of the opening of the will. Furthermore, the object of the legatee's right should be existent at the time of the death of the deceased<sup>71</sup>. As wills have a personal nature, a representation is excluded. A will may be revoked by a later one (see Article 1035 of the BW). Holograph wills are deposited at a notary. After the testator's death, the will is opened. The notary draws up a memorandum, which is inserted, together with the will, in the records of the notary. Copies of both must be sent to the chief clerk of the Court (see Article 976, paragraph 1, of the BW; for the international wills, see paragraph 2).<sup>72</sup> Joint wills are not

<sup>66</sup> For a brief explanation of the consequences of death, see (in different languages): [www.coupleseurope.eu/en/belgium/topics/6-what-are-the-consequences-of-death/](http://www.coupleseurope.eu/en/belgium/topics/6-what-are-the-consequences-of-death/) (17.5.2019); [https://e-justice.europa.eu/content\\_succession-166-be-en.do](https://e-justice.europa.eu/content_succession-166-be-en.do) (17.5.2019). In English: Bolle, M. J., 2010, 62 et seq.

<sup>67</sup> See for more details: Bolle, M. J., 2010, 65 et seq.

<sup>68</sup> [https://e-justice.europa.eu/content\\_succession-166-be-en.do](https://e-justice.europa.eu/content_succession-166-be-en.do) (17.5.2019).

<sup>69</sup> For an analysis in English, see: Bolle, M. J., 2010, 59 et seq.; Pintens, W., 2011, 52 et seq. At the following link there is a description in different languages: [https://e-justice.europa.eu/content\\_succession-166-be-en.do](https://e-justice.europa.eu/content_succession-166-be-en.do) (17.5.2019).

<sup>70</sup> See Bolle, M. J., 2010, 68.

<sup>71</sup> <https://www.notaire.be/donations-successions> (17.5.2019).

<sup>72</sup> The procedure is described by Pintens, W., 2011, 69.



allowed. The prohibition extends to joint wills for the benefit of a third party as well as to a reciprocal and mutual provisions (Article 968 of the BW).

### 3.3.1.2. Who has the testamentary capacity?

Articles 901 et seq. of the BW require the capacity of the testator to express his or her will validly and freely.<sup>73</sup> Capable to testate are only the persons who are already 18 years old. However, the one who is 16 years old can make a will, disposing of half of the disposable share of the estate (Article 904 of the BW, in connection with Articles 913 et seq. of the BW).<sup>74</sup>

### 3.3.1.3. What are the conditions and permissible contents of the will?

The will must be done in one of the authorized forms.<sup>75</sup> In his or her will the testator may appoint an heir. A universal legatee (*legs universel*: Articles 1002 et seq. of the BW), a legatee by general title (*legs à titre universel*: see Articles 1002, 1010 et seq. of the BW) or a special legatee (*legs particulier*) can be appointed as well. Furthermore, the testator can appoint an executor or *exécuteur testamentaire* (see Article 1025 of the BW). He can also order a distribution according to Articles 1075 and 1078 of the BW. A substitute legatee may be appointed too (Article 898 of the BW). However, no reversionary heirs or legatees may be appointed by the testator (see Article 896 of the BW; see also point 3.1.3: an exception is the so-called *legs de residuo*). A will may be revoked through a testamentary disposition (see Articles 1035 et seq. of the BW). There is also the possibility to “recover” a revoked will. Joint wills are not allowed under the Belgian law (see Article 968 of the BW). The will may also contain provisions which are of non-patrimonial nature.<sup>76</sup>

### 3.3.1.4. Describe the characteristics of will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a will?

The will is a solemn act. The testator must have the capacity to testate (Articles 901 et seq. of the BW). The possibility of a representation is excluded (see also point 3.3.1.1). There are three different types of will under the Belgian law:<sup>77</sup>

- the holographic will (written, dated and signed by the hand of the deceased: Article 970 of the BW);<sup>78</sup>
- the public will (dictated to and written by a notary in the presence of 2 adult and capable witnesses; or, if there're no witnesses, made by two notaries; it must be signed by the testator, the notary and the witnesses: Article 971 et seq. of the BW; note that there're some persons that are not authorized to act as witnesses);<sup>79</sup>
- the international will (foreseen by the Washington Convention on the Form of an International Will of 1973 and introduced in Belgium in 1983). The international will, which replaced in Belgium the secret will, consists in a will (a private deed written by the testator or – on behalf of him or her – by another person, *e.g.* a notary, and signed by the testator), which is presented to a notary. After a declaration made in presence of 2 witnesses, a certificate (*i.e.* a

<sup>73</sup> [https://e-justice.europa.eu/content\\_succession-166-be-en.do](https://e-justice.europa.eu/content_succession-166-be-en.do) (17.5.2019).

<sup>74</sup> Bolle, M. J., 2010, 68.

<sup>75</sup> See Pintens, W., 2011, 52 et seq.; Bolle, M. J., 59 et seq. See also [https://e-justice.europa.eu/content\\_succession-166-be-en.do](https://e-justice.europa.eu/content_succession-166-be-en.do) (17.5.2019).

<sup>76</sup> For an analysis, see: Pintens, W., 2011, 52 et seq.; Bolle, M. J., 59 et seq., 64 et seq.; [https://e-justice.europa.eu/content\\_succession-166-be-en.do](https://e-justice.europa.eu/content_succession-166-be-en.do) (17.5.2019).

<sup>77</sup> See Bolle, M. J., 2010, 59 et seq.; Pintens, W., 2011, 57 et seq. For a general information in different languages, see: [https://e-justice.europa.eu/content\\_succession-166-be-en.do](https://e-justice.europa.eu/content_succession-166-be-en.do) (17.5.2019).

<sup>78</sup> Bolle, M. J., 2010, 59 et seq.; Pintens, W., 2011, 57 et seq.

<sup>79</sup> Pintens, W., 2011, 62 et seq.; Bolle, M. J., 2010, 60.

notarial deed) has to be attached to the will in order to prove its validity. The international will has to be put in an envelope (sealed by the testator and the witnesses), that is attached to the certificate and kept in the notary's records (see Articles 9, 17 of the Act of 1983).<sup>80</sup>

The Belgian law also provides for a special rule, that recognizes to a mute testator the possibility to write (in presence of a notary and witnesses) that the document contains his or her will (Articles 18 of the Act of 2 February 1983). After that, the notary certifies, that the abovementioned declaration was written in his or her presence as well as in the presence of the witnesses. The international will cannot be made by testator that cannot speak nor write.<sup>81</sup> Privileged or special wills (e.g. military and maritime wills; wills made in an isolated place due to an epidemic) are also regulated under the Belgian law (see Articles 981-1001 BW).<sup>82</sup> Oral and electronic wills are not allowed. The same is for the joint ones, made by two (or more) testators together.<sup>83</sup>

**3.3.1.5. Is there a (public) register of wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

Belgium ratified the Basle Convention of 16 May 1972 on the Establishment of a Scheme of Registration of Wills. In Belgium a central computerized register of wills (*Registre Central des Testaments*) exists. It's managed by the Royal Federation of the Belgian Notaries<sup>84</sup>. Notaries register public and international wills made in their presence. The same is for holographic wills lodged with them (in this case the testator may decline the registration).

The existence of the will and especially of its content remains secret during the entire life of the testator. After the testator's death, any interested party may request the register of it, presenting a death certificate or another document proving the death of the testator<sup>85</sup>.

**3.3.2. Succession agreement (*negotia mortis causa*). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.**

Originally, succession agreements were strictly prohibited under the Belgian law. There were only some exceptions (see Article 1130 of the BW). The reform of 2017/2018 changed the former situation, strengthening the exceptions (however, the principle of the prohibition of succession agreements was maintained). The reform admitted the possibility to conclude:

- a (global) family succession agreement (drawn up between the parents and their children or descendants and aiming to avoid disputes between children after the death of their parents.) or
- a specific succession agreement(s) (e.g. containing the renunciation to the reduction of a donation, Article 918 § 1 of the BW).

The law foresees some formalities in order to ensure that the decision can be made with full knowledge of the case. In particular, the intervention of the notary is required, and the form of a notarial deed is needed (Article 1100/5 of the BW). The ones who wish to enter into an agreement concerning their succession cannot, therefore, write it themselves, but must consult a notary. The latter draw up the succession agreement. Furthermore, the notary assists and informs the parties of the consequences arising from their choices. Before signing the succession agreement, each of the parties receives a draft of it. At the time of communication of the draft, a meeting date (to which all parties are invited) is fixed. This meeting doesn't take place before the expiry of a period of 15 days

<sup>80</sup> Pintens, W., 2011, 65 et seq., 66; Bolle, M. J., 2010, 60.

<sup>81</sup> Pintens, W., 2011, 66.

<sup>82</sup> Pintens, W., 2011, 55 et seq.

<sup>83</sup> Pintens, W., 2011, 55 et seq.

<sup>84</sup> <https://www.notaire.be/donations-successions/les-successions/enregistrement-des-testaments-le-crt> (17.5.2019).

<sup>85</sup> <http://www.arert.eu/Registering-and-searching-for-wills-304.html> (17.5.2019).; Pintens, W., 2011, 68; Bolle, M. J., 2010, 61; [https://e-justice.europa.eu/content\\_succession-166-be-en.do](https://e-justice.europa.eu/content_succession-166-be-en.do) (17.5.2019).

from the date of the dispatch of the draft and it represents an opportunity to explain the content of the succession agreement and its consequences. The succession agreement cannot be signed earlier than one month after the meeting. All parties have the opportunity to carefully examine the draft before signing it.

**3.3.3. Are conditions for validity of wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

The validity requirements of a will are governed by specific articles of the Belgian Civil Code, especially by article 967 et seq. of the BW concerning various typologies of will.

**3.3.4. Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

Under the Belgian law the freedom to dispose upon death is limited as the law recognises a reserved portion (*reserve héréditaire*) to the surviving spouse and the children (or descendants) (see Articles 913 et seq. of the BW) (so called forced heirs).<sup>86</sup> Originally the ascendants of the deceased were compulsory or forced heirs as well. However, the reform of 2017 repealed their reserved rights. Thus, today they may be disinherited by the deceased. The law only recognised them a maintenance if certain circumstances (situation of need) exist (see Article 205bis § 2 of the BW).<sup>87</sup>

Before the reform of the Belgian inheritance law the amount of the children's reserved portion varied according to the nature and the number of the existing compulsory heirs. Starting from 1 September 2018, the portion reserved to the children is fixed (1/2), irrespective how many they are.<sup>88</sup>

The spouse gets 1/2 of the estate in usufruct. His or her reserve includes at least the usufruct of the dwelling house and of its equipment (see Article 914 of the BW). If they have not received their reserved portion, the compulsory or forced heirs may bring an action for reduction. To determine the reserved portion the value of the assets donated has to be added to the assets existing at the time of the deceased's death. In order to allow to the forced or compulsory heir to get the reserved share testamentary dispositions as well as gifts affecting his or her rights may be reduced.<sup>89</sup> The value of the gift at the time of the donation has to be taken into account. As stated in Article 920 § 2 of the BW, compulsory heirs are now entitled to a monetary claim.<sup>90</sup>

**3.3.5. Cross-border issues.**

**3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?**

At present it seems there are no rulings applying Regulation 650/2012. The Belgian legislator adapted the Code of private international law to the European Regulation 650/2012 with the Act of 6 July 2017, providing that the jurisdiction and the law applicable to the succession shall be determined by the rules of the abovementioned Regulation (Articles 55 and 56 provide).

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<sup>86</sup> Bolle, M. J., 64 et seq.; [https://e-justice.europa.eu/content\\_succession-166-be-en.do](https://e-justice.europa.eu/content_succession-166-be-en.do) (17.5.2019).

<sup>87</sup> Pintens, W., 2017, 1452.

<sup>88</sup> This lead to more freedom for the testator: see Pintens, W., 2017, 1452.

<sup>89</sup> Bolle, M. J., 64 et seq.; [https://e-justice.europa.eu/content\\_succession-166-be-en.do](https://e-justice.europa.eu/content_succession-166-be-en.do) (17.5.2019).

<sup>90</sup> Pintens, W., 2017, 1452.

### 3.3.5.2. Are there any problems with the scope of application?

There are no specific problems arising from the Belgian praxis with regard to the scope of the Regulation's application.

### 3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country had experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?

At present it seems there are no relevant rulings applying Regulation 650/2012.

### 3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?

It's not clear, how Article 83, paragraph 2 of the European Regulation should be interpreted (specially, when the deceased had chosen the law applicable to his or her succession prior to 17 August 2015). It is unclear, if the limitations affecting the choice of law under the Belgian international private law rules (see Belgian international private law code) will be maintained also under Article 83, paragraph 2 of the abovementioned Regulation.<sup>91</sup>

### 3.3.5.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?

Traditionally, succession agreements were strictly forbidden in Belgium. Thus, one could have argued that the prohibition was part of the *ordre public* according to the Article 35 of the European Regulation. As stated above, the last reform of the Belgian succession law foresaw some additional exceptions to the prohibition of succession agreements. This could confirm that the abovementioned prohibition isn't part of the *ordre public* anymore. Some problems could arise regarding the provisions applying to the compulsory heirs too. However, in many States these rules are not considered to be part of the *ordre public* anymore.<sup>92</sup>

### 3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?

The Belgian law gives the competence to issue the European Succession Certificate to public notaries.<sup>93</sup> The Act of 6 July 2017, that introduced in the Civil Code the article 892/1 à 892/7, deals with the creation and management of a new Central Estate Register (*Registre central successoral*). This contains information on acts and certificates of heredity, on acts relating to a declaration of waiver as well as on acts concerning an acceptance under the benefit of inventory and on European Certificate of Succession. According to the Art. 2 of the Act of 26 February 2018 (*Arrêté royal portant la gestion du registre central successoral*) the notary must provide for a registration into the *Central Successoral register* within fifteen days of the certificate being issued. The registration of European Certificates of Succession established by the competent judicial authorities in accordance with article

<sup>91</sup> For a contrary opinion see Wautelet, P., 2013, 864; nevertheless, see Franzina, P., 2016, 857.

<sup>92</sup> See French Cour de cassation, 27 September 2017, No. 16-13.151, Nr. 16-17.198 (for a commentary, see: Pintens, W., 2018(1), 294 et seq.).

<sup>93</sup> Van Boxstael, J.-L., Goossens, E., 2017, 222. [https://dial.uclouvain.be/pr/boreal/object/boreal%3A186777/datastream/PDF\\_01/view](https://dial.uclouvain.be/pr/boreal/object/boreal%3A186777/datastream/PDF_01/view) (17.5.2019).

72 § 2 of the Succession Regulation 650/2012 must be carried out by the registrar of the Court who pronounced the decision, within 15 days.

### 3.3.5.7. Are there any national rules on international jurisdiction and applicable law (besides the Succession Regulation) concerning the succession in your country?

If the succession opened before 17 August 2015, the Belgian International Private Law Code (see point 2.1.1) applies.

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## Bulgaria

Dafina Sarbinova

### 1. Social perspective.

#### **1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without *affectio maritalis*).**

Various types of family formations and living lifestyles co-exist in Bulgaria. The family composed by man, woman and their children (one or more) prevail as a type of family formation. This, however, does not necessarily mean that the couple has entered into marriage. It is common for couples to live together (with/out children) without marriage and it is a widespread phenomenon for the couple to enter into marriage (if at all) after the birth of the child.

Nucleus families are most common in big cities, while multi-generational families are typical for small cities and villages. Due to the strong family relationships, including such between different generations, even nucleus families may quite often expand and include close links with (grand)parents without (grand)parents living together with their (grand)children as a single household.

Due to migration based on economic reasons, specifically in small towns and villages, family formations may be broken because one or both parents are working outside of the country. In such circumstances, usually children are looked after by grandparents or single parent.

31.586 persons changed their current address in Bulgaria with an address abroad in 2017 - 50.8% male. Every second emigrant (55.1%) is aged 20 to 39 years. The youngest emigrants (under 20 years) are 14.6% of the total number and the emigrants over 60 years of age - 6.9%. Most preferred destination countries are Germany (22.0%), the United Kingdom (16.3%) and Spain (12.2%). The decrease of population due to the international migration measured through the coefficient of net migration is minus 0.8‰

Single-person households exist but are not quite common. Single-parent and a child/ children family formation are not seen very often. In both cases such households are usually attached to bigger family formation including multigenerational links. Common household of two or more persons without *affectio maritalis* is the least typical and least durable family lifestyle.

#### **1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.**

There is a slight tendency of increase in the number of marriages and of decrease in the number of divorces. No information for other family unions is recorded in the official publicly available statistical data probably also influenced by the fact marriage between a man and a woman is the only family union recognized by FL. There were 28.593 juridical marriages registered in 2017, or 1.790 more than in the previous year. The marriage rate (number of marriages per 1000 population) is 4.0‰. Three quarters of the total marriages number (21.536) are registered among urban population. The average age at the time of first marriage in 2017 was 31.4 years for males and 28.4 - for females. Compared to the previous year, the average age at the time of first marriage has increased by 0.3 years for both - males and females. 87.1% of females and 86.2% of males have married for the first time in 2017.

**1.3. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.**

The number of divorces in 2017 was 10.411 or 192 less than in 2016. Out of the total number of divorces, 81.0% refer to the urban population. The highest is the number of divorces by 'mutual agreement' (63.4%), followed by divorces due to 'incompatibility of temperament' (26.6%) and 'virtual parting' (8.3%). The divorce is not the first one for 9.8% of females and 10.7% of males who divorced in 2017. The average duration of a marriage before the divorce in 2017 was 15.8 years.

**1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).**

No such information is found to be available.

## 2. Family law

### 2.1. General.

**2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?**

The main source of Family Law in Bulgaria is the *Family Code (Семейн кодекс)*, published in State Gazette, issue 47 from 23.06.2009, in force as of 01.10.2009. General principles of FL are also outlined in the Constitution of the Republic of Bulgaria, namely art. 14, art. 32, art. 46, art. 47.

Additional sources of FL are the Law on the Protection of the Child, the Law of the Civil Registration, the Civil Procedure Code and *mutatis mutandis* Bulgarian civil law legislation as a whole. Numerous regulations and ordinances have been enacted on technical issues such as concerning the register of the property relations between spouses, the procedures and intermediation in case of interstate adoption, the payment of child maintenance on behalf of the state, the foster family care and procedures, etc.

Bulgaria has adhered to the relevant international conventions in the field of FL and where need be had implemented them in domestic law. In particular Bulgaria is a party to the Convention for the Protection of Human Rights and Fundamental Freedoms, Convention on the Rights of the Child, The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, The Hague Convention on the Civil Aspects of International Child Abduction, European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, The Hague Convention of on the International Recovery of Child Support and Other Forms of Family Maintenance and the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

To the extent Bulgaria is EU member state, it applies all EU regulation in the area of family law with an international aspect, including the EU regulations adopted under a procedure of enhanced cooperation. For FL matters with international element for which no EU legislation exists, the rules of Private International Law Code are relevant.



**2.1.2. Provide a short description of the main historical developments in FL in your country.**

Historically, Bulgarian FL may be divided in five separate time periods. The first one is from 1878 until 1944 (the year of the establishing of the communist regime); the second one – from 1944 until 1968 (the year of the adoption of the first modern Family Code); the third – from 1968 until 1985 (the year of adoption of the second Family Code); the fourth – after 1990 (the year of establishing the democratic socio-economic regime) until 2009 (the adoption of the new Family Code) and the fifth – after 2009.

During the first time period which begins with the establishment of the Third Bulgarian state in 1878 until 1944, Bulgarian FL has not been regulated in one single act of legislature – neither as a part of a larger civil law codification, nor as a special piece of legislation solely in the field of FL. Certain family law matters and relations have been dealt with in separate acts of legislature which have been copied from then existing civil laws of the countries from Western Europe, mostly French civil law. Nevertheless, this piecemeal legislation was far from encompassing all family law matters. The matters concerning marriage and divorce have been regulated in the Exarchic memorandum (applicable for orthodox individuals). Due to many deficiencies and inconsistencies in the written FL, the customary law was also an important source of legal regulation. The legal regulation of origin, adoption and the relationship between parents and children have been provided by the following normative acts – Law on the Custody (1890), Law on the Persons (1909), Law on the Recognition of the Unlawfully Born Children, for the Procedure of Becoming Lawful and Adoption (1909), Ordinance Law for the Maintenance Obligations (1937), Law for the Children Born Out of Wedlock and the Adoption (1940).

After the socio-political changes in Bulgaria during the 1940s, new general principles of law, including of FL, have been introduced. Notwithstanding the fact that most of these principles have been politically underpinned and determined as “socialist”, when it comes to FL they may be characterized as progressive, democratic and humanistic in their essence. They are principles of universal significance and in line with the contemporary requirements envisaged in the international treaties, the conventions and the declarations of the United Nations Organization. They concern the equality between men and women, the protection and the rights of the children, the prohibition of discrimination of any nature in family relations, etc. As it comes to the judicial technique implemented for the regulation of family law relations, the guiding method is the method of regulation by the state. The jurisdiction of the orthodox church and its regulations has been eliminated. The normative regulation of FL is built gradually during this period, when the guiding principles of FL have been included also in the Constitution. The state regulation of FL culminated in 1960s when the first Family Code was introduced in 1968. In 1985 the second Family Code has been adopted.

The third period between 1968 and 1985 was the period of codification of FL. The Family Code from 1968 introduced a significant reform in key institutes of FL, such as the entrance into marriage, the matrimonial property relationships and the adoption. The Family Code from 1985 included regulation of custody and guardianship, as well as certain amendments concerning the regulation of divorce.

The Family Code from 1985, subject to certain amendments, continued its application even after 1990 when new social and economic structure of the relations have been introduced in Bulgaria based on democracy and free market economy. The key legal principles of FL retained their relevance and they found further their legitimation in the Constitution from 1991 when the socialist political references have been deleted. Major cornerstone during this fourth historical period of development of FL was the ratification of the UN Convention on the Rights of the Child in 1992 and the resulting draft of the Law for the Protection of the Child, which was finally adopted in 2000. After the adherence to international law instruments in the area of the adoption, the necessary amendments in this matter have also been implemented into the Family Code from 1985.

However, the significant reform of Bulgarian FL did not come before 2009 when the new and presently valid Family Code was adopted and entered into force. This is a long due piece of

legislation, the drafting of which started in 1999. The new Family Code introduces a step towards full liberalization of FL in Bulgaria. It envisages a possibility for the spouses to choose a contractual bespoke regime for their matrimonial property subject to few mandatory limitations. In addition, spouses may choose between other property regimes – of community and of separate matrimonial property. In the matters of divorce, the regulation steps further in direction to its liberalization and most importantly these results in the fact that the court is no longer obliged *ex officio* to make a statement on the party who is guilty for the divorce. The procedure for adoption is to certain extent simplified. With regard to the regulation of the relations between parents and children, it is envisaged that the parents may reach an agreement concerning all matters related to upbringing and education of children, including in view of the exercise of parental rights in case the parents are living separately.

### 2.1.3. What are the general principles of FL in your country?

The following general principles of Bulgarian FL may be outlined:

- protection of marriage and family by state and society (art. 14 Constitution of the Republic of Bulgaria, art. 2 FC) – state regulation of family relations, right of protection against unlawful interference in personal and family life (art.32(1) Constitution of the Republic of Bulgaria); encouragement of the birth of children, promotion of maternity, raising and education of children;
- gender equality (art. 46(2) Constitution of the Republic of Bulgaria, art. 2 FC) between the men and women in marriage and as parents;
- voluntary nature of matrimony – guaranteed by the procedure for entering into marriage and the right to divorce;
- special protection of children;
- equal treatment of children born in wedlock, out of wedlock and adopted (art. 47 Constitution of the Republic of Bulgaria, art. 2 FC, Law for the Protection of the Child);
- respect of the personality of each family member;
- respect, care and support among family members.

Additional principles:

- the voluntary settlement of family relations: in matrimonial property (nuptial) agreement (Art. 38 FC); in the event of divorce (art. 49(4) and art. 50 FC); in the process of exercise of parental rights (art. 127(1) FC); in case of termination of adoption (art. 106(8) FC);
- matrimony law: validity only of the civil marriage entered into the form prescribed in FC; monogamy and heterosexuality;
- the regulation of origin: the principle of the ties based on blood; truthfulness and stability;
- in the relations between parents and children: each parent is entitled to full-fledged parental responsibility; parental rights and obligations are exercised jointly and consistently or severally among the two parents as may be agreed or ordered.

### 2.1.4. Define “family” and “family member” in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?

There are different definitions for “family” depending on the area of law where the definition applies.

Under the Family Code, two definitions of a family may be outlined – a *family in a broad sense* and a *family in a narrow sense*. In a broad sense, family means a group of individuals who are related legally by marriage, affinity or adoption and as an exception – without such type of relationship, like

it is in the case with the spouse and the children of the other spouse. A family in a narrow sense are only the spouses and their common children until the date they reach full age (18 years) and in case they have not entered into a marriage and live together with their parents.

In the sense of the Constitution (Arts. 14, 32) and the Convention for the Protection of Human Rights and Fundamental Freedoms, family is defined in an even broader terms and includes 1.) individuals other than parents who have been granted with parental functions (like guardians, close relatives, foster family); 2.) *de facto* family (marital unity without formal marriage or *de facto* exercise of parental functions).

Legal terms for family may be found in the Law for the Local Fees and Taxes and the Law for the Building Houses Cooperation, where family is defined as the spouses and their children under the age 18 years, if they are living together with the parents. Pursuant to the definition given in the Law on the Credit Institutions, family is formed by spouses, relatives related lineally, brothers and sisters and individuals that cohabit on a permanent basis.

### 2.1.5. Family formations.

#### 2.1.5.1. Define the “spouse” in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?

To the extent that FL recognises only marriage between individuals of different sex in the sense that marriage is only a union between a man and a woman, spouse may be defined as a person who enters into marriage based on his/her free and explicit consent *with a person of different sex* and such consent is given in person and simultaneously before an official registrar.

The person entering into marriage (a man or a woman) should be of marriageable age – above the age of eighteen. By way of exception, where compelling reasons warrant it, a person aged sixteen may also get married with the consent of the district judge at the place of permanent residence of this person. The district judge shall hear both marrying partners and the parents or the guardian of the minor. The opinion of the marrying adult, the parents or the guardian may be also given in writing with a notarized signature. Upon marriage, the minor acquires full legal capacity but may dispose with immovable property only with the consent of the district judge at the place of permanent residence of the minor.

Marriage is prohibited to a person who: 1. is bound by another marriage; 2. is under full judicial interdiction or suffers from a mental disorder or imbecility, which provides grounds for imposing full judicial interdiction; 3. suffers from a disease which seriously threatens the life or health of the offspring or the other spouse, unless the latter is aware of such disease. Marriage is also prohibited to: 1. ascendants and descendants; 2. siblings, as well as other collateral kin up to fourth degree (cousins); 3. persons between whom adoption results in relations of ascendants or descendants or siblings.

A person in *de facto* (informal) marital union may be subject to certain rights and obligations under the law, but not in the field of family law *stricto sensu*. Informal marital union is irrelevant in intestate succession law.

*De facto* family (marital union without marriage or *de facto* exercise of parental responsibility without formal authorization) has some relevance in the areas of law related to taxation, imposition of certain administrative restrictions or prohibition, it is normally included also in the definition for related (connected) parties in various legislative acts concerning taxation, civil proceedings law, labour law and civil servants regulations. The informal marital union is also recognized in the legislation concerning home violence, the legislation concerning the forfeiture in favour of the state of *illegally acquired assets* and the law with respect to the transplantation of organs etc.

**2.1.5.2. What types of relationships/unions between persons are recognised in FL of your country? In particular, formal (registered) and informal (*de facto*) unions, heterosexual and same-sex unions, unions with and without *affectio maritalis*. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

The only union recognised by FL is *marriage*. Pursuant to leading scholarship, marriage is defined as a voluntary and equal rights union between a man and a woman which has been entered into with the purpose to create a family in compliance with the procedure and the requirements established by law that gives rise to mutual rights and obligations of the spouses. Three key principles of matrimony law may be outlined:

1. validity only of the civil marriage entered into in the form prescribed by the law. The religious marriage is optional and the religious ceremony may be performed only after the civil marriage has been entered into;
2. monogamy;
3. heterosexuality.

All these key principles are established on constitutional level (art. 46 of the Constitution from 1991) and they may only be varied by an amendment in the Constitution. According to Art. 46: "(1) Marriage is a voluntary union between a man and a woman. Only civil marriage is valid. (2) Spouses have equal rights and obligations in marriage and family. (3) The form for the validity of the marriage, as well as the prerequisites and the procedure for the entrance into it and its dissolution, as well as the personal and property rights between the spouses are regulated by law."

FL does not recognize marriage between spouses of same sex (as this is contrary to the Constitution), as well as other forms of formal or informal heterosexual or same sex unions.

As noted in s. 2.1.5.1 above, the concept of *de facto* family finds limited legal recognition with respect to certain aspects related to tax and public law (administrative) regulations, as well as in the area of civil registration, domestic violence and medical law issues. However due to the fragmentation and the variety of purposes served by this legal concept, it is not possible to outline *de facto* family as a separate family law formation.

**2.1.6. What legal effects are attached to different family formations referred to in question 2.5.?**

As already explained, marriage between a man and a woman is the only family formation recognized in FL. Marriage results in the establishment of personal and property relationships between the spouses.

The Family Code provides only for the framework of the personal relations between the spouses and leaves to them the possibility to form their personal relationships as they wish. The freedom of the spouses is exercised within the limits of the accepted principles of morality, customs and fairness. Spouses stand on equal footing in marriage and they have rights and obligations of equal quality, although they may differ in terms of quantity, as spouses perform their obligations with respect to the family in accordance with the abilities of each spouse.

The personal obligations are of natural character as they are not forcefully enforceable. They may be of significance in case of determining the guilty party for the divorce and for the compensation of any incurred damages (on the basis of unjust enrichment). The following personal obligations may be outlined: obligation for mutuality, including mutual respect and mutual understanding, fidelity, undertaking common care for the wellbeing of the family in accordance with the individual abilities (financial and otherwise) of each spouse.

The property relationships between the spouses are subject to detailed regulation in Family Code, where the spouses are in the position to choose their property regime. Family Code envisages three

property regimes between the spouses – statutory property matrimonial regime, statutory separate matrimonial regime and a contractual regime. The statutory property matrimonial regime is the regime applied by default if the spouses: 1.) have not concluded a valid matrimonial property agreement and have not chosen the separate matrimonial regime; 2.) are under the age of 18 or have a limited legal capacity; 3.) have not regulated all issues in the matrimonial agreement. For the sake of legal certainty and stability, the applicable property regime between the spouses is noted in a public registry.

**2.1.7. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/*de facto* family formations? Explain briefly.**

No.

**2.2. Property relations.**

**2.2.1. List different family property regimes in your country.**

Family Code provides for three possible property regimes between spouses during the marriage:

- *statutory matrimonial property regime*

This regime represents a joint ownership of all assets (excluding bank deposits), acquired during the marriage. The matrimonial property regime is indivisible. These assets are jointly owned by both spouses, regardless of whose name they were acquired under, if acquired by means of a joint contribution by both spouses. The joint contribution of the spouses may take the form of the investment of funds and labour, childcare and housework. Joint contribution is presumed subject to proof to the contrary. Each spouse's personal property consists of assets acquired before the marriage and inheritances and gifts acquired during the marriage. Chattels (movable property) acquired by a spouse during the marriage for his or her normal personal use or the exercise of his or her profession are personal property. Following the divorce, matrimonial property is transformed into normal property.

- *statutory separate property regime*

The rights acquired by each of the spouses during the marriage are held personally by that spouse, but upon termination of the marriage by petition, each spouse is entitled to obtain a portion of the value of the rights acquired by the other spouse during the marriage, to the extent that the claiming spouse contributed by labour, by his or her financial means, by taking care of the children, by housework or otherwise. The expense of meeting family needs is borne by both spouses; the spouses incur shared liability for obligations assumed for ongoing family needs.

- *contractual regime*

Under FC from 2009, spouses may conclude a matrimonial agreement, an option that is new to Bulgarian FL. A matrimonial agreement may be concluded by spouses either before or during their marriage. The matrimonial agreement is limited to stipulations regarding the division of property between the parties, such as: the parties' rights to the property acquired during the marriage; the parties' rights to the property they owned before the marriage; the manner in which the property, including the family home, is managed and disposed of; the sharing of expenses and obligations by the parties; the property-related consequences in the event of divorce; the spouses' maintenance during the marriage and in the event of divorce; the maintenance of the children born in the marriage. A stipulation transforming any premarital property of one of the parties into matrimonial community property is inadmissible. A matrimonial agreement may not contain provisions on pre-death arrangements, except with regard to the spouses' shares in agreed matrimonial community property upon dissolution. The statutory matrimonial property regime applies to any property relations which are not settled by the nuptial agreement.

**2.2.2. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?**

The statutory matrimonial property regime applies where the persons entering into marriage have not chosen a regime for their property relations or if they are minors or persons with limited legal capacity.

Rights in rem acquired during marriage as a result of joint contribution are shared by both spouses, regardless of the fact in whose name they have been acquired. The joint contribution may be expressed in the input of resources, labour, care of the children and housework. The joint contribution is presumed until proven otherwise. A claim for lack of joint contribution may be filed by: (1) a spouse during marriage or after its dissolution; or (2) an heir to a spouse.

Rights in rem acquired before the marriage, as well as those acquired during marriage by inheritance or gift belong to the spouse who has acquired them. Personal are also the rights in rem acquired by either spouse, where a creditor seeks recovery of a personal debt from the other spouse pursuant to the provisions of the Code of Civil Procedure concerning rights in rem constituting matrimonial community of property. Personal are chattels (movable property) acquired by either spouse during marriage, which serve ordinary personal needs or the exercise of a profession or occupation; as well as the rights in rem acquired by either spouse who is a sole trader during marriage for the purpose of engaging in business activities and included in his or her business.

Rights in rem acquired during marriage exclusively with personal property are considered personal. Where rights in rem have been acquired in part with personal property, the personal holding of the spouse shall be determined on a pro rata basis, unless this portion is insignificant.

**2.2.3. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a “new regime just for them”?**

A matrimonial property agreement or agreement related to property may be concluded only in relation to (future or existing) marriage. Bulgarian law does not recognise another type of family formation other than marriage between spouses of different sex (a man and a woman).

Spouses may conclude a matrimonial agreement in case they choose to apply the contractual regime during their marriage. The matrimonial agreement may be concluded before or after the entrance into the marriage and only by persons with full legal capacity. The content of the matrimonial agreement includes arrangements pertaining only to the property relations of spouses, such as:

- rights of the parties over property to be acquired during marriage;
- rights of the parties over their matrimonial property;
- manners of managing and disposing with matrimonial property, including family home;
- participation of the parties in costs and liabilities;
- proprietary effects of a divorce;
- maintenance of spouses during marriage and in the event of a divorce;
- maintenance of the children born during the marriage.

The matrimonial agreement may contain arrangements concerning any other property relations insofar the mandatory provisions of FC are not violated. In this respect, it may be concluded that the matrimonial agreement provides the parties with the possibility to create a ‘new regime just for them’ within the limits of the imperative provisions of FC.

The property relations of the parties may be settled also through reference to a statutory regime. A clause envisaging the transformation of premarital property of either party into common

matrimonial property is prohibited. The matrimonial contract may not include clauses concerning the event of death, but this restriction does not apply to the disposal with the shares of the spouses upon termination of agreed matrimonial community of property. The provisions designated for the statutory matrimonial property regime govern the property relations, which are not settled in the matrimonial agreement as default provisions.

A matrimonial agreement becomes effective at the time of marriage or, when concluded during marriage, on the date of conclusion of the contract or any other date specified in the agreement. The agreement has no prejudice to rights acquired by third parties prior to its conclusion. A matrimonial contract may be amended in the form prescribed for its conclusion and without prejudice to rights acquired by third parties prior to the amendment.

A matrimonial agreement is terminated in any of the following cases: (1) at the mutual consent of the parties, whereby they may choose a statutory regime or conclude another contract, otherwise the statutory matrimonial property regime applies; (2) at the request of either spouse in the event of material change of circumstances, where the agreement presents a serious threat to the interests of this spouse, the children under age or the family; (3) upon dissolution of marriage, except for the clauses settling the effects of termination and intended to apply afterwards.

**2.2.4. Explain briefly the rules on the administration of family property and compare if there are difference for different property regimes.**

Under the *statutory matrimonial property regime*, spouses have equal rights with respect to the common property. Neither spouse may dispose during marriage with the share that this spouse would receive upon termination of the community of property. Common property may be managed by either spouse, but spouses dispose jointly with common property.

The disposal with a right in rem over common immovable property by either spouse individually is not *per se* void but is subject to challenge. The other spouse may challenge the disposal in court within six months of becoming aware of it but not later than three years after the disposal. In the case of disposal with a right in rem over common movable property for consideration by either spouse without the participation of the other, the third party shall acquire the right provided the third party was not aware or could not be aware because of the circumstances that the consent of the other spouse was lacking.

Each spouse may freely and independently dispose with his or her personal property in a transaction with a third party or the other spouse.

Specific rule applies with respect to disposal of the *family home*, i.e. when the family home constitutes personal property of one of the spouses, disposal requires the consent of the other spouse, unless the two spouses own another home which is co-owned or personally owned by each one of them. In the absence of consent, disposal can take place with the authorization of the district judge if it is established that the disposal is not detrimental to the children who have not reached the age of majority and to the family. This rule is relevant for all types of matrimonial property regimes with the exception of the contractual regime and to the extent something different has been provided in the matrimonial property agreement.

When a divorce is granted, if the family home cannot be used separately by the two spouses, the court will award its use to one of them if he or she has requested this and has a housing need. Where there are children born of the marriage who have yet to reach the age of majority, the court will rule of its own motion on the use of the family home, and may award such use to the spouse who has been awarded the exercise of parental rights, for as long as he or she exercises them.

In case spouses have chosen the *statutory separate property regime* to apply with respect to their marriage, each spouse is entitled to administer and dispose with his/her personal property freely so far as under this property regime there is no common matrimonial property of the spouses. If the spouses are co-owners of certain proprietary rights, the ordinary regime for joint property applies.

When the (future) spouses have concluded a matrimonial property agreement, they have chosen the contractual regime to apply with respect to their marital property relations. In this case spouses manage and dispose with their personal and/or common matrimonial property in compliance with the arrangements in the matrimonial property agreement. The regime of management and disposition agreed in the matrimonial agreement may be complied by the spouses solely on a voluntary basis.

**2.2.5. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

The property regime is recorded in the Spousal Property Relations Register. The property regime may be modified during the marriage. The modification is noted in the record of civil marriage and in the register. Matrimonial agreements and the applicable matrimonial property regime are recorded in a central electronic register with the Registry Agency. The register is publicly accessible. When one or both spouses engage(s) in a transaction with a third party, where a property regime is not recorded in the register, the statutory matrimonial property regime applies.

**2.2.6. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

The statutory matrimonial property regime governs the transactions between each spouse and a third party where no regime of property relations has been entered into the register. The spouses are jointly liable for the monetary obligations undertaken vis-à-vis third parties due to the institute of the specific representation when the obligation was undertaken by only one of the spouses. Joint liability may be opposed by the other “represented” spouse. In case of joint liability spouses are not entitled to a right of recourse.

Both under the statutory matrimonial property regime and the statutory separate property regime costs incurred to meet family needs are borne by both spouses. Spouses are jointly liable for debts incurred to meet family needs. As family needs are considered mostly the common needs of the whole family, however, certain justified personal needs of a family member may also be considered family needs (i.e. for medical treatment). If the spouses have concluded a matrimonial agreement, the question the participation of the parties in debts and liabilities, may be regulated in this agreement and parties may exclude the joint liability between themselves.

Personal are also the debts of the commercial enterprise (going concern) of the spouse who acts as a sole trader which he/she has incurred in the course of business activities. The community of matrimonial property is terminated when the court decision which declares the bankruptcy of a spouse who is a sole trader or a partner with unlimited liability becomes effective.

On the same token, the execution by a creditor seeking recovery of a personal debt of either spouse from matrimonial property pursuant to the provisions of the Code of Civil Procedure results in the termination of the community of this property.

**2.2.7. Describe allocation and division of property in case of divorce, separation or dissolution of the union.**

The marriage is terminated on one of the following grounds: (1) death of one of the spouses; (2) annulment of the marriage; (3) divorce. The concept of legal separation does not exist in current Bulgarian legislation. *De facto* separation simply means that the spouses are neither living together nor sharing a household.

The matrimonial (community) property is terminated upon the dissolution of the marriage and spouses have equal shares upon termination. Where the matrimonial community of property is



terminated due to divorce, the court may award a greater share of the common property to the spouse exercising the parental rights over children under age where this creates particular difficulties to this spouse. The spouse exercising the parental rights over children under age shall be awarded, in addition to his or her share, the movable property needed for their upbringing and nurturing. The court may award a greater share of the common property to either spouse provided that the contribution of this spouse substantially exceeds that of the other spouse.

In case of divorce, each spouse shall be entitled to receive a portion of the value of the property needed for the exercise of his/her profession or occupation and of deposits (including, but not limited to money on account) of the other spouse acquired during marriage, where their value is substantial and this spouse has contributed to their acquisition with labour, resources, care of the children or housework. This portion may be claimed also prior to the divorce, where the conduct of the spouse who has acquired the property endangers the interests of the other spouse or the children.

When a divorce is granted, if the family home cannot be used separately by the two spouses, the court will award its use to one of them if he or she has requested this and has a housing need. Where there are children born during the marriage who have yet to reach the age of majority, the court will rule of its own motion on the use of the family home, and may award such use to the spouse who has been awarded the exercise of parental rights, for as long as he or she exercises them.

**2.2.8. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?**

No such limitation exists. Dowry is not regulated in current Bulgarian FL.

**2.6. Cross-border issues.**

**2.2.1. Is your country participating in the enhanced cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?**

Bulgaria participates in the enhanced cooperation with regard to both regulations (1103/2016 and 1104/2016).

**2.2.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as “marriage”, “matrimonial property agreement”, “partnership property agreement” etc.?**

FL does not recognize other family formations except marriage between a man and a woman. Problems may arise concerning the definition of the terms and the recognition of:

- marriage between persons from the same sex, and
- registered partnership.

Certain court practice exists, which recognizes same sex marriages for the purpose of establishment of the couple (previously resident in another Member State) in Bulgaria and same sex registered partnership under foreign law for the purposes of succession in Bulgaria. In both cases, same sex spouses/partners have been of foreign nationality. Bulgarian court does not recognize in Bulgaria a same sex marriage entered into by Bulgarian nationals in another state (United Kingdom). Nevertheless, case law on these issues is not settled.

**2.2.3. Are you expecting any problems with the application of the rules on jurisdiction?**

Problems may arise with respect to the qualification of terms and concepts, which are not present in national FL.

**2.2.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

Problems may arise with respect to the qualification of terms and concepts, which are not present in national FL.

**2.2.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

Problems may arise with legal institutes and concepts not recognized under national FL, specifically with such notions and terms that have been established on constitutional level – like the heterosexuality of marriage.

**2.2.6. Are there any national rules on international jurisdiction and applicable (besides the Regulations) concerning the succession in your country?**

The national rules on international jurisdiction concerning succession in the Private International Law Code have been derogated by the rules of universal application in Regulation 650. Existing bilateral treaties with third states (for example with the Russian Federation) for legal aid in the area of civil and family law may find application with respect relationship connected to that particular third state.

The same is relevant for regulations 1103/2016 and 1104/2016.

### **3. Succession law**

#### **3.1. General.**

**3.1.1. What are the main legal sources of Succession Law (SL) in your country? What are the additional legal sources of SL?**

The main legal source of SL is the Law on Succession from 1949, as amended. The Law on Succession encompasses a wide range of issues concerning succession. It regulates the opening of the inheritance, inherence (in)ability, succession by law and succession by will – general matters, reserved shares, restitution of reserved share; invalidity and repeal of the will; acquisition and transfer of the succession estate – acceptance and withdrawal of succession; relations originating from succession – between the successors and with third parties; division and liquidation of succession estate.

Other legislative acts which concern separate aspects of succession laws are: Family Code, Law on House Building Cooperation, Law on Copyright and Neighboring Rights, Law on Property, Social Security Code, Law on Local Fees and Taxes, Civil Procedure Code.

**3.1.2. Provide a short description of the main historical developments in SL in your country.**

The historical development of SL may be divided into three time periods:

**1<sup>st</sup> period** – from the enactment of the Law on Succession from 1890 until the entrance into force of the Law on Succession from 1949

- Until 1944 male heirs are subjected to privilege;
- Until 1947 the succession rights of the “unlawfully” born children are limited
- Donation was also regulated by the Law on Succession

**2<sup>nd</sup> period** – from the time of entrance into force of the Law on Succession from 1949 until the changes made with the Constitution from 1991

- short and undeveloped regulation of succession law
- various limitations with respect to: scope of the legal heirs; the freedom to make a testamentary disposition; possession of real estate

**3<sup>rd</sup> period** from the time of entrance into force of the Constitution from 1991 and the respective amendments in the Law on Succession

- extending the scope of the heirs in intestate succession – up to 6<sup>th</sup> degree collateral relatives;
- removal of various limitations on the testamentary will
- removal of the time period in which the inheritance has to be accepted
- regulation of so called restitution issues – the return of immovable property that have been nationalized without compensation during the early communist regime in Bulgaria.

### **3.1.3. What are the general principles of succession in your country?**

The right of succession is protected and guaranteed by law (principle envisaged in art. 17(1) of the Constitution). The following principles of succession law may be outlined:

1. principle of equality –
  - a. with respect to gender this concerns the equality between the heirs from the line of the mother and from the line of the father;
  - b. between all children – born in wedlock, out of wedlock and adopted children
2. in the field of intestate succession, the following principles apply:
  - a. closer relatives exclude remoter relatives;
  - b. lineal descendants inherit before lineal ascendants;
  - c. closer collateral relatives exclude remoter collateral relatives
3. in the field of testate succession, the following principles apply:
  - a. freedom of disposition with the inheritance estate – preference is given to testamentary disposition before intestate succession
  - b. protection of the reserved share
  - c. formality of testamentary disposition
4. in the field of acceptance of the inheritance:
  - a. the succession estate is acquired only in case it has been accepted
  - b. acceptance is always unconditional
5. in the relations between the heirs and with third parties:
  - a. separability of rights and obligations
  - b. community of *in rem* rights in the form of ordinary (separable by division – voluntary or in court) co-ownership.

### **3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.**

There is no specific procedure for the acceptance of the succession by the heir. Succession takes place upon acceptance. Acceptance takes effect on the opening of the succession. Acceptance may be effected by filing an application in writing to the district judge in the district where the succession

is opened. In this case, acceptance is entered in a special register. There is also deemed to be acceptance where an heir takes an action clearly indicating his or her intention to accept the succession or where an heir conceals inherited property. In the latter case, the heir forfeits the right to his or her share of the property concealed.

Acting at the request of any interested party, the district judge, having summoned the person entitled to inherit, sets a time limit for that person to declare or waive acceptance of the succession. If a court case has been brought against the heir, the time limit is set by the court hearing the case. If the heir fails to reply within the time limit set, he or she forfeits the right to accept the succession. The declaration of acceptance is entered in the special court register.

**3.1.5. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?**

There are two legal basis of succession – intestate and testate. Testate succession is given priority before intestate succession. Any person who is 18 years of age or above and is of sound mind may dispose of his or her property upon death through a will. The testator may dispose of his or her entire property in the will. In all cases testamentary dispositions cannot infringe upon the reserved share of the succession estate. The cumulative application of intestate and testate succession is possible to the extent this does not infringe upon the reserved share of other *ex lege* heirs.

**3.1.6. What happens with the estate of inheritance if the decedent has no heirs?**

Where there are no persons, capable of inheriting, or where all heirs make a waiver of succession or lose the right to accept the estate, the estate shall devolve on the *state*, except for movable property, housing, workshops and garages, as well as the plots of land and property, primarily intended for residential construction, which shall become ownership of the *municipality*, on the territory of which they are located.

**3.1.7. Are there special rules or limitations concerning succession with reference to the deceased's (or heir's) culture, tradition, religion or other characteristics?**

No specific legal limitation exists with respect to deceased's (or heir's) culture, tradition, religion. Specific canonical regulations exist with respect to high clergy in the orthodox church.

**3.2. Intestate succession.**

**3.2.1. Are men and women equal in succession? Are domestic and foreign nationals equal in succession? Are decedent's children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?**

Heirs are equal in succession irrespective of the fact whether they are men or women, children born in or out of wedlock or adopted (if case of full adoption). A child conceived at the time of entry of succession is capable of inheriting.

Spouses irrespective of the fact whether they are men or women are equal in succession. As marriage between persons of different sex is the only legally recognized family union, *de facto* family partners are not considered *ex lege* heirs, but they may be heirs on testate basis. Nevertheless, *de facto* family members are entitled to monetary compensation for non-material damages as a result

of the death caused to their partner if it is proofed before the court that they had a deep and lasting relationship with the deceased and had truly suffered damages as a result of his/her death (Interpretative Judgement No. 1/2016 of the General Meeting of the Bulgarian Supreme Court of Cassation).

Foreigners are not equal in succession to nationals only in respect to the acquisition of ownership rights over land. Individuals from member states of EU and states from EFTA are not considered foreigners. Foreigners may acquire ownership rights in land by way on testate succession, but they are under an obligation to transfer such property rights within a period of three years to a person who is capable of being an owner of land in Bulgaria.

### **3.2.2. Are legal persons capable of inheriting? If yes, on which basis?**

Legal persons are capable of inheriting only on testate succession basis.

### **3.2.3. Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.**

Unworthy of succession is the person who: a) has murdered or attempted to murder the deceased, his/her spouse or child, as well as any accomplice in said crimes, unless the act has been committed under circumstances excluding punishment, or it has been amnestied; b) has unjustly accused the deceased of a crime, punishable by imprisonment or graver penalty, unless such unjust accusations are prosecuted upon complaint of the victim and none has been filed; c) has persuaded or hindered the deceased by force or through deceit to make, amend or the revoke appointments in the will, or who has destroyed, concealed or corrected the will of the deceased or has made use of an untrue will.

The unworthy of succession can take, where the deceased has expressly acknowledged him or her to be worthy, through an act whose content has been certified by notary-public or in a will. The unworthy of succession, in favour of whom the deceased has made a testamentary disposition, having been aware of the reason of unworthiness, without expressly acknowledging the worthiness of the latter, shall only inherit within the limits of the will.

### **3.2.4. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?**

Heirs *ex lege* are certain close group of physical persons in a family relationship with the deceased. The state could also be *ex lege* heir under specific circumstances. The following principles apply to intestate succession, depending on the specific case:

- **If the deceased was single and had no children**, the surviving parents or the surviving parent receive equal shares of the property (Article 6 of the Succession Act). If the deceased has left only ascendants those closest to the deceased inherit equal shares (Article 7). If there are only surviving siblings, they inherit equal shares. Where the deceased has only left brothers and sisters, they shall inherit from him in equal shares. Where the deceased has only left brothers and sisters, together with ascendants in the second or higher degree, the former shall take two-thirds of the estate and the ascendants - one-third. Where the deceased has left no ascendants in the second or higher degree, no brothers or sisters or descendants thereof, the relatives on the lateral line up to the sixth degree inclusive shall inherit. The ones closer in degree, as well as the descendant of a relative closer in degree, shall exclude those more distant in degree.

- **If the deceased was single but there are surviving children**, they inherit equal shares (Article 5(1)). The share of a predeceased child is passed down to its descendants by order of succession (representation).
- **If the deceased leaves a spouse**, but no children, ascendants, siblings or their descendants, the spouse inherits the whole property (Article 9). When the spouse inherits the property of the deceased together with ascendants or siblings or their descendants, the spouse inherits half of the property provided that the succession takes place less than 10 years after the marriage. Otherwise, the spouse receives two-thirds of the property. When the spouse inherits the property of the deceased together with ascendants and siblings or their descendants, the spouse inherits one-third of the property in the former case and half in the latter case.
- **If the deceased leaves a spouse and children**, the spouse and the children inherit equal shares.

### 3.2.5. Are the heirs liable for deceased's debts and under which conditions?

The heirs, who have accepted the succession, shall incur the liabilities it has been encumbered with, in accordance with the shares they have taken.

An heir, who has accepted the succession by inventory is responsible to the extent of the received inheritance. The acceptance of succession by inventory must be declared in writing to the regional judge within three months, after an heir has come to know, that the estate has been opened. This term can be extended by the regional judge up to three months. The acceptance is recorded. Legally incapacitated persons, the state and public organizations shall only accept the succession by inventory.

Acceptance by inventory by one of the heirs may be used by the others, but it does not deprive them of the right to directly accept succession or make a waiver from it. An heir shall be obliged to indicate to the regional judge all inheritance properties, known to him/her, in order to be included in the inventory, or else he/she shall lose the benefits, associated with acceptance of succession by inventory. An heir, who has accepted succession by inventory, shall manage inheritance possessions, being obliged to take the same level of care he takes of his own works. He/she cannot alienate immovable property up to five years after acceptance and movable property up to three years any, except following a permission of the regional judge; conversely, he shall incur the liabilities of the deceased without limitation. The heir shall be accountable to the creditors for his or her management. When succession has been accepted by inventory, each creditor can request from the regional judge to determine the rules, following which the heir will pay the creditors. In case this is not made, the heir, who has accepted succession by inventory, shall pay the creditors in the order, in which they make their claims to him. The creditors of the estate can, within three months following acceptance of succession, require the separation of possessions of the deceased from those possessions of the heir.

### 3.2.6. What is the manner of renouncing the succession rights?

The waiver of succession rights is made through a written declaration to the regional judge, in the district, where the estate has been opened for distribution. Waiver is entered in a special book.

### **3.3. Disposition of property upon death.**

#### **3.3.1. Testate succession.**

##### **3.3.1.1. Explain the conditions for testate succession.**

All subjects of civil law – individuals, legal corporations and the state, may become heirs by means of testate succession. The individuals included in the circle of heirs by law, may in addition be also subjects to testate succession and in such way their share from the inheritance estate enlarges.

##### **3.3.1.2. Who has the testamentary capacity?**

Any person (irrespective of his/her nationality), who has reached 18 years of age and is not under full incapacitation due to dementia and who is capable of acting reasonably, can make testamentary dispositions with regard to his or her property for the time after his or her death.

##### **3.3.1.3. What are the conditions and permissible contents of the will?**

A testator can dispose through a will of his/her entire property. A testator may dispose also with his or her share of the matrimonial property. Testamentary dispositions, which refer to the whole or a fractional interest in the entire estate of a testator shall be called "general" and shall make the person, to the benefit of whom they were made, an heir. Testamentary dispositions, which refer to specific properties, shall be "partial" and confer the capacity of legatee.

The testamentary freedom should not infringe the reserved share of the heirs by law. An heir, having the right to a reserved share, who cannot take in full over said share due to wills or donations, can request their reduction to the extent, necessary to supplement his or her reserved share, after compensation of the testamentary dispositions and donations made in his or her favour with the exception of ordinary gifts. This right is given to the heir in its private interest and it is within the discretion of the heir to ask for compensation of his/ her reserved share. Testamentary disposition which infringes a reserved share is not *per se* invalid.

Testamentary dispositions can be made conditional or dependent on encumbrance. A general testamentary disposition (testamentary dispositions, which refers to the whole or a fractional interest in the entire estate of a testator), whose period is fixed, shall be considered a legatee of usufruct over the whole estate or the respective share thereof. The starting date shall be considered unwritten.

Each interested person can request the execution of encumbrances, imposed by the will. The non-fulfilment of the latter, however, shall not entail the abolition of a testamentary disposition.

A testamentary disposition shall be null: i) when it has been made in favour of a person, who does not have the right to take by bequest; ii) when the mandatory form for the validity of the will has not been complied with, and c) when a testamentary disposition or the sole motive, expressed in a will, due to which the disposition has been made, are contrary to the law, the public order and the good morals. The will is also null when the condition or encumbrance is impossible.

##### **3.3.1.4. Describe the characteristics of will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a will?**

Wills may be handwritten (written entirely in the testator's own hand and signed by the testator) or notarised, i.e. drawn up by a notary in the presence of two witnesses.

A handwritten will has to be written entirely in the testator's own hand. It must be dated and signed by the testator. The signature must be placed below the disposition instructions. The will may be delivered to a notary in a sealed envelope for safekeeping. In that case, the notary draws up a

custodian statement on the envelope. The statement is signed by the testator and the notary and entered in a special register.

A notarised will is drawn up by the notary in the presence of two witnesses. The testator gives an oral statement of his or her will to the notary, who writes it down as stated and then reads it back to the testator in the presence of the witnesses. The notary makes note of the accomplishment of these formalities in the will, specifying the place and date of the will. Afterwards the will is signed by the testator, the witnesses and the notary. If the testator cannot sign the will, he or she must state the reason why and the notary makes note of this statement before reading out the will.

**3.3.1.5. Is there a (public) register of wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

There is an electronic register of the wills kept by the Notary Chamber, but such registration does not have legally binding character. No such register exists for handwritten wills.

Each notary is under an obligation to keep his register (on paper) where he or she notes the handwritten wills which have been left with him for keeping, for the return or the announcing of a handwritten will.

A handwritten will can be transmitted for keeping to a notary in a sealed envelope. In this case the notary shall draft a protocol on the very envelope. The protocol shall be signed by the person, who has presented the will, and by the notary, and it shall be entered in a special register. A personally handwritten will, submitted for keeping with the notary, can be taken back, but only by the testator in person. A note is made of the return of a will in the special register, which is signed by the testator, two witnesses and the notary.

A person, who has possession of a personally handwritten will, must as soon as he or she becomes aware of the testator's death, request its disclosure by the notary. Any interested person may require from the regional judge at the place, where the estate was opened for distribution, to fix a term for presentation of the will, in order to have it announced by the notary. A notary shall disclose the will, drafting a protocol to this effect, where the status of the will is described and a note is made of its unsealing. The protocol must be signed by the person, who has presented the will and by the notary. The paper, on which the will was written, countersigned by the above persons on each page is attached to the protocol. Where a will has been submitted for keeping to the notary the above steps are implemented by the notary in whose possession the will is.

**3.3.2. Succession agreement (*negotia mortis causa*). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.**

Succession agreements are not recognized in SL. It is expressly prohibited for two or more individuals to make testamentary dispositions in one and the same act to their mutual benefit, or to the benefit of third parties. As an exception, the matrimonial agreement may include dispositions concerning the shares of the spouses upon termination of an agreed community of property rights.

**3.3.3. Are conditions for validity of wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

Specific SL rules govern testamentary dispositions.



**3.3.4. Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

The testamentary freedom should not disturb the reserved share of the heirs by law. The surviving spouse and children of the deceased or, in the absence of descendants, the parents of the deceased are entitled to a reserved share. If the testator has descendants, surviving parents or a spouse, the testator may not make dispositions or gifts that would adversely affecting their reserved share. The sum total of the reserved shares of all beneficiaries may account for up to five-sixths of the property if the deceased leaves behind a spouse and two or more children. The property other than the reserved share represents the testator's disposable share.

If there is no surviving spouse, the descendants (including adoptees) have the following reserved shares: in the case of one child or that child's descendants: one half; in the case of two or more children or their descendants: two-thirds of the testator's property. If there are descendants and a surviving spouse, the reserved share of the spouse is equal to the reserved share of each child. The disposable share amounts to one-third of the property in case the spouse inherits with one child; one quarter in case the spouse inherits with two children; and one-sixth of the property in case he/she inherits with three or more children. If the testator leaves no descendants, the reserved share of the spouse is one half if the spouse is the only heir or one-third if there are surviving parents of the deceased. The reserved share of the surviving parent or parents is one-third. An heir, having the right to a reserved share, who cannot take the full extent of said share due to wills or donations, can request their reduction to the extent, necessary to supplement his or her reserved share, after compensation of the testamentary dispositions and donations made in his or her favour with the exception of ordinary gifts. This right is given to the heir in its private interest and it is within the discretion of the heir to ask for compensation of his/ her reserved share. Testamentary disposition which infringes a reserved share is not *per se* invalid.

**3.3.5. Cross-border issues.**

**3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?**

Regional courts have already gained practice mainly in issuing European Certificate of Succession. In appeal proceedings, the higher instance district court had the possibility to correct the judgements of the regional courts in different aspects, for example:

- refusal to issue such certificate to UK national due to the fact that UK is not participating in Succession Regulation;
- listing in the certificate solely of real estate situated in Bulgaria and not in other Member States, like Germany in the particular case;
- not upholding the choice of law to a mutual succession agreement in favour of a law of a non-Member State (Swiss law).

As an overall remark, it could be noted that Bulgarian courts have the general knowledge and apply Succession Regulation where needed. Regional courts as a first instance courts experiencing huge workload (particularly in big cities) may not always take full consideration in more complex cases, but normally their mistakes are corrected by the higher instance court.

**3.3.5.2. Are there any problems with the scope of application?**

I have not found such problems during my research on publicly available case law. Even legal institutes that are unknown to Bulgarian legal system are recognized when Succession Regulation applies. For example, in Judgment No. 10 from 24.01.2018 of Dobrich District Court, the succession

estate has been distributed pursuant to a mutual succession agreement governed by Swiss law between German nationals with habitual residence in Bulgaria. *Negotia mortis causa* is also recognized under Judgement No. 150 from 14.07.2016 r. of the Supreme Court of Cassation under civil case No. 6280 / 2015. Court Judgement No. 29 from 15.02.2016 of Nessebar Regional Court recognizes registered same-sex partner as heir to the extent the applicable Finnish law equalizes registered partnership to marriage when it comes to inheritance rights. Both the deceased and his registered partner have not been Bulgarian citizens.

**3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country have experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?**

In the large amount of the cases Bulgarian court bases its jurisdiction on the last habitual residence of the deceased, including when it concerns the issuance of European Certificate of Succession. It is even in such proceedings that complicated issues may emerge, including such concerning the law applicable to succession with resulting consequences from its scope.

In Judgment No. 10 from 24.01.2018, the Dobrich District Court grounds its jurisdiction on the last habitual residence of the deceased (art. 4) – a German national who had resided permanently in Bulgaria in the last four years together with her husband. The court takes into account the fact that the deceased and her husband have made a mutual succession agreement under Swiss law and have chosen the jurisdiction of Swiss court. Nevertheless, the court states that the husband should have derogated the jurisdiction of Swiss court (with reference to art. 7(2)) as he had seized Bulgarian court on the matter. The court does not stipulate on the fact that Swiss court is not a court of a Member State and as such no jurisdiction can be given to it under the Succession Regulation. The court also refers to art. 11 as it considers that it shall be burdensome in the case at hand (the succession estate consisted in real estate in Bulgaria and Germany) if the Swiss court was to be seized.

**3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?**

The general rule for determining the applicable law in favour of the law of the country of the habitual residence of the deceased at the time of his death is easy for application. In the already cited Judgment No. 10 from 24.01.2018, the second instance district court upholds the choice of Swiss law made in the succession agreement and overturns the first instance court judgment which found the choice of law clause not effective as it was in favour of the law of a third state.

In addition, the district court found that to the extent the choice of law was made before the entrance into force of the Succession Regulation this choice was valid under the terms of Art. 83, para 2, as even the deceased had never been a citizen of Switzerland, the private international law of Switzerland recognized such choice and it must be upheld under the regulation, as at the time the choice was made, Switzerland was the state in which the deceased had her habitual residence.

**3.3.5.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?**

I am not in a position to name a specific court decision in this regard, but it is generally considered in scholarship that the infringement of the reserved share of the heirs by law when foreign law applies to succession and which foreign law does not recognize or envisage excessively smaller portion for the reserved share, may invoke the application of public policy. This possibility, however, is not absolute, but depends on the particular circumstances of the case.

### 3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?

European Certificate of Succession is issued by the regional court (lowest instance court) where was the last (permanent) address of the deceased in the country and if no such address is present in the country – before the regional court in Sofia. The issuance (with respect to irregularities) and the refusal for issuance of European Certificate of Succession are subject to appeal before the relevant higher district court.

National Certificate of Succession is issued by the municipality where was the last permanent address of the deceased after a routine procedure possibly at the time of the request for issuing of such certificate. The certificate includes only the names of the *ex lege* heirs of the deceased.

### 3.3.5.7. Are there any national rules on international jurisdiction and applicable (besides the Succession Regulation) concerning the succession in your country?

Bilateral treaties with third (non-Member) states for legal aid in civil and family matters are still applicable.

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## Croatia

Maja Bukovac Puvača, Ivana Kunda, Sandra Winkler and Danijela Vrbljanac

Maja Bukovac Puvača (3. except 3.3.5.)

Ivana Kunda (2.3.; 3.3.5.)

Sandra Winkler (2. except 2.3.)

Sandra Winkler and Danijela Vrbljanac (1.)

### 1. Social perspective.

#### **1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without *affectio maritalis*).**

Multi-generational families are quite rare in Croatia, as in most part of Europe. Indeed, despite the ageing of the population in Europe and the necessity to care about older members of the society, the most common family formation is a nucleus family composed of parents (married or not) and their child or children, as well as single-parent families. There are also couples without children, which are commonly characterized by the *affectio maritalis*, even if sometimes it could be difficult to distinguish them from other possible types of living style as a common household of two persons who are not linked by an affective relationship. Both same-sex and opposite-sex unions are regulated under Croatian legislation. Recent trends of emigration of Croatians to other EU Member States probably will increase the manifestation of families where one member lives abroad, while the others stay in their own country, thus leading to the phenomenon of families that live separately, while being functional families. Stepfamilies as well represent a type of family formation which is known and in some aspects also legally regulated in Croatia.

#### **1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.**

Based on information retrieved from Eurostat, in 2017, 20 310 marriages have been concluded in Croatia. For previous years, the number of concluded marriages was: 20 467 in 2016; 19 834 in 2015; 19 501 in 2014; 19 169 in 2013; 20,323 in 2012.<sup>1</sup>

According to the 2011 Census in Croatia (the last official census), among 4 246 313 persons living in Croatia, 1 918 234 were married whereas 97 772 were in an extra-marital union. The number of single mothers is 174 517, while the number of single fathers is 33 345. The number of single person households is 373 120.<sup>2</sup> However, due to the fact that in Croatia de facto cohabitations initiate and end in an informal manner, it must be pointed out that numbers mentioned in 2011 Census are based on information given by the citizens. For this reason, it is not possible to verify this data. Often, for the research purposes, the number of de facto cohabitations is attempted to be linked to the number of children born out of wedlock. Nonetheless, this might not be a true indicator since parents of a certain number of children are not in any kind of relationship.

<sup>1</sup> Marriage indicators, Eurostat, [https://ec.europa.eu/eurostat/web/products-datasets/-/demo\\_nind](https://ec.europa.eu/eurostat/web/products-datasets/-/demo_nind) (21.5.2019).

<sup>2</sup> Census of Population, Household and Dwellings 2011, Household and Families, Statistical Reports, 2016, [https://www.dzs.hr/Hrv\\_Eng/publication/2016/SI-1583.pdf](https://www.dzs.hr/Hrv_Eng/publication/2016/SI-1583.pdf) (21.5.2019).

9. STANOVNIŠTVO PREMA STAROSTI, SPOLU, TIPU KUĆANSTVA I STATUSU U OBITELJI, PO ŽUPANIJAMA, POPIS 2011.  
POPULATION, BY AGE, SEX, TYPE OF HOUSEHOLD AND FAMILY STATUS, BY COUNTIES, 2011 CENSUS

Županija County of	Starost Age	Spol Sex	Ukupno Total	Osobe u privatnim kućanstvima prema statusu u obitelji Persons in private households, by family status						ostali (nisu članovi obitelji) Others (not family members)	Osobe u institucionalnim kućanstvima Persons in institutional households	
				svega All	dijete Child	suprug/ supruga Spouse	izvanbračni drug/ izvanbračna družica Cohabiting partner	majka s djecom Lone mother	otac s djecom Lone father			samac (samačko kućanstvo) Single (one- person household)
Republika Hrvatska Republic of Croatia	Ukupno Total	sv./ All m/ M ž/ W	4 284 889 2 066 335 2 218 554	4 246 313 2 050 166 2 196 147	1 450 210 804 192 646 018	1 918 234 959 117 959 117	97 772 48 886 48 886	174 517 - 174 517	33 345 33 345 -	373 120 143 769 229 351	199 115 60 857 138 258	38 576 16 169 22 407

Retrieved from the Census of Population, Household and Dwellings 2011, Household and Families, Statistical Reports, 2016

Since the Same-Sex Life Partnership Act in Croatia entered into force until the 31.12.2018 there were 293 registered partnerships in total. In the period from 1.1.2018 to 31.12.2018 the number of registered partnerships was 55 in total.<sup>3</sup> From 1.1.2017. to 31.12.2017. the number of registered partnerships was 64 in total,<sup>4</sup> while from 1.1.2016. to 31.12.2016. the number of registered partnerships was 66 in total.<sup>5</sup> From the entry into force of the Same-Sex Life Partnership Act, until 31.12.2015 the number of registered partnerships was 108. 66 of them were concluded between two Croatian citizens, 39 of them between a Croatian citizen and non-Croatian citizen, and 3 between two non-Croatian citizens.<sup>6</sup>

**1.3. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.**

In 2017, there were 6 265 divorces in total. In the last five years, the number of divorces increased: in 2016, there were 7 036 divorces; in 2015, 6 010 divorces; in 2014, 6 570 divorces; in 2013, 5 992; in 2012, 5 659 divorces.<sup>7</sup> Concerning other informal unions, statistical data on this matter is not collected.

**1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).**

Out of 20 310 marriages concluded in 2017, in 18 925 marriages the bride was a Croatian citizen and in 1 233 marriages, the bride was a foreign citizen. For 152 marriages, the citizenship of the bride was

<sup>3</sup> Javna uprava vama na usluzi, Statistički prikaz Ministarstva uprave, Broj 13, <https://uprava.gov.hr/UserDocImages//Statisti%C4%8Dki%20prikaz//Statisti%C4%8Dki%20prikaz%20%20Ministarstva%20uprave%20-%20broj%2013.pdf> (21.5.2019).

<sup>4</sup> Javna uprava vama na usluzi, Statistički prikaz Ministarstva uprave, Broj 9, <https://uprava.gov.hr/UserDocImages/Statisti%C4%8Dki%20prikaz/Statisti%C4%8Dki%20prikaz%20%20Ministarstva%20uprave%20-%20broj%209.pdf> (21.5.2019).

<sup>5</sup> Javna uprava vama na usluzi, Statistički prikaz Ministarstva uprave, Broj 5, [https://uprava.gov.hr/UserDocImages/Statisti%C4%8Dki%20prikaz/Statisti%C4%8Dki%20prikaz%20br%205%20\(24.01.2017.\).pdf](https://uprava.gov.hr/UserDocImages/Statisti%C4%8Dki%20prikaz/Statisti%C4%8Dki%20prikaz%20br%205%20(24.01.2017.).pdf) (21.5.2019).

<sup>6</sup> Javna uprava vama na usluzi, Statistički prikaz Ministarstva uprave, Broj 1, <https://uprava.gov.hr/UserDocImages/Statisti%C4%8Dki%20prikaz/FINAL-Statisti%C4%8Dki%20prikaz%20-24.02.2016..pdf> (21.5.2019).

<sup>7</sup> Statistical Yearbook of the Republic of Croatia, 2018, 2017, 2016, 2015, and 2014 [https://www.dzs.hr/Hrv/Publication/stat\\_year.htm](https://www.dzs.hr/Hrv/Publication/stat_year.htm) (21.5.2019).

unknown. Out of 1 233 marriages in which the bride had foreign citizenship, the bride had an citizenship on an EU MS (different from Croatia) in 210, and in 1 023, the bride had a citizenship of a non-EU MS.<sup>8</sup>

Among 293 registered partnerships concluded in Croatia from the date of entry into force of the Act on registered partnership of same-sex persons until the 31.12.2018, 158 of them are concluded between Croatian citizens, 111 between a Croatian and non-Croatian citizen and 24 between non-Croatian citizens.

In the period from 1.1.2018 to 31.12.2018 the number of registered partnerships was 55 in total: 25 of them were concluded between Croatian citizens; 24 of them between a Croatian and non-Croatian citizens; and 6 between non-Croatian citizens.<sup>9</sup> The number of registered partnerships from 1.1.2017 to 31.12.2017 was 64 in total: 31 of them were concluded between Croatian citizens; 24 of them between a Croatian citizen and non-Croatian citizen; and 9 between non-Croatian citizens.<sup>10</sup> From 1.1.2016 to 31.12.2016 the number of registered partnerships was 66 in total: 36 of them were concluded between two Croatian citizens; 24 of them between a Croatian citizen and non-Croatian citizen; and 6 between two non-Croatian citizens.<sup>11</sup> Since the Same-Sex Life Partnership Act entered into force, until 31.12.2015 the number of registered partnerships was 108: 66 of them were concluded between Croatian citizens; 39 of them between a Croatian citizen and non-Croatian citizen; and 3 between non-Croatian citizens.<sup>12</sup>

## 2. Family law.

### 2.1. General.

#### 2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?

The highest source of Family Law in Croatia is The Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*).<sup>13</sup> Provisions establishing the basis for regulation of Family Law can be found in the articles from 61 to 64 which are included in the section dedicated to the economic, social and cultural rights. First of all, art. 61 prescribes that “the family shall enjoy special protection of the state”. In the second paragraph it is stated that “marriage is a living union between a woman and a man”.<sup>14</sup> Furthermore, this article stipulates that marriage and the legal relations within it, as well as *de facto* union and family shall be regulated by law.

<sup>8</sup> Marriages by citizenship of bride (CITIZEN) and groom (PARTNER), Eurostat, [https://ec.europa.eu/eurostat/web/products-datasets/-/demo\\_marcz](https://ec.europa.eu/eurostat/web/products-datasets/-/demo_marcz) (21.5.2019).

<sup>9</sup> Javna uprava vama na usluzi, Statistički prikaz Ministarstva uprave, Broj 13, <https://uprava.gov.hr/UserDocImages/Statisti%C4%8Dki%20prikaz/Statisti%C4%8Dki%20prikaz%20%20Ministarstva%20uprave%20-%20broj%2013.pdf> (21.5.2019).

<sup>10</sup> Javna uprava vama na usluzi, Statistički prikaz Ministarstva uprave, Broj 9, <https://uprava.gov.hr/UserDocImages/Statisti%C4%8Dki%20prikaz/Statisti%C4%8Dki%20prikaz%20%20Ministarstva%20uprave%20-%20broj%209.pdf> (21.5.2019).

<sup>11</sup> Javna uprava vama na usluzi, Statistički prikaz Ministarstva uprave, Broj 5, [https://uprava.gov.hr/UserDocImages/Statisti%C4%8Dki%20prikaz/Statisti%C4%8Dki%20prikaz%20br%205%20\(24.01.2017.\).pdf](https://uprava.gov.hr/UserDocImages/Statisti%C4%8Dki%20prikaz/Statisti%C4%8Dki%20prikaz%20br%205%20(24.01.2017.).pdf) (21.5.2019).

<sup>12</sup> Javna uprava vama na usluzi, Statistički prikaz Ministarstva uprave, Broj 1, <https://uprava.gov.hr/UserDocImages/Statisti%C4%8Dki%20prikaz/FINAL-Statisti%C4%8Dki%20prikaz%20-24.02.2016..pdf> (21.5.2019).

<sup>13</sup> Ustav Republike Hrvatske, NN, br. [56/1990](#), [135/1997](#), [8/1998](#), [113/2000](#), [124/2000](#), [28/2001](#), [41/2001](#), [55/2001](#), [76/2010](#), [85/2010](#), [05/2014](#).

<sup>14</sup> The amendment followed the results of the popular constitutional initiative of 1 December 2013, OG 5/14, Decision of the Constitutional Court No. SuP-O-1/2014 of 14 January 2014.

The above mentioned articles determinate that the state shall protect the family, motherhood, fatherhood, children and young people and shall create the necessary conditions for such protection. As the Croatian Constitution states the family relationships shall be regulated by law. On this regard the main source of Family Law in Croatia is the Family Act (FA) – *Obiteljski zakon*.<sup>15</sup> Due to the absence of a civil code, beyond the Family Act there are many other legal sources which regulate some peculiar aspects of the family law. For the purpose of this questionnaire it is relevant to mention some of these legal sources. First, it has to be pointed out that registered and *de facto* same-sex partnerships are not included in the Family Act. From 2014, they are regulated by the Same-Sex Life Partnership Act (*Zakon o životnom partnerstvu osoba istog spola*).<sup>16</sup> Besides the above mentioned source, there are also several additional legal sources of family law. For instance, Protection against Domestic Violence Act (*Zakon o zaštiti od nasilja u obitelji*) defines the notion of domestic violence and the role of authorities in dealing with domestic violence, laying also down the measures for protecting victims of domestic violence.<sup>17</sup> Medically Assisted Procreation Act (*Zakon o medicinski pomognutoj oplodnji*) regulates health measures to assist a woman and a man in conceiving a child, regulating the requisites, conditions and limitations.<sup>18</sup> Social Welfare Act (*Zakon o socijalnoj skrbi*) regulates family social benefits.<sup>19</sup> Aliens Act (*Zakon o strancima*) deals with some aspects of family law deriving from the right to the family reunification.<sup>20</sup> State Registries Act (*Zakon o državnim maticama*) governs the registration of personal and familial status.<sup>21</sup> In addition, it must be pointed out that for the regulation of some aspects of family property rights, which are not prescribed in the Family Act or in the Same-Sex Life Partnership Act, the legislator refers to the law governing obligations and property.<sup>22</sup>

### 2.1.2. Provide a short description of the main historical developments in FL in your country.

After the Second World War several new acts, based on the new constitution of Federal People's Republic of Yugoslavia were adopted in the field of family law. Due to the absence of a unique civil code, family law was regulated under several different Acts. The most important ones were the Basic Act on Marriage from 1946 (*Osnovni zakon o braku*), the Basic Act on Relationships between Parents and Children from 1947 (*Osnovni zakon o odnosima roditelja i djece*) and the Basic Act on Guardianship from 1947 (*Osnovni zakon o starateljstvu*). With the enactment of Amendments to the Federal Constitution of 1971 and the new Constitution of the Socialist Federal Republic of Yugoslavia from 1974, some important changes occurred; *inter alia*, the possibility for every single republic to legislate independently in some fields of law, as family law.<sup>23</sup> Thus, the new Constitution represented the basis for a new and very modern act in that historical context (seventies of the last century). Precisely, the Marriage and Family Relations Act from 1978 (*Zakon o braku i porodičnim odnosima*) remained in force in Croatia for two decades. After the independency, the sovereign Republic of Croatia issued in 1998 the first Family Act, which entered into force in 1999.<sup>24</sup> Few years later, in 2003 another (the second) Family Act entered into force, replacing the first one.<sup>25</sup> In the same year

<sup>15</sup> *Obiteljski zakon* NN, br. [103/2015](#).

<sup>16</sup> *Zakon o životnom partnerstvu osoba istog spola*, NN, br. [92/2014](#).

<sup>17</sup> *Zakon o zaštiti od nasilja u obitelji*, NN, br. [70/2017](#).

<sup>18</sup> *Zakon o medicinski pomognutoj oplodnji*, NN, br. [86/2012](#).

<sup>19</sup> *Zakon o socijalnoj skrbi*, NN., br. [157/2013](#), [152/2014](#), [99/2015](#), [52/2016](#), [16/2017](#), [130/2017](#).

<sup>20</sup> *Zakon o strancima*, NN., br. [130/2011](#), [74/2013](#), [69/2017](#), [46/2018](#).

<sup>21</sup> *Zakon o državnim maticama*, NN, br. [96/1993](#), [76/2013](#).

<sup>22</sup> *Zakon o obveznim odnosima*, NN, br. [35/2005](#), [41/2008](#), [125/2011](#), [78/2015](#), [29/2018](#). *Zakon o vlasništvu i drugim stvarnim pravima*, NN, br. [91/1996](#), [68/1998](#), [137/1999](#), [22/2000](#), [73/2000](#), [129/2000](#), [114/2001](#), [79/2006](#), [141/2006](#), [146/2008](#), [38/2009](#), [153/2009](#), [143/2012](#), [152/2014](#). Hrabar, D., 2002, 46.

<sup>23</sup> Šarčević, P., 2011, 25.

<sup>24</sup> *Obiteljski zakon*, NN, br. [162/1998](#).

<sup>25</sup> *Obiteljski zakon*, NN, br. [116/2003](#), [17/2004](#), [136/2004](#), [107/2007](#), [57/2011](#), [61/2011](#), [25/2013](#) i [5/2015](#).

(2003) for the very first time, it was issued an Act (independent from the Family Act), which regulated the unions between persons of the same sex, i.e. Same-Sex Partnership Act (*Zakon istospolnim zajednicama*).<sup>26</sup> The (second) Family Act, although amended on several occasions, remained in force until 2014, when a new Family Act (the third one) entered into force. Nonetheless, the third Family Act endured just a couple of months: the issue of constitutionality in relation to many provisions was raised.<sup>27</sup> Therefore, a new Family Act entered into force in November 2015.<sup>28</sup> It represents the fourth Family Act in twenty years and it is the Family Act, which today regulates the family law in Croatia. As to the unions of same-sex partners, in 2014 the new Same-Sex Life Partnership Act replaced the previous Act from 2003, introducing the possibility of the registration of the partnerships of persons of the same sex.

### 2.1.3. What are the general principles of FL in your country?

The general principles of family law in Croatia descends from the Constitution, as well as from several provisions of the very first part of the current Family Act.

These general principles, gathered from the Croatian Constitution and from the ratified International Conventions, proclaim the equality of women and men (Art. 3 FA); the family solidarity and the reciprocal respect and support of all the family's members (Art. 4 FA) as well as the respect of the best interest of the child (Art. 5 FA). There are also other principles declared by the new Family Act, but for the purpose of this report it is relevant to pinpoint mentioned ones.

Although the principle of the equality of women and men is expressly mentioned, it can be also inferred from many other provisions of the Family Act. For instance, it is evident in provisions, which stipulate that parental rights pertain jointly to both parents and provide for equal rights and duties of parents towards children, consensual decision making in joint matters and a presumption of equal shares on common property. The same remark can be referred to the principle of family solidarity and the reciprocal respect and support of all the family's members, which is on the basis of the personal and patrimonial rights and duties between family members (i.e. the right to maintenance). Moreover, this principle governs also the family law provisions regarding the property issues between spouses, registered partners and *de facto* cohabitants. Finally, the Croatian family law about the rights of the child is totally in line with the pedocentric concept of the UN Convention on the Rights of the Child from 1989.

### 2.1.4. Define "family" and "family member" in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?

As already mentioned, the Croatian Constitution states that "the family shall enjoy special protection of the state". Furthermore, Article 61 of the Constitution stipulates that marriage and the legal relations within it, as well as *de facto* cohabitation and family shall be regulated by law.

As to the marriage and the relationships deriving from it, the status of spouse with all the rights and duties arising from it is valid for the entire legal system. The same can be concluded as to the position of the registered partner. Conversely, the definition of the *de facto* cohabitant (with specific reference to the *de facto* cohabitations of person of opposite sex) often differs from one field of law to another. Even if many examples can be offered on this regard, for sure the most important one concerns succession law. Indeed, the definition of the *de facto* cohabitation in the Succession Act is different than the one prescribed by the Family Act.<sup>29</sup> The risk is that a person can be considered *de facto* cohabitant under the family law, while under certain other, such as succession law, he or she

<sup>26</sup> Zakon o istospolnim zajednicama, NN, br. [116/2003](#).

<sup>27</sup> Obiteljski zakon, NN, br. [75/2014](#), [5/2015](#).

<sup>28</sup> Obiteljski zakon, NN, br. [103/2015](#).

<sup>29</sup> Hrabar, D., 2010, 41-48.



will not be recognised as such. Therefore, it may be concluded that the legal consequences of the *de facto* cohabitations vary depending on which corpus of laws is applied.

#### 2.1.5. Family formations.

##### 2.1.5.3. Define the “spouse” in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?

The Croatian Constitution, as well as the Family Act define marriage as a living union between one man and one woman.<sup>30</sup> Preconditions for marriage, its formalisation, legal consequences and termination are regulated by the Family Act. Same-sex marriage does not exist in Croatia.

Preconditions for marriage are composed of two sets of requisites: 1. the preconditions for existence of marriage; 2. the preconditions for the validity of marriage. In order to conclude a marriage all these preconditions must to be fulfilled.

Under the Family Act the preconditions for existence of marriage (art. 23) are:

- persons concluding a marriage must be of opposite sex;
- consent to conclude marriage needs to exist;
- consent needs to be expressed for a civil marriage before a registrar or for a religious marriage before an official of a religious community that has a regulated legal relationship thereof with the Republic of Croatia.

If the preconditions for existence are not fulfilled, the marriage is considered non-existent and has no legal consequences (Art. 23, para 2).

Under the Family Act the preconditions for the validity of marriage (from Art. 25 to Art. 29) are:

- a person concluding marriage may not be a child (person under 18 years). A court may, however, on justifiable grounds, allow the conclusion of a marriage to a child aged 16 (or more), who has appropriate physical and mental maturity, which enable him/her to understand the meaning and consequences of the rights and obligation arising from marriage (Art. 25);
- a person incapable of discernment may not enter into marriage. A person partially deprived of legal capacity may conclude a marriage on the conditions stated by the law (Art. 26).
- marriage may not be concluded by persons who are direct blood relatives or between persons of collateral consanguinity between a sister and a brother, a stepsister and a stepbrother, the child and its parent's sister or stepsister or brother or stepbrother, or between the children of sisters and brothers or stepsisters and stepbrothers (Art. 27). The same ban concerns persons who are connected by adoption (Art. 27, para 2).
- a new marriage may not be concluded in case of the existence of a previous marriage or a same-sex life partnership (Art. 28).

Marriage concluded contrary to the abovementioned conditions is not valid and it can be annulled (Art. 29).

The definition of marriage and spouse is valid also in other legal fields (successions, tax law etc...).

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<sup>30</sup> In the Constitution since 2013. In the Family Act this definition existed even before the Constitutional amendment.

**2.1.5.4. What types of relationships/unions between persons are recognised in FL of your country? In particular, formal (registered) and informal (*de facto*) unions, heterosexual and same-sex unions, unions with and without *affectio maritalis*. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

Croatian family law distinguishes between the following types of relationships:

- marriage between persons of opposite sex;
- life partnership (“registered” and “*de facto*”) of same-sex persons; and
- *de facto* cohabitation of persons of opposite sex.

Marriage (*see question 2.1.5.1.*): the Croatian Constitution, as well as the Family Act, define marriage as a living union between one man and one woman. Preconditions for marriage, its formalisation, legal consequences and termination are regulated by the Family Act. Same-sex marriage does not exist in Croatia.

Registered life same-sex partnership union is regulated by the Same-Sex Life Partnership Act (*Zakon o životnom partnerstvu osoba istog spola*), which defines it as a community of family life between two persons of the same sex registered before a registrar, the formalisation, legal consequences and termination of which is regulated by the Same-Sex Life Partnership Act (Art. 2).

In addition to registered partnership, the Same-Sex Life Partnership Act also regulates “non-formal” partnership, which is a community of family life between two persons of the same sex, who have not registered a partnership before the registrar, if this union lasts at least three years and if it accomplishes the preconditions required for a valid registered partnership. Legal consequences and termination are regulated under the Same-Sex Life Partnership Act.

*De facto* cohabitation is a living union of a man and a woman, who are not married, which lasts at least three years or less if a common child is born or if it is followed by a marriage (Art. 11 FA). Between the cohabitants, *de facto* cohabitation has the same legal consequences provided for spouses by the Family Act (Art. 11). Regarding legal consequences, provisions concerning marriage from Family Act apply *mutatis mutandis* to *de facto* cohabitation (art. 11). Due to the totally unformal way of constitution and dissolution of the *de facto* cohabitations, the main problem is to determine its beginning and/or its termination. Whether the *de facto* cohabitations will be regulated under the law, will depend on its duration.<sup>31</sup>

In other areas, life partnerships and *de facto* cohabitation have the same legal consequences if it is provided by law.

**2.1.8. What legal effects are attached to different family formations referred to in question 2.5.?**

Generally speaking, as to the patrimonial aspects, the property rights and duties in the family law are the same regardless whether one lives in a marriage, life partnership or *de facto* cohabitation. Some differences can be found in the field of succession law (*see section 3*). As to the other fields, due to the heterogeneousness of the legal sources, it happens that some legal consequences could be regulated differently.

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<sup>31</sup> Lucić, N., 2015, 101-132.

**2.1.9. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/*de facto* family formations? Explain briefly.**

There is an ongoing debate among the family lawyers and academics about the reform of the Croatian Family Act. One of the proposals aims to simplify the present legislation, which seems to be quite compressed and hyper-regulated.

**2.7. Property relations.**

**2.2.1. List different family property regimes in your country.**

Croatian family law differentiates between two matrimonial property regimes:

- legal (default) matrimonial property regime; and
- contractual matrimonial property regime.

Both regimes are applicable to marriage, life partnership and *de facto* cohabitation.

**2.2.2. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?**

The legal (default) matrimonial property regime applies to spouses, unless they conclude a marital property agreement. It establishes a community of spouses' assets (*bračna stečevina*) as well as personal assets (*vlastita imovina*) of each spouse (from Art. 35 to Art. 39).

The assets included in the community property regime of spouses are those acquired by work and those, which arise from these assets during the (effective) marriage life.<sup>32</sup> Indeed, the Croatian legislator expressly uses the term "bračna zajednica" (marriage life) instead of "brak" (marriage). Hypothetically, a marriage can formally exist even if there is no longer a living union of the spouses. Thus, these rules concerning property do not apply in cases of "dead" marriages. This normative choice is an evident expression of above mentioned principles (see 2.1.3.). Article 36, para 3 of the Family Act expressly states that the spouses' shares are equal. This provision is a clear expression of the abovementioned principle of family solidarity: despite the real capacity to contribute with one's own work, every spouse co-owns a half of all assets, which are included in the community property regime of spouses. They may also define an alternative proportion of their shares. In any case the principles governing Croatian family law have to be respected also in the context of patrimonial rights. It means that any different settlements, even if it is an expression of the party autonomy, shall be respectful of the principle of equality of spouses and of the principle of the familial solidarity, as well as respectful of other eventual limitation stated by the law.

In the past, the co-owned property was not specified (it was co-owned to both spouses) and it would be specified in case the marriage was terminated. This scheme created legal uncertainty, in particular in relation to the position of third parties (creditors). Thus, it was substituted (many years ago) with the present one, which guarantees a faster and easier division, if necessary.

As already pointed out in the doctrine, "the Family Act does not expressly specify what constitutes acquired matrimonial property (...)".<sup>33</sup> Nonetheless, community of assets generally consist of the salary, property of movables and immovable acquired by work, property of a company, stocks, savings, and incomes arising from the community of assets.<sup>34</sup>

<sup>32</sup> Ruggeri, L., Winkler, S., 2019, 172.

<sup>33</sup> Šarčević, P., Kunda, I., 2011, 184.

<sup>34</sup> Rešetar, B., Josipović, U., 2013, 115-138.

The legislator expressly mentions two elements of the community of assets: gain on games of chance and royalties gained from copyright and similar rights, acquired during the marriage. On the contrary, author's work remains personal property of the spouse who authored it. Separate property of each spouse (*vlastita imovina*) is the property acquired before marriage or received by a spouse without consideration during marriage (Art. 39) – i.e. inheritance and gifts. Separate property is exclusively owned by the spouse who has acquired it.

**2.2.3. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a “new regime just for them”?**

Yes, it is.<sup>35</sup> The Croatian Family Act offers to the spouses, alternatively to the legal (default) regime, the possibility of concluding a matrimonial property agreement.<sup>36</sup>

As to the content of the marital property agreement, the spouses are free to determine their property regime in a manner that differs from the statutory property regime.<sup>37</sup> Precisely, spouses are not limited to any models that would be envisaged by law. Nonetheless, as already mentioned, the spouses are not allowed to contravene the Constitution, mandatory rules and moral principles. The agreement must be concluded in writing and the signatures of spouses must be verified by a notary public (Art. 40, para 3).

A matrimonial property agreement may determine property relations for the existing and future property (Art. 40, para 1). The Croatian Family Act prescribes that a matrimonial property agreement may not be used to stipulate the application of foreign law to property's relations (Art. 42). However, it must be underlined that this ban concerns the situations when no cross-border elements are involved in.<sup>38</sup>

Still, the spouses exercise the right to settle an agreement quite rarely. In absence of a Register that collects these matrimonial agreements, it is quite difficult to provide some concrete numbers or percentage. It arises from the spouses' attitudes: it is quite common that this type of agreement is considered to be disrespectful of the romantic idea of the marriage (or generally speaking of the affective relationship between two persons).<sup>39</sup>

**2.2.4. Explain briefly the rules on the administration of family property and compare if there are difference for different property regimes.**

Under the legal (default) matrimonial property regime, spouses jointly manage the assets included in the community of property (Art. 37). However, for cases of ordinary administration, a spouse is supposed to have the consent of the other spouse (presumption – Art. 37, para 1) in order to be able to manage by himself or herself. On the contrary, for the extraordinary administration the Family Act prescribes under the paragraph 2 that the spouses' shall manage the assets jointly. One spouse is allowed to undertake the administration autonomously if he or she has the written consent. This consent must be given in writing and the signature must be verified by a notary public. As to the third paragraph of this article, in case that one spouse manages without the presence or the consent of the other spouse, it will not compromise the position of the third party who is in *bona fide*.

Regarding separate property, each spouse can freely dispose and manage his/her assets.

<sup>35</sup> Majstorović, I., 2005.

<sup>36</sup> Čulo, A.; Radina, A., 2011, 140.

<sup>37</sup> Ivančić-Kačer, B.; Klasiček, D., 2008, 1-30.

<sup>38</sup> Korać, A., 2007, 517.

<sup>39</sup> Ruggeri, L., Winkler, S., 2019, 175-176.

The Croatian Family Act does not state specific provisions on administration of matrimonial property in case of contractual matrimonial property regime due to the fact that the spouses may freely define the contents of their agreement and this freedom relates also to the administration rules.

**2.2.5. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

The Croatian law does not provide any kind of legal solution regarding the registration of matrimonial property agreements. It must be pointed out that in several occasions the Croatian scholars tried to underline the necessity of the establishment of a matrimonial property agreements register.<sup>40</sup> Nonetheless, until now, the Croatian legislator has not recognised the need for the introduction of such a register, already established in many European legal systems, which would be very useful also in the context of the family cross-border property regimes.

**2.2.6. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

Spouses may assume joint obligations, i.e. obligations binding both spouses under the general rules of obligations and obligations created in connection with their community of property. Each spouse can also assume autonomously obligations for the current living union needs of both, marriage or family.

Spouses are liable for joint obligations both jointly and severally with their community of assets as well as with their personal assets (art. 44, para 1). A spouse has a right of recourse for the sum paid in excess (Art. 44, para 2).

**2.2.7. Describe allocation and division of property in case of divorce, separation or dissolution of the union.**

The spouses' community of assets will be divided in the case of termination of marriage or already during marriage by an agreement. As to the government of their assets, after the termination of marriage or marriage life, the spouses can determine their mutual patrimonial relationship by an agreement or by starting proceedings. The division of the property will follow the rules on property law.

**2.2.8. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?**

No, there are no special rules or limitations regarding the property regimes between spouses, partners and *de facto* cohabitants in reference to their culture, tradition, religion or other characteristics. Likewise, the dowry is not regulated within Croatian legislation.

**2.8. Cross-border issues.**

**2.2.1. Is your country participating in the enhanced cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?**

Yes, Croatia is participating in both couple's property regulations from the beginning.

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<sup>40</sup> Čulo, A., Šimović, I., 2009., 1029-1068.

**2.2.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as “marriage”, “matrimonial property agreement”, “partnership property agreement” etc.?**

In situations which involve family property, one may expect that similar issues of delineation between different regulations may occur as in the recent CJEU case law in the context of the Succession Regulation.<sup>41</sup>

A particular situation may occur due to abovementioned non-recognition of same-sex marriages in Croatia,<sup>42</sup> as considered to be mandated by the amended provision of the Croatian Constitution. In situation in which a same-sex couple concluded the marriage abroad and wishes to rely this fact in the property-related proceedings before the Croatian courts, the courts will find themselves in the dilemma about the applicability of the two property regulations. It has been submitted that most likely the courts will not be able to apply the Matrimonial Property Regulation, but that they should characterise such marriage as a registered partnership for the purpose of application of the Registered Partnership Property Regulation.<sup>43</sup>

**2.2.3. Are you expecting any problems with the application of the rules on jurisdiction?**

The system of the rules in both regulations is very complex (there are several hierarchical levels of provisions on the jurisdiction and some exceptions) and hence certain problems might be expected before the courts familiarise themselves with the intended operation of the regulations. In particular, the jurisdiction rules are different from the previous rules of the Croatian private international law and the dependence of jurisdiction on the applicable law is a novelty.

**2.2.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

As in the case of jurisdiction rules, the system of conflict of law rules is also very complex and determining the applicable law might prove like a ride on a winding road due to several hierarchy levels, limitations, exceptions to the rules and applicable conditions.<sup>44</sup> It differs from the previous system in the Resolution of Conflict of Laws with the Laws of Other Countries in Specific Relations Act,<sup>45</sup> which ceased to be in force on 28 January 2019 to be replaced by the new Private International Law Act<sup>46</sup> whose entry into force was aligned with the two couple’s property regulations. Until recently, applicable law to matrimonial property was common nationality of the spouses, or failing that spouses’ common domicile, or failing that spouses’ last common domicile, or failing that Croatian law (Art. 36). In case spouses exercised party autonomy and concluded a matrimonial property agreement, the Croatian courts would also respect their choice of applicable law provided that the law which would otherwise apply based on objective connecting factor at the time of the conclusion of the agreement, allowed choice of law applicable to matrimonial property (Art. 37). Thus, a limited possibility to choose the applicable law depended on the applicable by objective connecting.

Thanks to Petar Šarčević’s initiative, the former Resolution of Conflict of Laws with the Laws of Other Countries in Specific Relations Act, which dated back to 1982, was the first legislation in the world to

<sup>41</sup> See 3.3.5.2. in this report.

<sup>42</sup> See 2.1.5.1. and 2.1.5.2. in this report.

<sup>43</sup> Kunda, I., 2019., p. 27.

<sup>44</sup> Župan, M., 2012, pp. 629-666.

<sup>45</sup> *Zakon o rješavanju sukoba zakona s propisima drugih zemalja u određenim odnosima*, NN [53/91](#) and [88/01](#).

<sup>46</sup> *Zakon o međunarodnom privatnom pravu*, NN [101/2017](#).

provide for special provisions on the law applicable to cohabitations. In Art. 39 thereof it was stated that property relations between cohabitantes are governed by the law of their nationality, or failing that common domicile. Their contractual property relations were subject to the same law at the time the agreement was concluded.

**2.2.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

In the absence of the court practice, it is difficult to predict the most important potential problems. However, these issues should not be that much different from what the Croatian courts have been faced with in the previous half of the century, only the frequency of cross-border cases and judgments from other Member States might be expected to rise. Nevertheless, there stands as a peculiarity a relatively recent decision of the Croatian court in which the court rejected public policy objection and ordered enforcement of a German decision on costs of the proceedings. This decision on costs followed previously rendered German decision on the merits in which Croatian national was denied succession right under the old German law because she was born out of wedlock. Although this is not as problematic from the point of view of the concept of public policy itself (which is usually the topic discussed in this context), it reveals lack of appreciation of the German system in which decisions on the costs are not necessarily included in the decision on the merits as is the case in Croatia. The position taken by the Croatian court that these are two different legal basis, merits and costs, is hardly acceptable from the perspective of pure logic. It would be interesting to see what the ruling would have had been if the ruling on costs was in the same judgment as the ruling on the merits.<sup>47</sup>

**2.2.6. Are there any national rules on international jurisdiction and applicable (besides the Regulations) concerning the couple's property regime in your country?**

Concerning the applicable law, the Croatian Private International Law Act<sup>48</sup> provides a special section 5 on extra-marital union and life partnership. Art. 38 states that establishing and terminating extra-marital (*de facto*) union is subject to the law of the State with which it is or was most closely connected. Art. 39 regulates registered life partnership which in relation to preconditions and procedure to establish and terminate such partnership in Croatia refers to the Croatian law. Registered partnership between same-sex partners registered abroad under the law of that State is recognised in Croatia as life partnership. Establishing and terminating *de facto* partnerships is subject to the law of the State with which it is or was most closely connected. Personal and property relations, including the maintenance is dealt with in Article 40. Personal relations are subject to the same rules as personal relations in marriage under Art. 34. Property relations between *de facto* partners are subject to the same rules as matrimonial ones, which are actually determined by the reference to the Matrimonial Property Regulation in Art. 35. Law applicable to property relations between registered partners is within the scope of the Registered Partnership Property Regulation. Law applicable to maintenance between *de facto* partners and registered life partners is determined by reference to the Hague Protocol on the Law Applicable to Maintenance Obligations of 2007.

<sup>47</sup> See Kunda, I., 2017, pp. 265-272.

<sup>48</sup> NN [101/2017](#).

### 3. Succession law.

#### 3.1. General.

##### 3.1.1. What are the main legal sources of Succession Law (SL) in your country? What are the additional legal sources of SL?

The Constitution of the Republic of Croatia<sup>49</sup> (Art. 48.4.) expressly guarantees the right of inheritance. Multilateral and bilateral international treaties, the Republic of Croatia has signed, constitute a part of the internal legal order and take precedence over the laws. For the succession law, the most important sources are multilateral international conventions containing provisions on conflict of laws (most of them entered into and acceded to by the former state) and bilateral international agreements on legal aid in civil matters.

The main legal source of the SL in the Republic of Croatia (RC) is the Succession Act of 2003 (SA).<sup>50</sup> The SA sets out the general rules on succession (Art. 1-7), the legal basis for succession (Art. 8-121), the legal position of heirs (Art. 122-145) and procedural succession law provisions (Art. 146-252). Important additional legal sources of SL are the Notaries Public Act<sup>51</sup> (because the notaries public are competent for probate proceedings) and Civil Procedure Act<sup>52</sup> (unless otherwise provided for in the SA, provisions of that act apply in probate proceedings). Many other regulations are additional sources of SL, especially those regulating ownership, obligations, family relations, same-sex unions and private international law.

##### 3.1.2. Provide a short description of the main historical developments in SL in your country.

After the Second World War, Croatia was one of six federal republics of Socialist Federal Republic of Yugoslavia. Although the right to inherit has not been abolished, application of inheritance rules of the General Civil Code<sup>53</sup> has been suspended, because those rules were considered to be contrary to the new social order. Some of them were used in combination with soviet general rules of succession for next few years. A new Federal Succession Act<sup>54</sup> entered into force in 1955, with the retroactive effect. That Act was largely influenced by Swiss and French and, in smaller extent, the Soviet inheritance rules. By constitutional changes in 1971, competence to regulate inheritance relations was given to republics and autonomous provinces. All of them, except Croatia,<sup>55</sup> have adopted their own succession laws. Croatia has opted to continue to apply the Succession Act. The same decision was made after the independence of Republic of Croatia, 1991.<sup>56</sup>

New Succession Act entered into force in 2003, and is still effective, with only few changes.

In the essence, the basic rules of succession in the Croatian law have not been changed since 1955.

Although the basic inheritance rules of previous act were maintained, some changes were introduced by SA 2003, particularly:

- The SA 2003 has provided for equal inheritance rights of spouses and extra-marital partners. The extra-marital union is understood as cohabitation of an unmarried woman and an unmarried man, which had lasted for a longer period and had ended at the time of

<sup>49</sup> OG [56/1990](#), [135/1997](#), [113/2000](#), [28/2001](#), [76/2010](#), [5/2014](#).

<sup>50</sup> OG [48/03](#), [163/03](#), [35/05](#), [127/13](#), [33/15](#).

<sup>51</sup> OG [78/1993](#), [29/1994](#), [162/1998](#), [16/2007](#), [75/2009](#), [120/2016](#).

<sup>52</sup> OG [53/1991](#), [91/1992](#), [112/1999](#), [129/2000](#), [88/2001](#), [117/2003](#), [88/2005](#), [2/2007](#), [96/2008](#), [84/2008](#), [123/2008](#), [57/2011](#), [25/2013](#), [89/2014](#).

<sup>53</sup> Austrian General Civil Code, 1853.

<sup>54</sup> OG 20/55

<sup>55</sup> The Socialistic Republic of Croatia.

<sup>56</sup> OG 53/91



decedent's death, in the case that all the prerequisites for a valid marriage had been fulfilled (Art. 8.2.).

- The succession rights of spouses and extramarital partners were increased in the second line of succession. The application of the principle of representation is excluded and decedent's consanguineous relatives are not legal heirs.
- The succession rights of decedent's brothers and sisters were reduced in the way they lost position of relative forced heirs.
- One special rule on the interpretation of a will has changed in the favour of testamentary heir (in the case of a dilemma concerning the real intention of the testator).
- Only one type of public will has been recognized, but the number of persons authorised to draw up a public will increased.
- The Croatian Register of Wills (CRW) has been established.
- In the procedural provisions, some of formalities have been reduced.
- Conduct of probate proceeding has been entrusted to a notary public, as a commissioners of court.

The SA (2003) has been changed four times, but none of the amendments affected general rules and main principles of inheritance. The first change took place in the year of its adoption, 2003, when Article 240 on the estimation of need of entrusting the conduct of probate proceedings to a notary public has been repealed.<sup>57</sup> In 2005, articles regulating the Lifetime Maintenance Agreement were abolished, because that agreement has been included in the new Law on Obligations.<sup>58</sup> In 2013,<sup>59</sup> the rules on liability for deceased's debts in a case the municipality is intestate successor, have been changed in a way that creditors of the deceased can initiate enforcement proceedings only concerning the assets that are part of estate. In 2015,<sup>60</sup> Article 245 on some principles of entrusting the conduct of probate proceedings to a notary public has been changed.

### 3.1.3. What are the general principles of succession in your country?

The general principles of succession in RC are:

- The principle of equality of all natural persons

All natural persons under the same conditions are equal in inheritance. Foreign nationals, subject to the presumed reciprocity, have the same inheritance rights as the citizens of the Republic of Croatia (Art. 2).

- The principle of *ipso jure*, but voluntary succession

Inheritance occurs due to the death and at the moment of the decedent's death, *ex lege* (Art. 3.), without any special modus of acquiring the subjective right to inherit or acceptance of estate. Despite of that fact, succession is voluntary. No one is obliged to inherit and an heir may renounce his or her inheritance rights. If he or she does so, it is considered as if he or she has never acquired the right to inherit (Art. 4. 4.). The principle of voluntary succession does not apply in the cases when municipality assumes legal position of heirs; it has no right to renounce the succession (Art. 6).

- The principle of universal succession

An heir is a universal successor of the decedent and upon decedent's death, all his rights and obligations are transferred to the heir, except those which because of their legal nature or pursuant to the law cannot be the object of inheriting (Art. 5.).

- The principle of the *numerus clausus* of the legal titles of succession

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<sup>57</sup> OG 163/03

<sup>58</sup> OG 35/05

<sup>59</sup> OG 127/13

<sup>60</sup> OG 33/15

There are only two titles of succession in Croatian law, a will and a law. Succession contract is not title of succession, it is considered null and void (Art. 102.).

- The principle of cumulating of the legal titles of succession

Statutory succession takes place when there is no will or entire estate is not disposed of in a will. In second case, both legal titles of succession exist and it is possible for someone to inherit on the basis of the will and by operation of law.

- The principle of freedom of testamentary succession

Everybody is entitled to make a will and dispose of estate for the case of his death, to determine his heirs, limit and encumber their rights (Art. 7.1.). The freedom of testamentary succession is not absolute, the rights of certain close family members are protected by limitation of decedent's disposing (Art. 7.2.).

#### **3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.**

Probate proceedings in Croatia are non-contentious proceedings in the first instance conducted before a municipal court or before a notary public, as a commissioner of court (Art. 176.1.). Probate proceedings are initiated *ex officio* after the court receives a death certificate, an excerpt from a Register of Deaths or other equivalent document (final decision on proclamation of person's death), (Art. 210.). The court entrusts the conduct of probate proceedings to a notary public with office registered in its territory. When a notary public conducts actions in probate proceedings as a trustee of the court, he is authorised as a judge or court adviser of municipal court would be to take all actions in proceedings and make all decisions, except those for which SA prescribed otherwise (Art. 176.4.).

If, during the succession proceedings, a dispute arises between the parties concerning any of their inheritance rights, the probate court has to stay the proceedings and instruct the parties to settle a dispute in a civil or an administrative action (Art. 222.). Settling the inheritance disputes in the first instance are in the competence of municipal courts. Deciding on appeals against decisions of municipal courts are in the competence of county courts. In cases where the post-appellate legal remedies are available, they are decided before the Supreme Court of the Republic of Croatia.<sup>61</sup>

#### **3.1.5. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?**

In Croatian law, there are only two titles of succession: a will and a law. Inheritance rights are acquired only on the basis of a valid will (testate succession) or by operation of law (intestate succession). Testator's will is a stronger legal ground than statutory provisions and the testate succession has priority over the intestate one, which takes place only where there is no will. In the case that the entire estate is not included and disposed of in a will, the part of estate not distributed in the will is free for inheriting by operation of law. Because of that, it is possible that the both legal titles come into play in the same time and the same person can become an heir on the basis of both titles.

#### **3.1.6. What happens with the estate of inheritance if the decedent has no heirs?**

If the decedent has no heirs or they all renounce succession, then the right to inheritance is passed on to the municipality, which acquires the same position as the heir of the decedent but cannot renounce succession (Art. 6.).

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<sup>61</sup> Courts Act, OG 28/13, 33/15, 82/15, 82/16, 67/18 (CA), Art. 18.-20.

**3.1.7. Are there special rules or limitations concerning succession with reference to the deceased's (or heir's) culture, tradition, religion or other characteristics?**

No, there are no limitations in that sense. As said in 3.1.3., all natural persons under the same conditions are equal in inheritance. Croatian law does not know discrimination rules based on culture, tradition, religion or other characteristics of that kind.

**3.2. Intestate succession.**

**3.2.1. Are men and women equal in succession? Are domestic and foreign nationals equal in succession? Are decedent's children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?**

The general principle of SL is the principle of equality in succession. All natural persons are equal: men and women, domestic and foreign nationals, children born in or out of wedlock and adopted children. A child conceived at the time of entry of succession is considered as being already born under the condition it is born alive. If the child is born alive, it becomes an heir as if it had been born at the time of entry of succession (time of decedent's death).

Spouses and extramarital partners are equal in succession, registered and unregistered homosexual couples are equal in succession.

**3.2.2. Are legal persons capable of inheriting? If yes, on which basis?**

Legal persons are capable of inheriting only by a will; they are absolutely incapable of inheriting by operation of law. Exception is municipality as an heir in case where decedent has no heirs.

**3.2.3. Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.**

A person who is unworthy of succeeding may not inherit on the statutory nor testamentary basis. Grounds for unworthiness are provided in Art. 125. SA and according to its provisions unworthy of succeeding is person who:

- intentionally murdered or attempted to murder the decedent
- with the use of fraud, threat or force induced the decedent to make or to revoke the will or any of its provisions, or prevented him or her from doing that
- destroyed or hid the will of the decedent with the intention to prevail the realisation of decedent's last will or forged a will
- seriously breached a statutory obligation to maintenance a decedent, did not provide the necessary assistance to the decedent or left the decedent without assistance on situation danger to his or her life or health.

Unworthiness of one heir does not prevent his or her descendants to inherit; they can succeed as if that unworthy heir had died before the decedent. A testator is authorised to grant pardon for any reason that would make an heir unworthy of inheriting in one of forms provided for a will. Unworthiness is considered by the court ex officio, except in the case of breach the duties to maintain or to assist the decedent (Art. 126. SA).

**3.2.4. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?**

According to the Croatian law, heirs *ex lege* (intestate heirs) are persons entitled to acquire right to inherit on a statutory basic. The circle of potential intestate heirs is defined in Art. 8. 1. and 8.2. of SA, as well as in Art. 55. of Same-sex Life Partnership Act, according to which partner or informal life partner is equal to the spouse, so has a same position of intestate heir as spouse does.

The decedent's intestate heirs are his or her:

- descendants, adopted children and their descendants
- spouse, extra-marital partner, life partner, informal life partner
- parents, adopters
- siblings and their descendants
- grandparents and their descendants
- other ancestors

All mentioned persons are classified into classes (lines) of succession (Art. 8.3.). The relationship between those lines of succession is based on the principle of elimination. The heirs of closer line eliminate the heirs belonging to a more distant line of succession (Art. 8.4.). The intestate heirs from next line will inherit only when there is no heir from prior line.

The first line of succession according to the SA (and SLPA) includes the decedent's children and their descendants, adoptees and their descendants, spouse, extra-marital partner, life partner or informal life partner. The decedent is inherited, prior to all others, by his children and spouse (partner), who inherits in equal shares each (Art. 9). If the decedent's child has died before the decedent, the principle of representation applies and the portion of estate belonging to the deceased child is inherited by his or her children in equal shares (Art. 10). The principle of representation applies as long as there are any decedent's descendants. If there are no decedent's descendants, the spouse (partner) inherits in the second line. If all decedent's descendants renounce inheritance, the spouse (partner) remains in the first line of succession and inherits the whole estate.

The second line of succession according to the SA includes the decedent's parents and spouse (partner) (Art. 11.1.). Parents inherit one half of estate in equal shares (1/4 each parent) and spouse (partner) inherits the second half (Art. 11.2.). If both parents had died before the decedent, the spouse (partner) inherits the whole estate (Art. 11.3.). The spouse (partner) in the second line of succession prevents the application of the principle of representation so parent's descendants cannot represent them. If one parent had died before decedent, his or her share goes to the outlived parent (Art. 11.5.).

If there is no outlived spouse (partner) of the decedent, parents inherit the whole state in equal shares (one half each) (Art. 11.4.). If there is no outlived spouse (partner) of decedent and one of the parents had died before the decedent, the portion of deceased parent inherit his or her children (decedent's siblings), his or her grandchildren and further descendants (Art. 12.1.). If both parents had died before the decedent, the part of estate that would have belonged to each of them if they had outlived the decedent is inherited by parent's descendants (Art. 12.2.). If one parent of decedent had died before the decedent and principle of representation cannot be applied because that parent has no descendants, the portion of deceased parent goes to other parent, and if this other partner had also died before decedent, his descendants inherit what both parents would have inherited (Art. 13.).

The decedent's grandparents inherit in the third line of succession. They inherit in the cases where there are no heirs from first and second line of succession. One half of estate is inherited in equal portion by grandparents from the father's side and other half by grandparents from the mother's side of family (Art. 14). The principle of representation applies in that line of succession (Art. 15)

Decedent's great grandparents inherit in the fourth line of succession. Equal shares of estate go to the great grandparents from each side of family (Art. 17). In the fourth line of succession the principle of representation does not apply, only the principle of accrual. The same goes for the other lines of succession.

### **3.2.5. Are the heirs liable for deceased's debts and under which conditions?**

The heirs are jointly and severally liable for deceased's debts. Every heir is liable only up to the value of the assets inherited (Art. 139. 4.). Among the heirs, debts are divided in proportion with their portions of inheritance, unless otherwise is stipulated in the will (Art. 139.5.). An heir who renounces inheritance, is not liable for deceased's debts (Art. 139.2.); he or she is considered never to have been an heir.

For the deceased's debts, an heir is liable with all his or her own property and with the inherited property. Deceased's creditors may request the separation of estate of inheritance and heir's own property within 3 months of the deceased's death, if show the probability of the existence of their claims and the danger of not being able to settle that claims without that separation (Art.140. 1.).

### **3.2.6. What is the manner of renouncing the succession rights?**

Every heir, except the municipality, has the right to renounce the inheritance by giving a certified declaration or recorded statement prior to the first-instance decision in probate proceedings (Art. 130.1.). The statement on renunciation can be given only after the death of the decedent when succession is already entered, and cannot be revoked (Art. 135). Statements on renunciation of inheritance given before that moment have no legal effect (Art. 134.1.)

## **3.3. Disposition of property upon death.**

### **3.3.1. Testate succession.**

#### **3.3.1.1. Explain the conditions for testate succession.**

In the Croatian law, a will is the legal title of succession only if it meets some general characteristics and formal requirements for one of recognized types of wills. It has to be unilateral declaration of last will aimed at disposing of estate after the death of its maker, has to be in form prescribed by law and be valid. It is strictly personal manifestation of will and cannot be made through a representative.

#### **3.3.1.2. Who has the testamentary capacity?**

Testamentary capacity in Croatian law is acquired at the age of 16 (Art. 26.1.). A will is null and void if testator at the moment of disposing is under that age or is not capable of making judgments (Art. 26.2.). Capacity of making judgments is presumed and whoever holds that at the time of making the will testator was without that capacity, bears the burden of proving that fact (Art. 26.2.). Testator was without capacity of making judgments if at the time of making the will he was not able to understand the meaning and the consequences of his declaration or was not capable to control his will to the extend needed for behave according to that understanding (Art. 26.2.). A subsequent loss of capacity of making judgments does not have effect to the validity of the will (Art. 26.3.)

#### **3.3.1.3. What are the conditions and permissible contents of the will?**

By the will, testator is able to dispose with all that he was able to dispose of during his life, unless otherwise provided by the law (Art. 42.1.). He is able to produce the same legal effects he was able

to produce during his life, unless otherwise provided by the law (art. 42.2.), but can produce only those inheritance effects provided by SA (art. 42.3.).

All provisions of the will have to be able to be executed and legally admissible, otherwise are considered null and void and have no legal effect (as if they did not exist).

Determining heir(s) is the most common content of the will, but the will in the Croatian law does not have to contain the provision of such appointment. By the will, testator may determine one or more persons as his heir(s) (Art. 43.1.), but does not need to do so. A testator may also determine substitutes to the heir(s) for the case they die before the testator, renounce inheritance or become unworthy of succession (Art. 44.1.). Under the Croatian succession law, determination of heir to one's own heir is not allowed (Art. 44.2.).

A testator may nominate one or more persons as his legatees (Art. 45.). A legatee is person to whom the testator has assigned a specific thing or right, he is particular successor in title. Art. 43. 3. of the SL provides that such a person can be qualified as an heir (not a legatee) if, in accordance with the rules of interpretation of wills, it is founded that it was the testator's will that that person be the heir. A testator may, by testamentary disposition, explicitly disinherit his legal heirs, wholly or partly. There is no need for a special reason for disinheritance, but testator's free will to disinherit is limited by the rules on legitimate succession.

A testator may dispose by will that his estate of inheritance or its part be used to achieve some permitted purpose (Art. 46.1.) If testator has ordered to set up foundation, and has allocated funds to accomplish its purpose, such foundation will come into existence when all prerequisites stipulated in special law on foundations will be met (Art. 46.2.).

By the will, testator may impose a duty (mandate) on heir(s) and other persons who benefit from his will (Art. 47.1.). Testamentary dispositions may be made under conditions or limited in time. Impossible, illegal or immoral conditions, as well as those that are unreasonable or contradictory, shall be considered non-existent (Art. 47.2-47.3.).

A failure to fulfil the mandate will result in termination of the inheritance right of the heir who failed to fulfil it (Art. 48.1.).

A testator may appoint one or more person(s) as the executor(s) of a will (Art. 60.1.). The appointed executor is not obliged to accept that position and obligation to act in accordance with the testator's provisions (Art. 60.3.)

A testator is authorised to grant pardon for any reason provided for in Art. 125. SA that would make an heir unworthy of inheriting. Valid pardon has to be made in one of forms provided for a will (Art. 126. 2.).

**3.3.1.4. Describe the characteristics of will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a will?**

A will is unilateral, strictly personal and strictly formal and revocable declaration of last will. Only a will declared by testator himself, made in the form prescribed by law and subject to the prerequisites provided for by law is valid. Revocability of the will is direct effect of testamentary freedom. The testator is free to revoke a will at any moment during his lifetime. The right to revoke the will can be neither renounced, nor limited and any provision by which the testator obliges himself to revoke or not to revoke the will is considered null and void (Art. 104). The will may be revoked in any form of manifestation of will, also by conclusive acts (destruction of the will, making a subsequent will, disposing with assets that are the object of testation). The will become irrevocable only if the testator loses his capacity of making judgments and because of that is not capable to validly manifest his will.

The wills are divided into public and private and into ordinary and extraordinary ones. The first classification is based on the form of the wills, the second on the circumstances under which the will is made. Public wills are those in whose making the public authorities took part, private are those made without their participation. Legally authorised persons whose participation in making a public

will are prescribed by SA are a municipal court judge, a municipal court adviser, notary public and consular or diplomatic representative of RH abroad (Art. 32. 2.). Any person with the capacity of making the will can make a valid will in the form of public will. For testator who is not able to or not capable of writing, reading or signing a document, public will is the only possible form of ordinary testation (Art. 32. 1.).

Private wills are holographic will (a will written and signed by the testator's hand, Art. 30.1.), allographic will before witnesses (before two simultaneously present witnesses testator declare that document is his will and signs it and witnesses sign the document, Art. 31.) and oral will (a will made under extraordinary circumstances, Art. 37.-40.). Except of oral will, all mentioned types of wills are ordinary.

**3.3.1.5. Is there a (public) register of wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

The Croatian Register of Wills (CRW) is public register established and administered by the Croatian Chamber of Notaries Public according to the Art. 68. SA. It contains information about facts that a will has been made, deposited or announced (Art. 68.1.). Registration of will is not compulsory and does not have effect to its validity (Art 68.5.). On the testator's request information concerning drawing up, depositing and announcing of his will is submitted for registration by competent courts, notaries public, attorneys-at-law and the persons who made a will (Art. 68.3.) Prior to the testator's death, the data from the CRW are available only to the testator himself or to the person explicitly authorised by him for that purpose (Art. 68.4.). In probate proceedings, the court or a notary public which conduct those proceedings are obliged to request from CRW all data on possible wills of the deceased person (Art. 203.3.). The specific rules concerning registration of wills are laid down in Ordinance on Croatian Register of Wills.<sup>62</sup>

**3.3.2. Succession agreement (*negotia mortis causa*). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.**

In the Croatian law, an agreement on succession is null and void (Art. 102.). It is considered as limitation of the principle of the testamentary disposition. Agreements on future inheritance or legacy and agreements on the contests of will are also null and void (Art. 103.-104.).

Although they are not agreements on succession, very important succession law effects have agreement on the transfer and distribution of property during lifetime (Art. 105.-115. SA) and lifetime maintenance agreement (Art. 579.-585. Law on Obligations).

**3.3.3. Are conditions for validity of wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

Croatian SA governs conditions for validity of wills and other dispositions of property upon death. Conditions for validity of wills are governed in art. 26.-29. SA. According to those provisions, a will is valid if testator has testamentary capacity (Art. 26., see: 3.3.1.2.), declares his will without vitiated consent (Art. 27.-28.) and in form prescribed by law (Art. 29.).

SA prescribes nullity of agreement on succession (Art. 102.), agreement on future inheritance or legacy (Art. 103.) and agreements on the contests of a will (Art. 104.).

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<sup>62</sup> OG 135/03, 164/04.

**3.3.4. Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

The principle of freedom of testamentary dispositions are not absolute, some limitations are set in order to protect interests of certain family members. SA protects two categories of so called forced heirs, whose justified succession interests are expressed as a compulsory portion (legitimate share, reserved share) and cannot be diminished by deceased's dispositions: absolute and relative forced heirs.

The absolute forced heirs are the testator's descendants, adopted children and their descendants, the testator's spouse or extramarital partner, life partner or informal life partner being equal to the spouse (art. 69. 1., art. 55. Same-sex Life Partnership Act). The compulsory portion of an absolute forced heir is one-half of the value of the portion that he would have inherited in the case of intestate succession.

The relative forced heirs are the testator's parents and other ancestors, as well as his adopters (Art. 69. 2.). This category have to meet two additional prerequisites: they must be indigent and permanently incapable for work. The compulsory portion of a relative forced heir is one- third of the value of the portion that he would have inherited in the case of intestate succession.

Forced heirs are entitled to claim compulsory portion only if they are, considering all the principles of intestate succession, entitled to inherit as legal heirs in that specific case (Art. 69. 3.).

The right to compulsory portion does not come into play if potential forced heirs do not request the annulment of dispositions which infringe their portion.

Under the prerequisites prescribed by law, the decedent may disinherit forced heirs. He or she can do it only by an explicit provision in the case where reasons for justifiable exclusion (Art. 85.-87.) or deprivation (Art. 88.) exist.

Reasons for whole or partial exclusion are prescribed in Art. 85:

- a. a more serious violation against the decedent by way of breaking a legal or moral obligation arising out of the family relations with the decedent
- b. a more serious, intentionally committed criminal offence against the decedent, decedent's spouse, child of partner
- c. criminal offence committed against the Republic of Croatia or the values protected by international law
- d. idleness or dishonest life

The testator must explicitly declare his or her wish to exclude an heir, stating the grounds for that. The reason for exclusion must exist at the time of testation.

A forced heir, being the decedent's descendant, can be deprived of the compulsory portion in the favour of heir's descendants. The testator may, only by an express provision, entirely or partially, deprive the forced heir who is heavily indebted or has been a squander at the time of testation as well as at the time of decedent's death, and has an under-aged child or grandchild, or a child of grandchild incapable to work or indigent (Art. 88). The provision on deprivation has to satisfy all the prerequisites for the valid will.

**3.3.5. Cross-border issues.**

**3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?**

The Succession Regulation is applied by the Croatian competent authorities and quite debated especially in the notaries circles,<sup>63</sup> probably as a consequence of the CJEU judgments in *Pula*

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<sup>63</sup> E.g. Milaković, G., pp. 25-33.



*Parking*<sup>64</sup> and *Zufikarpašić*,<sup>65</sup> where the notion of the “court” was interpreted in the context of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation Brussels I bis)<sup>66</sup> and Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims,<sup>67</sup> respectively. Unlike in these cases, in the framework of the Succession Regulation, the notaries in Croatia as considered captured by the notion of the court or other competent authority.<sup>68</sup> There was also some experience with the European Certificate of Succession.<sup>69</sup>

### 3.3.5.2. Are there any problems with the scope of application?

There are no problems yet identified in practice, but judging by the experience in the other Member States such as in the CJEU case of *Kubicka*<sup>70</sup> and *Mahnkopf*,<sup>71</sup> the relationship between different regulations and determining their respective scopes of application *ratione materiae* will occasionally come up as an issue because of the profound differences in substantive laws in civil, family and succession laws.

### 3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country have experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?

It is difficult to assess this in the absence of case law, due to short period of time of the application of the Succession Regulation. However, more abundant case law on habitual residence is developed under the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II bis Regulation),<sup>72</sup> which shows that despite certain confusions, the awareness and understanding on the part of the judges (at least, those deciding family cases) is satisfactory.<sup>73</sup> Despite the fact that determining habitual residence is becoming a routine job for the courts and competent authorities, it is true that, in comparison to the former connecting factors, nationality and domicile, habitual residence will be more time and effort consuming because it entails establishing and assessing all relevant facts of the case.<sup>74</sup> Formerly applicable provision of Art. 71 of the Resolution of Conflict of Laws with the Laws of Other Countries in Specific Relations Act, provided for the exclusive jurisdiction of Croatian court if immovable was located in the territory of Croatia. Therefore, the courts will have to appreciate the fact that this is no longer so. Likewise, because it is a novelty in the Croatian legal system (along with the same provision in the former Maintenance Regulation and later Matrimonial Property Regulation and Registered Partnership Property Regulation), applying the provision on the *forum necessitatis* may prove challenging in the future.

<sup>64</sup> CJEU Judgment of 9 March 2017, *Pula Parking d.o.o. v Sven Klaus Tederahn*, C-551/15, EU:C:2017:193.

<sup>65</sup> CJEU Judgment of 9 March 2017, *Ibrica Zufikarpašić v Slaven Gajer*, C-484/15, EU:C:2017:199.

<sup>66</sup> OJ L 351, 20.12.2012, pp. 1–32.

<sup>67</sup> OJ L 143, 30.4.2004, pp. 15–39.

<sup>68</sup> See Rec. 20 of the Succession Regulation.

<sup>69</sup> See 3.3.5.6. in this report.

<sup>70</sup> CJEU Judgment of 12 October 2017, *proceedings brought by Aleksandra Kubicka*, C-218/16, EU:C:2017:755.

<sup>71</sup> CJEU Judgment of 1 March 2018, *proceedings brought by Doris Margret Lisette Mahnkopf*, C-558/16, EU:C:2018:138.

<sup>72</sup> OJ L 338, 23.12.2003, pp. 1–29.

<sup>73</sup> See examples of Croatian cases in Honorati, C. (ed.).

<sup>74</sup> This is also pointed out by Poretti, P., p. 571.

**3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?**

It is not possible to assess this, due to lack of available case law. However, it is sharply in contrast to the previously applicable connecting factor – nationality of the deceased.<sup>75</sup>

**3.3.5.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?**

It is not possible to assess this, due to lack of available case law.

**3.3.5.6. How is issuing and relying on the European Certificate of Succession operating in your country?**

The topic of ECS is very much in the focus of not only courts, but also notaries, which in the succession matters act as the courts' trustees and are competent to issue the ESC.<sup>76</sup> A landmark case concerns the proceedings for registration of the ownership right over the Croatian real estate into the Croatian Land Registry to the name of the Italian national, based on the ECS made by an Italian notary – in the Italian succession proceedings pursuant to Italian law. The Croatian notary made the Records on establishing the facts pursuant to Article 90 of the Notaries Act,<sup>77</sup> in which he confirmed all the facts and described the course of the proceedings before the Italian notary prior to issuing the ECS, and added the power of attorney and the application for registration of the ownership right, all officially translated to Croatian. Based on this the Croatian court entered the registration as applied for. This was considered an innovative approach receiving an award by the European professional association of notaries, because the Records on establishing the facts has been used as a “bridge” connecting the ECS issues in a foreign Member State to the Croatian Land Registry.<sup>78</sup> Some notaries have expressed the need for the Register on the ESCs to improve legal certainty.<sup>79</sup>

**3.3.5.7. Are there any national rules on international jurisdiction and applicable (besides the Succession Regulation) concerning the succession in your country?**

No, the PIL Act only contains three provisions concerning the succession matters which refer to other legal sources. Art. 29 contains the general rule that the law applicable to succession is to be determined by applying the Succession Regulation. In addition, Art. 30 provides that the form of a will is governed by the law determined according to the 1961 Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions. Finally, Art. 54 states that jurisdiction of the court or other competent authority to carry on the succession proceedings or dispute or proceedings

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<sup>75</sup> See Art. 30 of the Resolution of Conflict of Laws with the Laws of Other Countries in Specific Relations Act.

<sup>76</sup> Art. 6(1) of the Act Implementing the Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (*Zakon o provedbi Uredbe (EU) br. 650/2012 Europskog Parlamenta i Vijeća od 4. srpnja 2012. o nadležnosti, mjerodavnom pravu, priznavanju i izvršavanju odluka i prihvaćanju i izvršavanju javnih isprava u nasljednim stvarima i o uspostavi europske potvrde o nasljeđivanju*), NN 152/14, in force as of 17 August 2015. On ECS see e.g. Hoško, T., Bolonja, B., pp. 13-22.

<sup>77</sup> NN 78/93, 29/94, 162/98, 16/07, 75/09 and 120/16.

<sup>78</sup> Krajcar, D., p. 104.

<sup>79</sup> Košir Skračič, R., Vodopija Čengić, Lj., p. 103.

related to claims against the estate is determined according to the Succession Regulation. There is also a relevant rule in Art. 14 about the legal capacity.<sup>80</sup>

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<sup>80</sup> On the succession in PIL see e.g. Ratković, T., pp. 8-32.

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## Cyprus

Anna Plevri

### 1. Social perspective.

- 1.2. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without *affectio maritalis*).
- 1.3. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.
- 1.4. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.
- 1.5. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).

#### Answer to questions 1.1.-1.4.

In Cyprus the presiding model of families is that of nuclear families and multigenerational families and this is in accordance with the “traditional” type of living lifestyle and family formation. In this framework, the marital status of half of the population in Cyprus is “married”.

Of course after 2015, when the institution of civil union/civil partnership between couples of opposite or same sex, was permitted by law in Cyprus there are now 567 couples who are under registered civil partnership but this is obviously just a very small percentage of the population. More specifically, according to the official data from local District Administrations in Cyprus, (as reported by the press) from year 2015, when the relevant legislation was implemented, 467 heterosexual couples and 100 homosexual couples have chosen civil partnership [Nicosia, 242 (198 heterosexual couples and 44) homosexual couples), Limassol 179 (151 heterosexual couples and 28 homosexual couples). Ammohostos (free part) 52 (50 heterosexual couples and 2 homosexual couples), Paphos 48 (35 heterosexual couples and 13 homosexual couples) and Larnaca 46 (33 heterosexual couples and 13 homosexual couples)<sup>1</sup>. In addition, marriages between Cypriot citizens and citizens of other (mostly non European) countries are not rare.

Lastly, there are no official statistics regarding non-marital cohabitation or regarding marriages where spouses have moved abroad.

Moreover, according to information available on the website of Cypriot Statistical Authority<sup>2</sup> based on the results of the latest census (2011), the resident population of Cyprus is 840.407, of which 408.780 male (48,6%) and 431.627 female (51,4%)<sup>3</sup>.

<sup>1</sup> Source: <http://www.philenews.com/koinonia/eidiseis/article/656591/posa-zevgria-epelexan-to-symfono-symbiosis?fbclid=IwAR1quAztLi3WY2Zg35QsNnUbjFqe6syoICzq0vG476IV7EXJzFveVmZJcNc>, (data of 15.02.2019 in Greek) (3.5.2019).

<sup>2</sup> [www.cystat.gov.cy](http://www.cystat.gov.cy) (30.3.2019).

<sup>3</sup> The Statistical Service of the Republic of Cyprus has estimated, that by the end of 2006 the population of Cyprus was 867.600, out of which 660.600 (76.1%) belonged to the Greek community, while 88.900 (10.2%) belonged to the Turkish Community, see Emilianides, C. A., 2018, 17, footnote 2.

Among them, 667.398 of people (79,4%) have Cypriot citizenship, 106.270 (12,6%) have citizenship of other EU countries, 64.113 (7,6%) are citizens of other countries and 2.626 (0,3%) people have no specified citizenship.

Moreover, 58,2% of Cyprus's population is legally married (married, under register partnership, separated), while 41,0% of the population of the country is single, with single males (at 21,7% of total population) being significantly more numerous than single females.

Resident population by marital status	
Total	840.407 <sup>4</sup> (667.398 =79.41% Cypriots, 106.270 = 12.64% European citizens and 64.113 = 7,62% third country nationals)
Married	420.172
Single	344.931
Widowed	37.405
Divorced	31.792
Not specified	6.107

Family formations		
		Population
Nuclear families	Married couples without children	144.212
	Married couples with at least 1 child under 25 y.o.	422.250
	Married couples with the youngest child over 25 y.o.	49.908
	Couples living together without children	18.788
	Couples living together with at least 1 child under 25 y.o.	10.694
	Couples living together with the youngest child over 25 y.o.	466
	Single father with at least 1 child under 25 y.o.	4.249
	Single father with the youngest child over 25 y.o.	2.326
	Single mother with at least 1 child under 25 y.o.	37.066
	Single mother with the youngest child over 25 y.o.	13.123
Extended families	Single-person household - man	27.743
	Single-person household - woman	35.219
	Household with two or more persons	32.063
	Household with two or more families	38.459

## 2. Family law

### 2.1. General.

#### 2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?

Sources of Family Law (hereinafter "FL"):

1. The 1960 Constitution of Cyprus is a major source of Cypriot FL and safeguards the fundamental rights of respect of private and family life and right to marry and found a family (articles 15 and 22<sup>5</sup>). No law or administrative act may be inconsistent or contrary to the Constitution. Since the Fifth

<sup>4</sup> It is estimated that approximately 82% of the total current population of Cyprus are Orthodox Christians, see Emilianides, C. A., 2018, 17, footnote 2.

<sup>5</sup> Article 22 of the Cypriot Constitution corresponds to article 12 of ECHR. The right to marry according to article 22 is exercised in accordance with the applicable law for each person in accordance with the constitutional provisions.

Amendment of the Constitution in 2006, EU Law is considered as an integral part of the Constitution, therefore, no provision of the Constitution may invalidate the law of the EU. It should be noted that the EU law is acknowledged as an intra-constitutional principle and not as a supra-constitutional principle.

Article 111 of the Constitution applies with respect to marriages between members of the Greek Orthodox Church or the three religious groups while marriages between members of the Turkish community are governed by the constitutional provisions establishing the Turkish Communal Chamber. Article 111 of the Constitution is of extreme importance, since it also governs the grounds for divorce applying to marriages of members of the Greek Orthodox Church, the establishment and composition of the Family Courts and the Appellate Family Courts, as well as the attempt to compromise (conciliation) and the spiritual dissolution of the marriage and the choice of civil marriage for members of the Greek Community<sup>6</sup>.

Moreover, article 22 § 3 of the Constitution and article of law on marriage (104 (I)/2003) provide a (legal) definition of (civil and religious) marriage which can be established/exist only between women and men, namely not between persons of the same sex. Article 22 § 2 of the Constitution governs the applicable law in case of mixed marriages<sup>7</sup>.

EU Regulations, which have constitutional status, apply directly in the Republic of Cyprus. The most important of such instruments with respect to FL are: Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility (Brussels IIa) and Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions, and cooperation in matters relating to maintenance obligations<sup>8</sup>.

2. In Cyprus there is no Civil Code. Cyprus<sup>9</sup> is a state with a mixed/hybrid legal system<sup>10</sup> and not a pure common law jurisdiction. Under Cypriot law, the main source of substantive FL are various laws. Nearly all legislation relevant to FL was enacted following the 1989 constitutional amendment and reflects changing social structures and policy in the regulation of FL affairs<sup>11</sup>.

More specifically, the corpus of FL legislation in Cyprus includes:

- a) Section 22 of the Courts of Justice Law 14/1960, which provides for the limited jurisdiction of the President of the District Court to hear family law disputes (*last amendment 2017*)
- b) Family Courts Law 23/1990 (mostly procedural provisions) (*last amendment 2009*)
- c) Family Court Procedural Regulation of 1990
- d) Family Court (Religious Groups) Procedural Regulation of 1995
- e) Relationship between parents and children Law 216/1990<sup>12</sup>(*last amendment 2008*). In section 2 of this law, there is definition of "child" which is here a person who is under 18 years old. A person though who is under 18 years old but is married is not considered a child according to this law

<sup>6</sup> Emilianides, C. A., 2018, 29.

<sup>7</sup> See Sergides, G., 1988.

<sup>8</sup> Emilianides, C. A., 2018, 29-30.

<sup>9</sup> "The Republic of Cyprus was established as an independent and sovereign republic on August 1960, when in Constitution come into force and the British sovereignty over Cyprus, as a crown colony, ceased. On 20 July 1974 the Republic of Turkey, one of the guarantor powers of the independence, sovereignty and territorial integrity of Cyprus, invaded the country with its armed forces and occupied the northern part of the country. As a result of the occupation, the Greeks and the other Christians of the northern region became displaced persons, having fled to the southern part of the island. In addition to that, the Muslim Turks of the southern part of the island were induced to relocate to the north. The area occupied by Turkey amounts to 36.4% of the territory of the Republic of Cyprus. The Turkish occupation in Cyprus continues to the present day, and therefore, the Republic of Cyprus is prevented from exercising its powers over the occupied territory", Emilianides, C. A., 2018, 17, § 1.

<sup>10</sup> See Nikitas, E. H., 2013, 1.

<sup>11</sup> Emilianides, C. A., 2018, 30.

<sup>12</sup> See in detail Emilianides, C. A., 2018, 131-144.

- f) Law on attempt to compromise/conciliation and spiritual dissolution of marriage, 22/1990<sup>13</sup> which governs marriage and divorce (*last amendment 1995*). In section 2 of this law, there is definition of "marriage" which is here "*a marriage which has been conducted in accordance with the religious norms of the Greek Orthodox Church*"
- g) Children (Kinship and Legal Substance) Law 187/1991 (*last amendment 2008*)
- h) Matrimonial property of spouses Law 232/1991<sup>14</sup> on the maintenance and matrimonial property of the spouses in case of separation or divorce (*last amendment 2008*). In section 2 of this law, there is definition of "*relationship of spouses*" which is defined as a relationship between a man and a women founded as a result of a marriage which is recognised by the State
- i) Family Courts (Religious Group) Law 87 (I)/1994 set out the jurisdiction, composition and applicable law of the Family Courts and the Family Courts of the Religious Groups respectively (*last amendment 2009*). Article 2 (b) of Law 87 (I)/1994, as amended by Law 38 (I)/1996, provides for the jurisdiction of the Family Courts of Religious Groups to hear applications for the dissolution of religious marriages which have been celebrated in accordance with the tenets and rules of a religious group, regardless of whether such marriages are mixed or not<sup>15</sup>.
- j) Adoption Law 19/(I)1995<sup>16</sup> (*no amendments*) and Adoption Procedural Regulations of 1954
- k) Marriage Law 104 (I)/2003 (*last amendment 2017*).
- l) Law 120 (I)/2003 for the application of the Marriage Law of 2003 to members of the Turkish Community<sup>17</sup> (Temporary Provisions) (*no amendments*)
- m) Marriage of members of the Old Calendar Law 60 (I)/1994 (*no amendments*)
- n) Articles 83-90 of the 2010 Charter of the Greek Orthodox Church, which provides on the issues of the establishment and validity of marriage and grounds for divorce and dissolution of marriage
- o) Law on the establishment of civil union/partnership/cohabitation between couples of opposite or same sex 184 (I)/2015<sup>18</sup> (*no amendments*). In section 2 of this law, there are definitions of "*partner*" namely a person who is related by civil union with another person and "*child*" which is defined here too a person who is under 18 years old. A person though who is under 18 years old but is married is not considered a child according to this law too. The establishment of civil union between couples of same sex was a social need and demand of the above couples for many years in Cyprus<sup>19</sup>, so these couples were included in the application scope of law 184 (I)/2015. Under Cypriot law, in case of marriage and divorce, maintenance of the other spouse is governed by sections 3-12 of the matrimonial property of the spouses law 232/1991. Identical provisions apply to the civil partners pursuant to section 23-32 of the Civil Union Law 184 (I)/2015<sup>20</sup>.
- p) Law on the application of medical assisted reproduction 69(I)/2015<sup>21</sup> (*last amendment 2018*)
- q) The latest development in the field of FL in Cyprus is law 62 (I)/2019<sup>22</sup> on mediation in family disputes. This law contains various definitions. Among them reference is to be made to the term

<sup>13</sup> See in detail Emilianides, C. A., 2018, 103-106.

<sup>14</sup> See in detail Emilianides, C. A., 2018, 145-160.

<sup>15</sup> Emilianides, C. A., 2018, 39 § 56.

<sup>16</sup> See in detail Emilianides, C. A., 2018, 124-130.

<sup>17</sup> See also article 2 of the Turkish Family Courts Law, Cap.338.

<sup>18</sup> See in detail Emilianides, C. A., 2018, 112-114.

<sup>19</sup> The establishment of civil marriage for couples of the same sex in Cyprus was also a demand on behalf of these people. It has to be noted that in the USA, gay marriage is considered a constitutional right as stated in the decision of the Supreme Court of the USA in *Obergefell et. al. v. Hodges* (2015), available at: [https://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf) (4.5.2019). First line of the above decision states: "*The 14th Amendment requires a State to licence a marriage between two people of the same sex and to regognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State*".

<sup>20</sup> See Emilianides, C. A., 2018, 146, § 318.-

<sup>21</sup> See in detail Emilianides, C. A., 2018, 115-123.



“child” which in the framework of this law means a person under 18 years old and to the term “family dispute” which means a dispute related with the institution of family and includes among others, disputes in relation with custody (parental care) of children, child support (maintenance), support of spouse (maintenance) or partners, property relationships of spouses or partners but it does not include disputes regarding assignment or removal of parental care.

- r) **Treaties:** Cyprus has ratified several relevant international treaties. Main treaties with respect to Cypriot FL are the Convention on the Civil Aspects of International Child Abduction (Ratification) Law 11(III)/1994, the Convention on the Legal Status of Children born out of Wedlock (Ratification) Law 50/1979, the Convention on the Rights of the Child (Ratification) Law 5 (III)/2000, the European Convention on the Exercise of Children’s Rights (Ratification) Law 23 (III)/2005, the Convention on the Recovery Abroad of Maintenance (Ratification) Law 50/1978, the Convention on Protection of Children and Cooperation in respect of Intercountry Adoption (Ratification) Law 26(III)/1994, the Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriage (Ratification) Law 16(III)/2002<sup>23</sup> and the Istanbul Convention of the Council of Europe on the prevention and fight against domestic violence and violence against women (Ratification) Law 14 (III)/2017<sup>24</sup>. Of importance for both FL and SL is the ECHR which was ratified in the internal legal order by the European Convention for the Protection of Human Rights (Ratification) Law 39/1962,

**3. Jurisprudence (Case Law):** The principles of common law and equity apply in the Republic of Cyprus. Previous decisions of the Supreme Court are binding for lower courts. That is why case law is of great significance with regard to interpretation of legal provisions. Decisions of Courts of First Instance act purely as guidelines and they are not binding to other courts. Decisions of the British Courts have also a guiding role according to article 29 of the Courts of Justice Law 14/1960, as long as there is no contrary jurisprudence or legislative provision. It is noted, that previous case law (in general) is only binding so far as a subsequent law with different content has not been enacted. *“Having a substantially codified legal system, Cyprus applies common law principles where there is no Cypriot legislation in force and insofar as existing Cypriot legislation is not contradicted”*<sup>25</sup>.

#### 4. Principles of equity

##### 2.1.2. Provide a short description of the main historical developments in FL in your country.

Historical background of FL and Succession Law:

**Roman and Byzantine Era:** Cyprus remained for more than eight and a half centuries between 325 and 119, a province of the Byzantine Empire. Thus, Christianity was the State religion of the island, similarly to other parts of the Byzantine Empire. The ecclesiastical courts of the Orthodox Church applied Byzantine law and had competences over religious matters and matters of personal status, including family and succession law matters<sup>26</sup>.

**Frankish and Ottoman Rules:** The ecclesiastical courts of the Greek Orthodox Church applied, with respect to the family and succession law affairs of members of the Orthodox Church, the so called Hellenic law of Cyprus, which essentially consisted of a codification of Byzantine law. The period of Ottoman rule lasted for more than 300 years, from 1571 until 1878 and marked the first appearance of adherents of the Islamic faith in Cyprus. The Sheri law, namely the interpretation of the Qurani law, was not only the personal law of the Muslims of Cyprus, but also the State law, thus replacing the law of the Assizes which has been the State law during the period of Frankish and Venetian rule.

<sup>22</sup> 25th of April 2019.

<sup>23</sup> Emilianides, C. A., 2018, 31.

<sup>24</sup> See in detail, Plevri, A., 2017, 1005-1027.

<sup>25</sup> Emilianides, C. A., 2018, 33.

<sup>26</sup> Emilianides, C. A., 2018, 18-19.

The ecclesiastical courts of the Greek Orthodox Church continued to be the only competent courts with regard to the family relations of their members and continued to apply the Byzantine law<sup>27</sup>.

**British Rule**<sup>28</sup>: The system in this period could be characterized as post-Millet, in the sense that the right of all religious communities, either Muslim or non-Muslim, to administer their religious and family affairs without any State intervention, was recognized. The application of the canon law of the Orthodox Church, with respect to the adjudication of the family law disputes of its members, was also recognized and confirmed by the Administration of Justice Law 38/1935. With respect to succession law of Christians and non-Muslims, the Wills and Succession Law 20/1895 was enacted. Such law remained in force until 1946 when the current Wills and Succession Law was enacted and governed the succession of non-Muslims. Law 20/1895 constituted a curious mixture of elements, not only from English and Ottoman law but also from the Italian Civil Code and consequently the Roman law<sup>29</sup>.

**Independence**: The 1960 Constitution of the Republic of Cyprus provides that Cyprus is a unitary State, comprised of two communities: (1) The Greek community and (2) the Turkish community. According to article 110 § 1 of the Constitution, the Autocephalous Greek Orthodox Church shall continue to have the exclusive right of regulating and administering its own internal affairs and property in accordance with the Holy Canons and its Charter in force for the time being<sup>30</sup>. The same right is accorded to the Islamic religion through the Muslim religious institutions, and to the three constitutionally recognized religious groups. All three religious groups (Maronites, Armenians and Roman Catholics) opted to belong to the Greek Community<sup>31</sup>.

**The 1989 Constitutional Amendment**: The need to adjust all matters relating to personal institutions to the commitments of the Republic of Cyprus towards international conventions led to First Amendment of the Constitution (Law 95/1989), which amended article 111. The First Amendment was held to be constitutional on the basis of the Cypriot doctrine of necessity. According to the provisions of law 95/1989: (i) All matters relating to divorce, judicial separation or restitution of conjugal rights or to family relations of the member of the Orthodox Church came under the jurisdiction of a Family Court. In divorce cases the court is composed of the three members. (ii) All matters relating to divorce, judicial separation or restitution of conjugal rights or to family relations of the members of the three religious groups, came under the jurisdiction of the Family Court of the religious groups, which eventually came into force with law 87/1994. (iii) The Constitution specifically provides for grounds for divorce. The ground of irretrievable breakdown rendering the marital relationship intolerable for the claimant is introduced, while the grounds of divorce, mentioned in the Charter remain in force. The House of Representatives may establish with law any other grounds for divorce: such new grounds for divorce were eventually established with the promulgation of law 46 (I)/1999 and then law 104 (I)/2003. (iv) All members of the Greek Community, including members of the Greek Orthodox Church or the three religious groups may choose to perform a civil marriage. This became possible after the promulgation of law 21/1990, which established a dual regime of civil and religious marriage and subsequently law 104(I)/2003. (v) Matters relating to betrothal, marriage and nullity of marriage continue to be governed by the law of the Greek Orthodox Church or the Church of the corresponding religious group as the case may be<sup>32</sup>. After the 1989 amendment of the Constitution, Cypriot FL has been modernized and its religious character might be said to have diminished. However, the Church membership of the parties remains an important criterion for the division of people for the purposes of family law. Church membership is important not only with respect to the application of the provisions of article 11 of the Constitution but also with respect to

<sup>27</sup> Emilianides, C. A., 2018, 19-20.

<sup>28</sup> With the signing of the Convention of Defence Alliance on 4 June 1878 in Constantinople, the period of British rule in Cyprus officially began.

<sup>29</sup> Emilianides, C. A., 2018, 21-23.

<sup>30</sup> For Article 110 of the Constitution see Emilianides, C. A., 2014.

<sup>31</sup> Emilianides, C. A., 2018, 23-24.

<sup>32</sup> Emilianides, C. A., 2018, 26-27.

the interpretation of the Cypriot law of marriage and divorce. Thus, family matters of members of the Greek Orthodox Church or of the three religious groups continue to be treated specifically in article 111 of the Constitution, despite the fact that the competence with respect to such family matters now belongs to the (State) Family Courts and not to the (religious) ecclesiastical court<sup>33</sup>.

### 2.1.3. What are the general principles of FL in your country?

General (core) principles of FL in Cyprus are:

- a) Mandatory character of most provisions of FL which cannot be undermined by private agreements signed between the parties nature, namely those provisions prevail any contrary private will of a person. Private will of parties may prevail in some cases of matrimonial property disputes<sup>34</sup>,
- b) Principle of equality between spouses<sup>35</sup>, which is constitutionally established,
- c) Mutual obligation of spouses and registered partners to collaborate in the interest of the family,
- d) Obligation of maintenance and assistance between the members of the family and duty to take into account and protect the best interest of the child as regards upbringing issues,
- e) Freedom to marry, which is also constitutionally established,
- f) Principle of monogamy.

### 2.1.4. Define “family” and “family member” in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?

The Cypriot Constitution and the Cypriot law in general does not include a specific provision giving a single definition of the terms “family” and “family member” for the entire legal system. The term “family” is considered an indefinite legal concept, specified in the context of the application of FL law rules. This lack of specific legislative provision reflects the reluctance of the legislator to provide for a binding definition of an institution that, out of its nature, is necessarily affected by the social variations evolving over time. In section 2 of the matrimonial property of spouses Law 232/1991,<sup>36</sup> there is definition of “relationship of spouses” which is defined as a relationship between a man and a women founded as a result of a marriage which is recognised by the State.

Article 22 of the Constitution does not define “marriage”. Marriage is however defined in section 3 § 1 of the Marriage Law 104 (I)/2003, as the agreement between a man and a woman to unite in marriage which is celebrated by a Registrar in accordance with the provisions of this law or by a registered priest in accordance with the rites of the Greek Orthodox Church or the doctrines of the three religious groups recognized by the Constitution.<sup>37</sup>

### 2.1.5. Family formations.

#### 2.1.5.1. Define the “spouse” in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?

A spouse is the person who has entered into marriage (religious and/or civil) recognised by the State with another person of the opposite sex (according to section 2 of the matrimonial property of spouses Law 232/1991<sup>38</sup>. The substantive requirements for a valid marriage<sup>39</sup> are:

<sup>33</sup> Emilianides, C. A., 2018, 27-28.

<sup>34</sup> See *Kozaki v. Kozaki* ( 2002) Supreme Court Judgement 1710.

<sup>35</sup> Also between parents and between children.

<sup>36</sup> See in detail Emilianides, C. A., 2018, 145-160

<sup>37</sup> Emilianides, C. A., 2018, 63.

<sup>38</sup> See in detail Emilianides, C. A., 2018, 145-160.

- a) sex difference; a marriage may only be celebrated between an man and a woman<sup>40</sup>
- b) marriageable age, which is set at 18 years. However, in accordance with section 15 of Law 104 (I)/2003, a person might be allowed to celebrate a marriage even if he/she is below 18 years of age, provided that he/she is over 16 years of age, there is an important ground (e.g. pregnancy) and the persons having parental responsibility consent in writing, or there is a relevant judgment on waiving of this requirement by a competent Family Court<sup>41</sup>
- c) free will/consent, i.e. future spouses must agree by a simultaneous personal unconditional declaration
- d) capacity of understanding and appreciating act of marriage, i.e. persons who are incapable due to mental disorder or intoxication, or brain injury r other illness, are not capable to celebrate a marriage<sup>42</sup>
- e) absence of a pre-existing civil or religious marriage which has not been dissolved<sup>43</sup>
- d) absence of relationship between the future spouses either in blood or from affinity. A marriage between parties related up to fifth degree in blood, or third degree in affinity is prohibited<sup>44</sup>.
- e) absence of adoption, i.e. marriage between an adoptive parents and their kin with the adopted child are prohibited<sup>45</sup>.

**2.1.5.2. What types of relationships/unions between persons are recognised in FL of your country? In particular, formal (registered) and informal (de facto) unions, heterosexual and same-sex unions, unions with and without *affectio maritalis*. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

Three types of relationships can me distinguished and are regulated in the Cypriot legal order:

- a) Civil and religious marriage between a man and a woman
- b) Civil union between heterosexual or same-sex couples according to the Civil Union Law 184(I)/2015<sup>46</sup>. As mentioned before, until recently there was no legislation governing civil partnership since Cypriot FL referred exclusively to married couples. The right to celebrate a civil union instead of a marriage was eventually recognized by the enactment of the Civil Union Law 184(I)/2015. The right to a civil union or partnership is recognized not only for heterosexuals but also for homosexual couples. A civil union has the same legal validity and consequences as if a marriage, either religious or civil has been celebrated<sup>47</sup>, with the exception of the right to adoption which is precluded as it was deemed to be highly controversial<sup>48</sup>. It should be noted, though, that the ECtHR has already recognized the right of adoption to single homosexual parents<sup>49</sup>. Having said that, its exception from the ambit of Law 184 (I)/2015 might well be inconsistent with the principle of non-discrimination. A civil union presupposes the free consent of the intended partners. This is not deemed to exist, by

<sup>39</sup> See Marriage Law 104 (I)/2003, Emilianides, C. A., 2018, 77-87 and regarding capacity to marry in accordance with the Charter of the Orthodox Church, 80-81.

<sup>40</sup> Emilianides, C. A., 2018, 77-79.

<sup>41</sup> Emilianides, C. A., 2018, 79 § 148.

<sup>42</sup> Emilianides, C. A., 2018, 79 § 147.

<sup>43</sup> Bigamy is a criminal offence in accordance with section 179 of the Criminal Code, Cap.154 which provides that any person performing bigamy is subject to a five-year imprisonment.

<sup>44</sup> Emilianides, C. A., 2018, 79 § 149.

<sup>45</sup> Emilianides, C. A., 2018, 79-80 § 149.

<sup>46</sup> See in detail Emilianides, C. A., 2018, 112-114.

<sup>47</sup> See Emilianides, C. A., 2018, 112 § 231, Tryfonidou A., 2017, 183-213. See also *V.v. Greece*, Judgment of 7 November 2013· *O. v. Italy*, Judgment of 9 July 2016.

<sup>48</sup> Emilianides, C. A., 2018, 112 § 231.

<sup>49</sup> *E.B. v. France*, Judgment of 22 January 2008.

virtue of section 5 of Law 184(I)/2015, if any of the partners lack the capacity to conclude a civil union, i.e., if they have not completed 18 years of age, or if they are incapable of understanding and assessing the consequences of their actions due to a mental disorder or unsoundness of mind or due to a brain or other disease or illness or intoxication<sup>50</sup>.

Persons intending to conclude a civil union should, by virtue of section 6 of Law 184 (I)/2015, appear in person before the Registrar (i.e. the District Commissioner) of the district either of them resides or if neither of them resides in the Republic, of a district of their choice, and submit completed and signed the Civil Union Form of Table I of Law 184(I)/2015<sup>51</sup>.

- c) Informal (de facto) partnership/free unions/cohabitation are not rare in Cyprus but they remain unregulated by law. Furthermore, whereas until a few years ago cohabitation without marriage was negligible in Cyprus, in recent years the number of persons who cohabit without marriage has increased. Where there is no law governing cohabitation without marriage in Cyprus<sup>52</sup>, it is accepted that the law of equity concerning constructive trusts applies to cohabitants<sup>53</sup>. *‘There is further no record of cohabitation rates, although it can be presumed that their number is significantly less compared to married couples<sup>54</sup>’*.

There is no single definition of civil union valid for the entire legal system.

#### 2.1.6. What legal effects are attached to different family formations referred to in question 2.5.?

Marriage establishes a reciprocal obligation of cohabitation for both spouses. Decisions concerning family life are taken by mutual consent. The spouses have a mutual obligation to maintain each other in accordance with section 3 of Law 232/1991. Each spouse is bound to contribute according to his/her means. Such means includes not only the actual income of spouses but also their total income potential<sup>55</sup>. In principle, the family name of each spouse does not change after marriage. Each spouse may use (in social life) the surname of the other spouse’s or add the other spouse’s surname to his own

The provisions concerning the legal effects of marriage apply to both personal and non-personal relationships, including the right of succession, of registered partners in a civil union. As stated above, a civil union has the same legal validity and consequences as if a marriage, either religious or civil has been celebrated, with the exception of the right to adoption. Moreover, in section 3 of Law 232/1991 is provided that the spouses have, proportionally to their means, a mutual obligation for maintenance. The same obligation exists for civil partners pursuant to section 23 of Law 184(I)/2015. In the same framework, maintenance of other spouse is governed by sections 3-12 of the Matrimonial Property of the Spouses Law 232/91. Identical provisions apply to the civil partners pursuant to sections 23-32 of the Civil Union Law 184 (I)/2015<sup>56</sup>.

<sup>50</sup> Emilianides, C. A., 2018, 112 § 232.

<sup>51</sup> Emilianides, C. A., 2018, 112 § 233.

<sup>52</sup> Emilianides, C. A., Shaelou, S. L., 2015, § 145.

<sup>53</sup> See in detail, Emilianides, C. A., 2018, 114 § 236, *Clerides v. Stavrides* [1998] 1 CLR 521 (in Greek).

<sup>54</sup> Emilianides, C. A., Shaelou, S. L., 2015, § 145.

<sup>55</sup> Emilianides, C. A., 2018, 146 § 318.

<sup>56</sup> Emilianides, C. A., 2018, 146 § 318.

**2.1.7. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/de facto family formations? Explain briefly.**

Yes, currently, there 7 bills (drafts of laws) of the Ministry of Justice are on hold, pending for approval by the House of Representatives of Cyprus. The topics of these official proposals for the reform and modernization of FL in Cyprus<sup>57</sup> are the following:

- a) Modernization of Article 111 of the Constitution and of issues regarding marriage and its validity
- b) Establishment and regulation of divorce by consent
- c) Abolishment in cases where there is an irretrievable marital breakdown due to domestic violence of the current (pretrial) compulsory process of disclosure to the Bishop by one spouse of his/her intention for divorce (in cases of religious weddings celebrated under the rules of Orthodox Church)
- d) Reduction of the years needed for the establishment of the ground of legal separation (as a ground for divorce) from 3 years of separation (current provision) to 2 years
- e) Enhance of prevention and combat of domestic violence, effective protection of children and improvement of relationships between parents and children by establishing intervention and assistance of experts (in cases required) and consultation services
- f) Conducting civil marriages to appropriate and suitable venues other than the Town Hall
- g) Amendment of certain provisions regarding null marriages.

**2.2. Property relations.**

**2.2.1. List different family property regimes in your country.**

Section 2 of the Contract Law, Cap. 149 provided that dower is the property given from one of the spouses or future spouses, or from a third party, to the other spouse or future spouse, in consideration for the performance of the marriage. Following, however, the enactment of section 3 of Law 22 (I)/1995 any contracts for dower performed after Law 22 (I)/1995 was enacted, are null and void. Marriage settlements in the sense of prenuptial agreements between the spouses are not valid, or at least not binding under Cypriot law<sup>58</sup>. The same is true with respect to any agreements for the future settlement of the matrimonial property which were concluded between the spouses after the marriage was celebrated, but prior to separation. It is only after the spouses have separated that the claim for contribution to the increase of the matrimonial property provided in section 14 of Law 232/1991 may be enforced and thus, any marriage settlements or agreements for the distribution of the matrimonial property which were concluded prior to the separation of the spouses, is not binding upon the parties and shall be disregarded by the Family Court. This is because the provisions of Law 232/1991 are of a mandatory character and cannot be undermined by private agreements signed between the parties (presumably under duress) which either restrict or exclude the right safeguarded under section 14 of Law 232/1991. Consequently, marriage settlements may only be concluded after the parties have separated and not before<sup>59</sup>.

Spouses and civil partners' property independence. Section 13 of Law 232/1991 provides that marriage does not affect the proprietary independence of the spouse. The same provision is provided in section 33 of the Civil Union Law 184 (I)/2015. Each spouse retains and acquires his/her own property even after the marriage is celebrated. The spouses may acquire joint property. However, each spouse shall in such a case have an undivided share in such property. If the marriage

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<sup>57</sup> The author of this report had the chance to contribute in an effective way to the preparation of these official proposals for the reform of FL in Cyprus, as a member of the Academic Committee for the reform of Cypriot FL.

<sup>58</sup> Emilianides, C. A., 2018, 152 § 331.

<sup>59</sup> Emilianides, C. A., 2018, 152 § 331.

is annulled or dissolved, or if the parties have been separated, then either party may claim his/her contribution to the increase of the property of other spouse. In particular section 14 of Law 232/1991 provides that if the property of either spouse has increased during the duration of the marriage and the other spouse has contributed to such increase, then the other spouse may file at matrimonial property petition before the Court and claim the part of the property which has been increased due his/her contribution<sup>60</sup>. Such contribution is rebuttably presumed at one-third of the increase, unless it is proven to be greater or smaller. If the spouses have acquired property from donations, inheritance, legacies or other *ex gratia* cause, this is not taken into account when calculating whether there has been increase of the property of the spouses<sup>61</sup>. It is notable that provisions of Law 232/1991 related to contribution are replicated in sections 34-42 of the Civil Union Law 184 (I)/2015 with regards to civil partners. Additionally, section 14 of Law 232/1991 applies only with respect to persons who were spouses and have either divorced or separated or their marriage has been annulled. Section 14 does not apply to persons who were engaged, or were living in a free union, or otherwise never married. The Family Court has exclusive jurisdiction regarding claims between the spouses for property acquired by them during the duration of their marriage. Section 15 (a) of Law 232/1991 stipulates that the claim for contribution is further subject to a three-year limitation period. So, any petition has to be filed within three years from the dissolution or annulment of the marriage. It is important to underline that the claim pursuant to section 14 is in principle a contractual right and not a right in rem<sup>62</sup>. Consequently, the beneficiary spouse may claim and be awarded monetary compensation for his/her contribution to the increase of property of the other spouse, irrespective of whether such property is movable or immovable. In any case, by virtue of section 14E of Law 232/1991 the Family Court may order the transfer of any property of the defendant to the claimant's compensation<sup>63</sup>.

**2.2.2. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?**

See answer to question 2.2.1.

**2.2.3. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a “new regime just for them”?**

See answer to question 2.2.1. The spouses can not create a “new regime just for them”.

<sup>60</sup> Emilianides, C. A., 2018, 153 § 332.

<sup>61</sup> See in detail analysis of section 14 of Law 232/1991 in Emilianides, C. A., 2018, 153-157.

<sup>62</sup> According to Cypriot case law too.

<sup>63</sup> In order to determine whether the property of the other spouse has increased or not, the crucial time is the time of separation of the spouses. It is therefore essential that the Court decides on the basis of evidence presented before it, when the spouses have separated as a matter of fact. It is the increase of property and not the property by itself that is the subject of a matrimonial property petition in accordance with section 14 of Law 232/1991. Determining the precise time when the spouses were separated is thus of extreme significance in order to determine the contribution, see Emilianides, C. A., 2018, 155 § 335-336.

**2.2.4. Explain briefly the rules on the administration of family property and compare if there are difference for different property regimes.**

See answers to question 2.2.1.

**2.2.5. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

See answer to question 2.2.1. There is no public register.

**2.2.6. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

See answer to question 2.2.1. Each spouse retains, acquires and manages freely his/her own property even after the marriage is celebrated. Accordingly each spouse is liable towards his own creditors. The spouses may acquire joint property. However, each spouse shall in such a case have an undivided share in such property.

**2.2.7. Describe allocation and division of property in case of divorce, separation or dissolution of the union.**

See answer to question 2.2.1.

**2.2.8. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?**

See answer to question 2.2.1. There are no special rules concerning property relationships between spouses and civil partners with reference to their culture, tradition, religion or other characteristics.

**2.3. Cross-border issues.**

Before embarking to particular answers a general remark is necessary. To the best of my knowledge it can be noticed that only rarely do Cypriot lawyers refer to the EU Regulations when handling a case; whereas Cypriot courts appear equally reluctant to apply such EU Regulations, maybe due to lack of familiarity with this field.

**2.3.1. Is your country participating in the enhance cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?**

Yes, Cyprus participates in the enhanced cooperation with regard to both Regulations, i.e. both<sup>64</sup> EU Regulation 1103/2016<sup>65</sup> and EU Regulation 1104/2016<sup>66</sup>. Cyprus belongs to the 18 EU countries<sup>67</sup>

<sup>64</sup> See <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:4353120&from=EN> (4.5.2019) and [http://europa.eu/rapid/press-release\\_IP-19-681\\_en.htm](http://europa.eu/rapid/press-release_IP-19-681_en.htm) (4.5.2019).

<sup>65</sup> Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (4.5.2019).

<sup>66</sup> Regulation (EU) 2016/1104 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (4.5.2019).



who agreed on the outline revised rules on the jurisdiction, the laws that should be applied, and the recognition and enforcement of decisions about matrimonial property regimes or property consequences of a registered partnership arising when marriages or registered partnerships break up, or when one partner dies.

**2.3.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as “marriage”, “matrimonial property agreement”, “partnership property agreement” etc.?**

The two Regulations stipulate that the applicable law applies to all assets regardless of where the assets are located. Issues about the legal capacity of spouses, the recognition or validity of the marriage, maintenance obligations and inheritance are not covered within the scope of the two Regulations.

To my view, Member-States will encounter problems with the application scope of the Property Regimes Regulations. Among other issues that are likely to arise in this respect, the most distinguishing is the determination of matters falling within said application scope instead of the Succession Regulation’s application scope.

Residence is the principal connecting factor in family law legislation in Cyprus. It was further held that the term residence generally means actual physical presence in particular place with a degree of permanence; temporary sojourn or casual presence in transit, even for a substantial time, does not amount to residence<sup>68</sup>. The term “*habitual residence*” has also been considered by the Supreme Court of Cyprus for the purposes of the Hague Convention on the Civil Aspects of International Child Abduction (Ratification) Law 11 (III)/1994.

Moreover, regarding the legal qualification of particular concepts, the legal notion of “*marriage*”, it is to be defined by the national laws of the Member States (*Regulation on matrimonial property regimes, Preamble n. 17*). Having said that, it is likely for Cypriot courts to adapt the notion of “*marriage*” as such notion is understood in the sense of substantive Cypriot FL, in which marriage is construed in this context as any contract between two individuals (man and woman) that results in the union of the couple on a potentially lifelong basis. In this framework, it seems likely that same-sex marriages and polygamous liaisons shall not be deemed to fall under the above notion.

Furthermore, based on the definitions of the Property Regimes Regulations, it may be argued that the legal concepts “*matrimonial property agreement*” (*article 3 § 1 of EU Regulation on Property Consequences of Registered Partnerships*) and “*partnership property agreement*”<sup>69</sup> (*article 3 § 1 of EU Regulation on Matrimonial Property Regimes*) are to be autonomously construed. In this case, it is likely that Cypriot courts applying the Regulations shall presumably take into consideration relative CJEU judgments on the interpretation of said legal concepts.

**2.3.3. Are you expecting any problems with the application of the rules on jurisdiction?**

From a general point of view, Member States are expected to encounter problems with the application of the rules of jurisdiction included in the Property Regimes Regulations. These Regulations have definitely departed from the Brussels I Regime, by virtue of which a true system of international jurisdiction for civil and commercial matters was established. The jurisdictional bases included in both Regulations seem to have generally followed those of the Succession Regulation,

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<sup>67</sup> The 18 EU countries participating in the enhanced cooperation are Belgium, Bulgaria, Cyprus, Czechia, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, Netherlands, Austria, Portugal, Slovenia, Finland and Sweden, as authorised by Council Decision (EU) [2016/954](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32016D0954), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32016D0954> (4.5.2019). Other countries are free to join at any time after the regulation is adopted.

<sup>68</sup> See more in Emilianides, C. A., 2018, 55 § 91.

while they also resemble to a certain extent EU Regulation 2201/2003 (concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility).

Moreover, reference may already be made to the application of the general rule included in both Regulations, pursuant to which where a court of a member State is seized in matters of the succession of a spouse or a civil partner (respectively) under the Succession Regulation, the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime/ on the property consequences the civil union (respectively), which arise in connection to such succession case. Among various interpretation issues that may arise in the future, an important one would be the determination of the court that has been "seized", i.e. whether a cumulative application of the jurisdictional rules of the Succession Regulation is necessary and whether and under what circumstances the evident aim of this provision, i.e. concentration of disputes, may be used as an interpretation principle by the courts.

In the same vein, it may be predicted that the construction of the jurisdictional bases such as articles 6 of 7 of each of the Property Regime Regulations may follow potential prior construction of articles 10 and 11 of the Succession Regulation.

Last but not least, it may be estimated that article 9 of the Regulation on matrimonial property regimes (namely Regulation 2016/1103) which stipulates that, by way of exception if a court of the Member State that has jurisdiction pursuant to Article 4, 6, 7 or 8 holds that, under its private international law, the marriage in question is not recognised for the purposes of matrimonial property regime proceedings, it may decline jurisdiction. Cypriot courts may therefore decline jurisdiction in case, for instance, of a polygamous union or a same sex marriage.

**2.3.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

When it comes to matrimonial property disputes in Cyprus, the application of foreign law is not possible and no choice of law is allowed; the law of the forum should always be applied<sup>70</sup>. Having said that, choice of the applicable law is a novelty in this respect.

**2.3.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

It is notable that both Regulations have followed the twofold system of enforceability of the initial Brussels I Regulation (EC Regulation n. 44/2001) with regard to enforceability and enforcement, with slightly minor differences. This means that the abolition of exequatur has not been envisaged in these Regulations. Finally, it is likely that Cypriot public policy may interfere at the stage of recognition (and assuming that following issues have not been resolved already at the legal qualification stage) in cases of foreign same-sex marriages, of polygamous liaisons and/or of unequal allocation of assets between spouses based on their sex et alia.

**2.3.6. Are there any national rules on international jurisdiction and applicable (besides the Regulations) concerning the succession in your country?**

As an introductory remark it has to be noted that while a high degree of harmonisation has been achieved via EU private international law instruments or conventions governing certain conflict of law issues, Cypriot private international law retains its distinctive common law nature<sup>71</sup>. English

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<sup>70</sup> See Emilianides, C. A., Shaelou, S. L., 2015, § 169.

<sup>71</sup> Emilianides, C. A., Shaelou, S. L., 2015, § 11. Cyprus, similarly to common law jurisdictions, attaches less weight to doctrine, than civil law jurisdictions do, see Emilianides, C. A., Shaelou, S. L., 2015, § 21.

common law is applicable where there is no specific Cypriot statutory provision or a case decided by Cypriot courts on point. Although, in Cyprus there is no comprehensive domestic legislation with regards to private international law, several domestic laws include provisions pertaining to private international law<sup>72</sup>.

In any case, the most important source of Cypriot private international law today is EU law. The supremacy of EU Law is enshrined in article 1A of the Constitution of the Republic of Cyprus.

Other than EU law, the common law governs private international law issues, wherever there is a gap, unless a statute of the Cypriot House of Representatives expressly governs that issue.

From 1960 onwards, Cyprus has ratified the majority of international treaties governing private international law issues, which constitutes another important course of Cypriot private international law<sup>73</sup>. Under article 169 of the Cypriot Constitution, treaties take precedence over domestic law, provided they are ratified by law and they are published in the Official Gazette of the Republic<sup>74</sup>. Cyprus has signed and ratified a number of multilateral agreements regarding private international law, inter alia: the Statute of the Hague Conference on Private International Law and its Amendments (Law 178/1986).

Furthermore, Cyprus has adopted several multilateral treaties in the field of family and succession law. These include: the Convention on the establishment of a Scheme of Registration of Wills (Law 64/1974), the Convention Providing a Uniform Law on the Form of a International Will (Law 22/1980), the European Convention on the Legal Status of Children born out of Wedlock (Law 50/1979), the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children (Law 36/1986), the Convention on the Civil Aspects of International Child Abduction (Law 11 (III)/1994), the Convention Protection of Children and Co-operation in respect of Inter-country Adoption (Law 26 (III)/1994), the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (Law 24(III)/2004, the Convention on the Recognition of Divorces and Legal Separations (Law 63/1982) and Convention on the Recovery Abroad of Maintenance (Law 50/1978)<sup>75</sup>. In addition, Cyprus has signed and ratified a number of bilateral agreements regulating various aspects of private international law.

Cypriot law has traditionally adhered to the common law concept of domicile for the purposes of private international law. Domicile had traditionally been the most important connecting factor of Cypriot private international law. The influence of EU law instruments in the field of private international law has, however, gradually limited the significance of domicile as a connecting factor<sup>76</sup>. Domicile remains to date of significant importance in Cypriot succession law; Cap. 195 being the only legal instrument which contains explicit rules governing the application of domicile as connecting factor. However, the Brussels IV will further restrict the scope of application of domicile. The notion of domicile is a rather complicated one. It has been accepted that domicile is a legal and not a factual notion. Residence and domicile are distinct from each other; domicile is the permanent home of a person, and not simply the place of permanent residence. Section of Cap.195 provides that there are two general categories of domicile; the domicile of origin and the domicile of choice. Every person has either a domicile of origin or a domicile of choice at any given time; however, no person may have more than one domicile in accordance with Section 13 of Cap.195<sup>77</sup>.

Moreover, a person acquires a domicile of origin at the time he/she is born. Sec.7 of Cap. 195 provides that a child born in wedlock during the lifetime of his father, has the domicile that his father had at the time of birth. If the child was born out of wedlock or after the death of his father, his domicile is the domicile that his mother had at the time of birth. Cap. 195 does not provide for the

<sup>72</sup> Emilianides, C. A., Shaelou, S. L., 2015, § 17.

<sup>73</sup> See Emilianides, C. A., Shaelou, S. L., 2015, § 12, § 16.

<sup>74</sup> Emilianides, C. A., Shaelou, S. L., 2015, § 18.

<sup>75</sup> Emilianides, C. A., Shaelou, S. L., 2015, § 19.

<sup>76</sup> Emilianides, C. A., Shaelou, S. L., 2015, § 24.

<sup>77</sup> Emilianides, C. A., Shaelou, S. L., 2015, § 24.

case where the parents of a child are not known; it is submitted that in such a case the domicile of the child should be the domicile of the place where the child was found. Domicile is thus related to the parental domicile at the time of birth; not with the country of birth or citizenship of the child. A domicile of origin has an enduring character and is maintained until, and if, a domicile of choice is acquired<sup>78</sup>. Sec.10 of Cap.195 provides that the domicile of origin is retained until a domicile of choice is acquired, which implies, that contrary to the position of common law, the domicile of origin of minors is not altered whenever their parents change their domicile. Thus, domicile of origin is set at birth and may not be changed before the person completes 18 years of age and acquires by his/her own actions a domicile of choice<sup>79</sup>. Contrary to the position in common law, in Cyprus, each person irrespective of sex, may acquire a domicile of choice or retain the domicile of origin. Marriage might be a factor to be taken into consideration by the court, but is not necessarily the crucial factor. The term “*habitual residence*” is gradually becoming the most important connecting factor in Cypriot private international law, because of its adoption in several significant EU law instruments<sup>80</sup>. The main legislation with respect to both substantive succession law and private international succession law is the Wills and Succession Law, Cap.195. The administration of estates is governed by Cap.189<sup>81</sup>.

When it comes to the succession law in Cyprus, the connecting factor in succession law cases, until the introduction of Regulation 650/2012, was “*domicile*”<sup>82</sup>. “*Domicile is the permanent home of a person and not simply the place of permanent residence*”<sup>83</sup>. Domicile still remains relevant for deaths which occurred prior to 17 August 2015. Section 6 of the Wills and Succession Law, Cap.195 provides that there are two general categories of domicile; the domicile of origin and the domicile of choice. No person may have more than one domicile in accordance with section 13 of Cap.195<sup>84</sup>.

With regards to the succession of persons who died until 16 August 2015, Cap.195 shall apply only if such persons had immovable property located in the Republic, or were domiciled in the Republic of Cyprus at the time of their death<sup>85</sup>. If the deceased was domiciled in Cyprus at the time of death, then Cypriot Law governs the succession to the movable property of the deceased, both in Cyprus and abroad, as well as the succession to the immovable property of the deceased which was situated in Cyprus; immovable property of the deceased which was situated outside Cyprus is not governed by Cypriot law, but is governed by the *lex situs*, namely the law of the land where such property is situated<sup>86</sup>.

On the contrary, in case the deceased was domiciled outside Cyprus, then Cypriot law governs only the succession to the immovable property of such person situated in Cyprus; the immovable property of such person situated outside Cyprus is governed by the *lex situs*<sup>87</sup>. Furthermore, regarding the movable property of such a person, a distinction has to be made on the basis of the place where the deceased actually died. More specifically, if the deceased died in Cyprus, then section 12 of Cap. 195 provides that the movable property of such a person is to be governed by the law of the deceased’s domicile at the time of death. If the deceased died outside Cyprus and did not have Cypriot domicile, then the relevant rules of Private International Law shall apply<sup>88</sup>. In case Cypriot law applies in accordance with the above, Cap. 195 will determine both the formal and

<sup>78</sup> Emilianides, C. A., Shaelou, S. L., 2015, § 25.

<sup>79</sup> Emilianides, C. A., Shaelou, S. L., 2015, § 32.

<sup>80</sup> See in detail Emilianides, C. A., Shaelou, S. L., 2015, § 36-39.

<sup>81</sup> Emilianides, C. A., Shaelou, S. L., 2015, §180.

<sup>82</sup> For the complicated legal notion of “*domicile*”, see more in Emilianides, C. A., 2018, 57 § 95.

<sup>83</sup> Emilianides, C. A., 2018, 57 § 95.

<sup>84</sup> If the domicile of choice is abandoned, without acquiring a new domicile, then the domicile of origin revives. If there is no sufficient evidence that a person has acquired a domicile of choice, he/she shall be presumed as maintaining his/her domicile or origin.

<sup>85</sup> Emilianides, C. A., 2018, 161 § 351.

<sup>86</sup> Emilianides, C. A., 2018, 161-162 § 351.

<sup>87</sup> Emilianides, C. A., 2018, 162 § 352.

<sup>88</sup> Emilianides, C. A., 2018, 162 § 352 and more extensively Emilianides, C. A., 2015, §181-188.

substantial validity of a will and succession in cases of intestacy and Cypriot courts will enjoy jurisdiction with respect to movable property situated both in Cyprus and abroad, as well as with respect to immovable property situated in Cyprus<sup>89</sup>. Immovable property situated outside Cyprus is not to be taken into consideration for the determination of the shares of the heirs or the disposable portion, even if the deceased was domiciled in Cyprus<sup>90</sup>.

Regarding the succession of persons who died after 17 August 2015, the rules of Cypriot private international law are harmonized with Regulation 650/2012 of the European Parliament and of the Council of 4 July 2012<sup>91</sup> on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession<sup>92</sup>. As it is well known, Regulation 650/2012 provides for a system of unity of succession, whereby a single law, mainly the law where the deceased had his habitual residence, shall govern the succession to the whole of the estate of the deceased, irrespective of whether such refers to movables or immovable property<sup>93</sup>. As it is noted regarding Regulation 650/2012: *“Thus, the notion of habitual residence has replaced the notion of domicile as far as movable property is concerned, and the lex situs as far as immovable property is concerned; a single law, that of the habitual residence of the deceased at the time of death shall govern the entire state of the deceased, either movable or immovable, either in Cyprus or outside of Cyprus. An escape clause stipulates that where by way of exception it is clear from all the circumstances of the case that at the time of death, the deceased was manifestly more closely connected with a State other than the State of the habitual residence; the law applicable to the succession shall be the law of the other State. Regulation 650/2012 further enables the deceased to organize his succession in advance and choose the lex successionis, by providing that a person may choose the law of the State whose nationality he possesses at the time of making the choice or at the time of death, as the law to govern his succession as a whole. A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death. Such right of the deceased person to choose the applicable law is a novel one, since the existing Cypriot legislation does not provide for such a possibility”*<sup>94</sup>.

When it comes to matrimonial property, Family Courts shall exercise their international jurisdiction as long as either the parties resides in Cyprus for a continuous period of over three months. Furthermore, by virtue of Section 11 (3) of Law 23/1990, as amended by Law 63 (I)/2006, the Family Courts shall have jurisdiction even if neither party resides in Cyprus, so long as there is any movable or immovable property which was acquired at any time after the conclusion of the marriage by either spouse, or even before the marriage but so long as it was acquired in anticipation of such marriage. This paradoxical provision effectively vests the Cypriot Family Courts with unlimited international jurisdiction over any matrimonial dispute<sup>95</sup>. This provision becomes more problematic, if it is considered that the approach chosen by Cypriot law with respect to applicable law is to always apply the law of the forum to the matrimonial property dispute by virtue of section 14 of the Family Courts Law 23/1990. Accordingly, the application of a foreign law is not possible in matrimonial property disputes and no choice of law is allowed; the law of the forum should always be applied<sup>96</sup>. Additionally, section 14 of the Family Courts Law 23/1990 provides that whenever the Cypriot Family Courts have jurisdiction with respect to maintenance proceedings, they shall always apply Cypriot domestic law. Accordingly, the application of a foreign law is not possible in maintenance

<sup>89</sup> Emilianides, C. A., 2018, 162 § 353.

<sup>90</sup> Emilianides, C. A., 2018, 162 § 353.

<sup>91</sup> *“This is undeniably a major development for the Cypriot legal system”*, Emilianides, C. A., 2018, 162 § 354.

<sup>92</sup> Emilianides, C. A., 2018, 162 § 354.

<sup>93</sup> Emilianides, C. A., 2018, 162 § 354 and more extensively Emilianides, C. A., 2015, §189.

<sup>94</sup> Emilianides, C. A., 2018, 162-163 § 355 and Emilianides, C. A., 2015, § 189-190.

<sup>95</sup> Emilianides, C. A., 2015, § 169.

<sup>96</sup> Emilianides, C. A., 2015, § 169.

proceedings and no choice of law is allowed as the law of the forum should always be the applicable law<sup>97</sup>.

In Cypriot law there is lack of rules about international jurisdiction. This lack of rules about international jurisdiction implies that Cypriot courts may exercise jurisdiction so far as they have local jurisdiction and provided that the defendant has been properly served with a writ of summons commencing an action<sup>98</sup>. As mentioned before, the Cypriot traditional rules governing international jurisdiction are extremely wide. In order to restrict the international jurisdiction of Cypriot courts, the principles of *forum non conveniens* have been consistently applied in Cyprus. It is therefore accepted that the Cypriot courts have discretion to stay in action, whenever it is considered that the forum selected is not an appropriate one<sup>99</sup>. Of course, jurisdiction of a Cypriot court may be based in the provisions of Brussels I Regulation<sup>100</sup>.

### 3. Succession law

#### 3.1. General.

##### 3.1.1. What are the main legal sources of Succession Law (SL) in your country? What are the additional legal sources of SL?

Legislation governing SL was enacted prior to Independence. The main legislation with respect to both substantive succession law and private international succession law is the Wills and Succession Law, Cap.195 which has been modified twice with Laws 100/1989 and 75/1990<sup>101</sup>. The administration of estates is governed by Cap.189<sup>102</sup> and Administration of Estates Regulation of 1955. With regards to succession law the most important EU Regulation is Regulation 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions, and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession<sup>103</sup>.

Cyprus has not signed the Form of Testamentary Dispositions Convention. It has signed, however, the Basel Convention on 27<sup>th</sup> June 1974 and ratified it on 20<sup>th</sup> January 1975 by Law 64/1974<sup>104</sup>, the Washington Convention on the form of international wills (Law 22/1980) and various bilateral agreements with other countries.

##### 3.1.2. Provide a short description of the main historical developments in SL in your country.

Legislation governing SL was enacted prior to Independence. The main legislation with respect to both substantive succession law and private international succession law is the Wills and Succession Law, Cap.195 which has been modified twice with Laws 100/1989 and 75/1990. See also answer to question 2.1.2 (Historical background of FL and Succession Law).

<sup>97</sup> Emilianides, C. A., 2015, § 173.

<sup>98</sup> Emilianides, C. A., Shaelou, S. L., 2015, § 203.

<sup>99</sup> Emilianides, C. A., Shaelou, S. L., 2015, § 207 and in detail § 203-206 on local jurisdiction, service of writ out of jurisdiction and submission to the jurisdiction.

<sup>100</sup> Emilianides, C. A., Shaelou, S. L., 2015, § 210.

<sup>101</sup> Last amendment by Law 96(I)/2015.

<sup>102</sup> Emilianides, C. A., Shaelou, S. L., 2015, §180.

<sup>103</sup> Emilianides, C. A., 2018, 30.

<sup>104</sup> Emilianides, C. A., Shaelou, S. L., 2015, §197.

### 3.1.3. What are the general principles of succession in your country?

In the fundamental principles of Cypriot succession law shall be included:

- a) Succession may occur in three ways: by will, by law and both will and the law
- b) Every person is capable of inheriting, except in those cases where the potential heir has been declared unworthy<sup>105</sup>
- c) The principle of universal succession
- d) The application of intestate succession by operation of law if the deceased dies intestate
- e) The free unilateral disposition *mortis causa*
- f) The provision of a compulsory statutory share for statutory heirs.
- g) The provisions on four classes of kinship, set out in the First Schedule of Cap.195.
- h) The provision that a posthumous child born alive shall have the same right of succession as if he/she had been born before the death of the deceased (section 15 of Cap.195). It is has to been proven that the child had already been conceived before the death of the person to be succeeded.

### 3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.

Any person may, in accordance with section 9 section 1 of the Administration of Estates Law, Cap. 189 deposit his/her will to the Registry of a District Court. The will should be delivered personally by the testator in a closed envelope which is sealed by the Registrar in accordance with Regulation 3 of the Administration of Estates Regulation of 1955. It is also possible to keep a will at home or hand it over to an advocate for safekeeping. There are three ways of revoking a will. These are provided exhaustively in section 37 of Cap. 195<sup>106</sup>. An application by the executor of the will or the administrator has to be made as soon as possible after the death of the deceased, either personally or through a lawyer in accordance with Form 1 of Annex A of the 1955 Regulations. Moreover, section 4 of Cap.189 provides that a Probate Registrar shall send to the principal probate registry, that is, the Supreme Court Registry, a notice of every application made in the registry for a grant as soon after such application has been made, no grant shall be made by the Probate Registrar until he/she has received a certificate from the principal probate registry stating that no other applications appear to have been made in respect of the estate of the testator or intestate<sup>107</sup>. An interested person may object to the grant by filing a caveat to the Probate Registrar; the caveat is essentially a written notice to the Court that is should not allow any further proceedings regarding the estate of the deceased, without first notifying the person who files the caveat<sup>108</sup>. Probate actions, namely actions for the grant of probate of letters of administration of the estate of the deceased, or for the revocation of such grant or for a decree pronouncing for or against the validity of a purported will, are governed by special procedural rules<sup>109</sup>. See also answer in question 3.2.5.

### 3.1.5. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?

Under the provisions of Cypriot law, death may be proven before a court by any evidentiary means. Section 20 of the Population Registry Law 141(I)/2002 provides that the death of any person who

<sup>105</sup> On the basis of the provisions of section 17 of Cap.195. See Emilianides, C. A., 2018, 167 § 365.

<sup>106</sup> See in detail Emilianides, C. A., 2018, 189-192 § 422-431.

<sup>107</sup> Emilianides, C. A., 2018, 205 § 462.

<sup>108</sup> Emilianides, C. A., 2018, 208 § 471.

<sup>109</sup> Emilianides, C. A., 2018, 209 § 472.

dies in Cyprus is registered by the Registrar of the District where the death occurred<sup>110</sup>. Moreover, the provisions of the Wills and Succession Law, Cap.195 govern the succession of natural persons (since legal persons may not anyway be the subject of succession and inheritance)<sup>111</sup>.

In the framework of Cypriot succession law, succession may occur in accordance with section 4 of the Wills and Succession Law, Cap.195, in the following three ways:

*«(1) By will: Deceased persons have in principle the right to choose their heirs by making a will before their death. However, such right is a limited one; whenever the testator had died living close relatives (children, grandchildren, parents or spouse) a statutory portion is reserved for the statutory heirs, as opposed to testament heirs. The aim of the legislator for introducing such restrictions to the right of the testator to choose his/her own heirs is to safe-guard that the spouse and next-of-kin of the deceased will inherit a fair portion of the deceased's estate.*

*(2) By law: a deceased may die intestate, without making a valid will. In such a case, the provisions of the Wills and Succession Law, Cap. 195 govern the distribution of the deceased's estate.*

*(3) By both will and the Law: As already mentioned under (1) above, the testamentary right is not absolute. Thus, there are cases where the estate of the deceased, despite the deceased's intentions, will be governed partly by the contents of the will (insofar as the disposable portion is concerned) and partly by the provisions of Cap. 195 (insofar as the statutory portion is concerned). Such a case may also occur whenever the testator has not provided in the will for the distribution of the entire estate, but only for part of the estate in which case there is undisposed portion of the estate”.*

Whenever a person dies intestate, or to the extent that the deceased's right to dispose by will is restricted because of the existence of statutory heirs, the estate shall be distributed to the heirs in accordance with the provisions of Cap.195. If there is a surviving spouse, then the share of the surviving spouse shall first be distributed and the remaining part of estate shall be distributed to the persons of kin of the deceased. There are four classes of kinship, set out in the First Schedule of Cap.195; persons of one class shall exclude persons of a subsequent class from succeeding to the estate of the deceased person<sup>112</sup>. The heirs are always determined at the time of death. If there is no person of kin to the sixth degree, the undisposed portion of the estate becomes the property of the Republic of Cyprus.

### **3.1.6. What happens with the estate of inheritance if the decedent has no heirs?**

If there is no person of kin to deceased within the sixth degree of kindred living at his/her death, then the deceased is considered to have died without heirs and any undisposed portion of the estate becomes the property of the Republic of Cyprus.

### **3.1.7. Are there special rules or limitations concerning succession with reference to the deceased's (or heir's) culture, tradition, religion or other characteristics?**

There are no special rules concerning succession with reference to the deceased's or the heir's culture, tradition, religion or other characteristics.

<sup>110</sup> Emilianides, C. A., 2018, 164 § 356.

<sup>111</sup> Emilianides, C. A., 2018, 170 § 375.

<sup>112</sup> Emilianides, C. A., 2018, 170 § 375.



### 3.2. Intestate succession.

**3.1.3. Are men and women equal in succession? Are domestic and foreign nationals equal in succession? Are decedent's children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?**

Men and women, domestic and foreign nationals, children born in wedlock, recognized children born out of wedlock and adopted children, including children conceived but yet unborn at the time of entry of succession, as well as spouses and same sex and opposite sex registered partners are equal in succession.

**3.2.2. Are legal persons capable of inheriting? If yes, on which basis?**

Legal entities are capable of inheriting in case of testamentary succession. It has to be noted though that article 3 of Chap. 195 states: "*In case of death of a person, their estate shall be transferred as a whole to one or more persons*". So the law does not specify whether the heir is a natural person or a legal person.

**3.2.3. Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.**

Every person is capable of inheriting, except in those cases where the potential heir has been declared unworthy. Section 17 of Cap.195 provides exhaustively for the circumstances under which a person may be declared as unworthy to succeed. The justification for declaring a person as unworthy is that nobody should prosper from illegal acts. Section 17 of Cap.195 provides for seven specific grounds on the basis of which a person may be declared as unworthy to succeed. The common characteristic of all grounds is the existence of an illegal or unjust action of the unworthy heir<sup>113</sup>.

**3.2.4. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?**

Whenever a person dies intestate, or to the extent that the deceased's right to dispose by will is restricted because of the existence of statutory heirs, the estate shall be distributed to the heirs in accordance with the provisions of Cap.195. If there is a surviving spouse, then the share of the surviving spouse shall first be distributed and the remaining part of estate shall be distributed to the persons of kin of the deceased. There are four classes of kinship, set out in the First Schedule of Cap.195; persons of one class shall exclude persons of a subsequent class from succeeding to the estate of the deceased person<sup>114</sup>. The heirs are always determined at the time of death. If there is no person of kin to the sixth degree, the undisposed portion of the estate becomes the property of the Republic of Cyprus.

Where a person died leaving a wife or husband, such surviving spouse shall be entitled to a share in the statutory portion and in the undisposed portion of the estate<sup>115</sup>. Regarding the share of the surviving

<sup>113</sup> Emilianides, C. A., 2018, 168-170 § 368-374.

<sup>114</sup> Emilianides, C. A., 2018, 170 § 375.

<sup>115</sup> See more in Emilianides, C. A., 2018, 171-174 §§ 376-383.

spouse is always entitled to a share in the statutory portion and in the undisposed portion of the estate; thus, the surviving spouse is entitled to a share irrespective of whether the deceased had made a valid will or not. The share of the surviving spouse is determined on the basis of the existence of other heirs, and in accordance with section 44 of Cap.195<sup>116</sup>.

The provisions on four classes of kinship, set out in the First Schedule of Cap.195. Persons of one class shall exclude persons of a subsequent class from succeeding to the estate of the deceased person<sup>117</sup>. The heirs are always determined at the time of death. If there is no person of kin to the sixth degree, the undisposed portion of the estate becomes the property of the Republic of Cyprus<sup>118</sup>.

### 3.2.5. Are the heirs liable for deceased's debts and under which conditions?

The heirs are not personally liable for any of the debts of the estate<sup>119</sup>.

The rights and liabilities to the estate of the deceased, including the statutory portion of the undisposed portion and the undisposed portion, shall be deemed to have been vested in the personal representative of the deceased from the date on which the deceased died, in accordance with section 25 of the Administration of Estates Law, Cap.189. Thus, the estate of the deceased is not directly acquired by the heirs or the legatees; such heirs or legatees shall only acquire their share when the deceased's property has been distributed by the administrator or executor in accordance with the provisions of Cap. 189<sup>120</sup>. The personal representatives shall represent the estate of the deceased for the purposes of legal proceedings, either as plaintiffs or as defendants; neither the heirs of the deceased nor the deceased's creditors may file an action or represent the estate in any legal proceedings. Any legal proceedings against the estate of the deceased should be against the administrator or the executor, as the case may be, of the estate of the deceased and not against the heirs, or legatees of the deceased<sup>121</sup>.

In case a person dies intestate, the District Court shall authorize one or more persons to administer his/her estate by providing them with "*letters of administration*", which constitutes a written authority to administer the estate of the deceased. If the deceased had made a will, such shall have effect, in accordance with section 14 of the Cap.189, only after it has been proved. If the testator has appointed in his/her will another person to act as executor of his/her will, the Court may grant administration of the estate of the deceased to such person by granting a probate. In case the testator has not appointed an executor or where the appointed executor has renounced probate or has become incapable, the Court may grant to an administrator the right of "*administration with will annexed*"<sup>122</sup>. Applications for grants of probate or letters of administration are made, in accordance with Regulation 9 of the 1955 Regulations, before the Registry of the District Court in the jurisdiction of which the deceased permanently or habitually resided at the time of death, and if no such place of residence may be established or if the deceased has no such place of residence in Cyprus, the Registry of the District Court of Nicosia<sup>123</sup>.

Furthermore, an application by the executor or the administrator has to be made as soon as possible after the death of the deceased, either personally or through a lawyer in accordance with Form 1 of Annex A of the 1955 Regulations<sup>124</sup>.

<sup>116</sup> See Emilianides, C. A., 2018, 172 § 380 and on the kindred of first, second, third and fourth classes in 174-177, §§ 384-393.

<sup>117</sup> Emilianides, C. A., 2018, 164 § 356.

<sup>118</sup> Emilianides, C. A., 2018, 170 § 375.

<sup>119</sup> Emilianides, C. A., 2018, 212 § 480.

<sup>120</sup> Emilianides, C. A., 2018, 204 § 459.

<sup>121</sup> Emilianides, C. A., 2018, 204 § 459.

<sup>122</sup> Emilianides, C. A., 2018, 204 § 460.

<sup>123</sup> Emilianides, C. A., 2018, 204 § 460.

<sup>124</sup> Emilianides, C. A., 2018, 204 § 461.

### 3.2.6. What is the manner of renouncing the succession rights?

*“Where the estate vests in and devolves upon a heir, such heir may unconditionally renounce the estate at any time, in accordance with section 51 of Cap.189, within three months from the time when he/she first became aware of the death of the deceased and of the fact that he/she is an heir to such deceased. If an heir has renounced the estate after the lapse of the three-month period, such renunciation is invalid. Renunciation may be effected by filing with the Registry of the Court a declaration. An heir who has renounced the estate shall incur no liability in respect of the debts of the deceased and shall receive no benefit from the estate of such deceased. Section 51 section 3 of Cap.189 further provides that any renunciation which is made by an heir with the object of defeating the rights of any of his/her creditors may be set aside by the Court on the application of any creditor and upon proof of such object; the above provision refers to the creditors of the heir and not to the creditor of the estate, since the heirs are not personally liable for any of the debts of the estate”<sup>125</sup>.*

### 3.3. Disposition of property upon death.

#### 3.3.1. Testate succession.

##### 3.3.1.1. Explain the conditions for testate succession.

When it comes to capacity to make a will, any person, who is over 18 years of age and is of sound mind, has the capacity to make a valid will, in accordance with section 22 of Cap.195. Consequently, minors or persons of unsound mind may not make a valid will<sup>126</sup>. The definition of a will is provided in section 2 of Cap.195 *“as the legal declaration in writing of the intentions of a testator with respect to the disposal of his/her movable or immovable property after his/her death and includes codicil”<sup>127</sup>.*

As far as the requirements for making a valid will, in accordance with section 23 of the Cap.195, no will shall be valid unless it is in writing and executed in a specific manner provided for in section 23. Oral wills are thus not permitted in Cyprus. However, there are no restrictions with respect to the material of the language used in order to write the will; the will may be hand written, typed and may be written in Greek or any other language<sup>128</sup>. Furthermore, it is necessary to write upon the will that it is such. Section 23 introduces four requirements for making a valid will; such requirements are mandatory and consequently any will not conforming to such requirements shall be invalid. However, Law 96 (I)/2015 has amended Cap.195 so as to provide for the discretion of the court in some cases in some cases to waive any of the four requirements for marking a valid will<sup>129</sup>. The first requirement is that he will is signed at the foot or end thereof by the testator or by some other person on his/her behalf, in his/her presence and by his/her direction.

In the framework of Cypriot case law on succession law, it has been held that joint wills, while rare, are lawful<sup>130</sup>. A joint will is a single document executed by more than one person, who are typically husband and wife, which has effect in relation to such signatory's property upon his/her death.

Revocation of a will is possible with three ways which are provided exhaustively in section 37 of Cap.195.

<sup>125</sup> Emilianides, C. A., 2018, 212 § 480.

<sup>126</sup> Emilianides, C. A., 2018, 182 § 404.

<sup>127</sup> Emilianides, C. A., 2018, 182 § 404: *‘...codicil is defined as an instrument in writing made in relation to a will explaining, adding to, altering or revoking in whole or in part its disposition and it shall be considered as forming an amendment or additional part of the will’.*

<sup>128</sup> Emilianides, C. A., 2018, 184 § 410.

<sup>129</sup> Emilianides, C. A., 2018, 184 § 410.

<sup>130</sup> Emilianides, C. A., 2018, 189§ 421.

Moreover, the right of a person to dispose of his/her property by will is not absolute. In accordance with section 41 of Cap. 195 such right is qualified to the disposal of the disposable portion of the estate, namely the portion of the estate that a person is legally allowed to dispose by will<sup>131</sup>. Section 41 of Cap.195 provides for three distinct cases for determining the disposable portion. The share of the estate which a person can dispose by will (testator) varies and depends on a) if the testator died leaving a spouse and a child, or a spouse and a descendant of a child, or no spouse but a child or a descendant, b) if the testator died leaving a spouse or a father or a mother, but no child nor descendant and c) if the testator died leaving neither spouse, nor child, nor descendant, nor a father, nor a mother. In last case (case c), the disposable portion shall be the whole of the estate.

### **3.3.1.2. Who has the testamentary capacity?**

Any person, who is over 18 years of age and is of sound mind, has the capacity to make a valid will, in accordance with section 22 of Cap.195. Consequently, minors or persons of unsound mind may not make a valid will<sup>132</sup>.

### **3.3.1.3. What are the conditions and permissible contents of the will?**

The right of a person to dispose of his/her property by will is not absolute. In accordance with section 41 of Cap. 195 such right is qualified to the disposal of the disposable portion of the estate, namely the portion of the estate that a person is legally allowed to dispose by will<sup>133</sup>. Section 41 of Cap.195 provides for three distinct cases for determining the disposable portion. The share of the estate which a person can dispose by will (testator) varies and depends on a) if the testator died leaving a spouse and a child, or a spouse and a descendant of a child, or no spouse but a child or a descendant, b) if the testator died leaving a spouse or a father or a mother, but no child nor descendant and c) if the testator died leaving neither spouse, nor child, nor descendant, nor a father, nor a mother. In last case (case c), the disposable portion shall be the whole of the estate.

### **3.3.1.4. Describe the characteristics of will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a will?**

In order a will to be valid it has to be in writing and executed in a specific manner, as it is provided in section 23 of Cap.195. Oral wills are not permitted in Cyprus. However, there are no restrictions with respect to the material of the language used in order to write the will; the will may be hand written, typed and may be written in Greek or any other language<sup>134</sup>. Furthermore, it is necessary to write upon the will that it is such. Section 23 introduces four requirements for making a valid will; such requirements are mandatory and consequently any will not conforming to such requirements shall be invalid. However, Law 96 (I)/2015 has amended Cap.195 so as to provide for the discretion of the court in some cases in some cases to waive any of the four requirements for marking a valid will<sup>135</sup>. The first requirement is that the will is signed at the foot or end thereof by the testator or by some other person on his/her behalf, in his/her presence and by his/her direction. Additionally, it has been held that joint wills, while rare, are lawful<sup>136</sup>. A joint will is a single document executed by more than one person, who are typically husband and wife, which has effect in relation to such signatory's property upon his/her death.

<sup>131</sup> Emilianides, C. A., 2018, 195 § 439.

<sup>132</sup> Emilianides, C. A., 2018, 182 § 404.

<sup>133</sup> Emilianides, C. A., 2018, 195 § 439.

<sup>134</sup> Emilianides, C. A., 2018, 184 § 410.

<sup>135</sup> Emilianides, C. A., 2018, 184 § 410.

<sup>136</sup> Emilianides, C. A., 2018, 189§ 421.

In Cyprus there are no notaries. Under Cypriot succession law, wills are not divided into public and private.

In any case, applications for grants of probate or letters of administration are made, in accordance with Regulation 9 of the 1955 Regulations, before the Registry of the District Court in the jurisdiction of which the deceased permanently or habitually resided at the time of death, and if no such place of residence may be established or if the deceased has no such place of residence in Cyprus, the Registry of the District Court of Nicosia<sup>137</sup>. Furthermore, an application by the executor or the administrator has to be made as soon as possible after the death of the deceased, either personally or through a lawyer in accordance with Form 1 of Annex A of the 1955 Regulations<sup>138</sup>.

**3.3.1.5. Is there a (public) register of wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

Any person may, in accordance with section 9 section 1 of the Administration of Estates Law, Cap. 189 deposit his/her will to the Registry of a District Court. The will should be delivered personally by the testator in a closed envelope which is sealed by the Registrar in accordance with Regulation 3 of the Administration of Estates Regulation of 1955<sup>139</sup>. In accordance with Regulation 4 of the 1955 Regulations, the testator has to sign the envelop in the presence of the Registrar. The Registrar then files the deposited will and informs accordingly the Chief Registrar of the Supreme Court who is also the Chief Registrar with respect to deposited wills in accordance with section 9 section 4 of Cap.189. It is also possible (for the testator) to keep a will at home or hand it over to an advocate for safekeeping.

Any person having in his/her possession or under his/her control any will of the deceased person, should, in accordance with section 11 of Cap.189, deliver it to the probate registrar of the Court within fourteen days from the time he/she became aware of the death of the testator; otherwise, he/she shall be liable to a fine<sup>140</sup>.

An application by the executor of the will or the administrator has to be made as soon as possible after the death of the deceased, either personally or through a lawyer in accordance with Form 1 of Annex A of the 1955 Regulations. Moreover, section 4 of Cap.189 provides that a Probate Registrar shall send to the principal probate registry, that is, the Supreme Court Registry, a notice of every application made in the registry for a grant as soon after such application has been made, no grant shall be made by the Probate Registrar until he/she has received a certificate from the principal probate registry stating that no other applications appear to have been made in respect of the estate of the testator or intestate<sup>141</sup>. An interested person may object to the grant by filing a caveat to the Probate Registrar; the caveat is essentially a written notice to the Court that is should not allow any further proceedings regarding the estate of the deceased, without first notifying the person who files the caveat<sup>142</sup>. Probate actions, namely actions for the grant of probate of letters of administration of the estate of the deceased, or for the revocation of such grant or for a decree pronouncing for or against the validity of a purported will, are governed by special procedural rules<sup>143</sup>.

<sup>137</sup> Emilianides, C. A., 2018, 204 § 460.

<sup>138</sup> Emilianides, C. A., 2018, 204 § 461.

<sup>139</sup> See in detail, Emilianides, C. A., 2018, 189-190 § 422-424.

<sup>140</sup> Emilianides, C. A., 2018, 190 § 424.

<sup>141</sup> Emilianides, C. A., 2018, 205 § 462.

<sup>142</sup> Emilianides, C. A., 2018, 208 § 471.

<sup>143</sup> Emilianides, C. A., 2018, 209 § 472.

**3.3.2. Succession agreement (*negotia mortis causa*). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.**

Donations made during the lifetime of the deceased are not related to the estate. However, donation mortis causa is directly related to succession law. Section 40 of Cap. 195 provides that any person who is of sound mind and has completed the age of 18 years may dispose of any movable property by a gift made in contemplation of death, if made in the presence of at least two witnesses who have completed the age of 18 and are of sound mind. A gift shall be deemed to be made in contemplation of death where a person who is ill and expects to die soon because of such illness delivers to another person the possession on any his/her movable property to keep as a gift in case the donor actually dies of that illness. It is noted that donation mortis causa refers only to movable property; the possession of immovable property may not be transferred in this way. Any gift made in contemplation of death shall be treated upon the administration of the estate exactly in the same way as if it were a specific legacy, in accordance with section 40 section 3 of Cap.195<sup>144</sup>.

Trusts are essential for estate planning, since an individual may, through the use of trust, bypass the provisions regarding statutory or disposable portion, or may enable persons who have not yet been born, or constituted, to inherit bypassing the relevant provisions of section 31 of Cap.195. Trusts are not considered as part of the estate of the deceased. The term trust denotes the legal relationship created *inter vivos* or on death of a person (the settlor), when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specific purpose<sup>145</sup>.

**3.3.3. Are conditions for validity of wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

Please see answer to question 3.1.1.

**3.3.4. Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

Whenever a person dies intestate, or to the extent that the deceased's right to dispose by will is restricted because of the existence of statutory heirs, the estate shall be distributed to the heirs in accordance with the provisions of Cap.195. Where a person died leaving a wife of a husband, such surviving spouse shall be entitled to a share in the statutory portion and in the undisposed portion of the estate<sup>146</sup>. The share of the surviving spouse shall first be distributed and the remaining part of estate shall be distributed to the persons of kin of the deceased. Section 41 of Cap.195 provides for three distinct cases for determining the disposable portion<sup>147</sup>.

**3.3.5. Cross-border issues.**

The general remark (*hereinabove under 2.3.*) applies in this section of the Report as well.

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<sup>144</sup> Emilianides, C. A., 2018, 200 § 452.

<sup>145</sup> Emilianides, C. A., 2018, 202 § 456.

<sup>146</sup> Emilianides, C. A., 2018, 171 § 376.

<sup>147</sup> See Emilianides, C. A., 2018, 195-196 § 440.

**3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?**

To the best of my knowledge there are only few Cypriot judgments insofar applying the Succession Regulation. The Cypriot courts do not seem to have insofar been presented with the opportunity to consider in depth certain of the numerous issues posed by the Succession Regulation.

**3.3.5.2. Are there any problems with the scope of application?**

From a general point of view it could be noted that numerous issues are likely to arise with regard to the application scope of the Succession Regulation. A point of interest is whether the *donation mortis causa* regulated in section 40 of Cap.195 falls within the application scope of the Succession Regulation.

**3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country have experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?**

In Cypriot law there is lack of rules about international jurisdiction. This lack of rules about international jurisdiction implies that Cypriot courts may exercise jurisdiction so far as they have local jurisdiction and provided that the defendant has been properly served with a writ of summons commencing an action<sup>148</sup>. Of course, jurisdiction of a Cypriot court may be based in the provisions of Brussels I Regulation<sup>149</sup>. Moreover, to the best of my knowledge there is no Cypriot case-law insofar applying the Regulation's jurisdictional bases. Furthermore, to the best of my knowledge Cypriot courts have not insofar been presented with any case and applied neither article 6 nor article 7 of the Succession Regulation.

**3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?**

As stated already in answers above when it comes to choosing the applicable law in matters of succession, this constitutes a novelty for Cypriot law.

**3.3.5.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?**

As concerns use of the twofold enforceability system envisaged in the Succession Regulation (following the Brussels I Regulation as well as the twin Regulations 2016) please see the answer under question 2.3.5.

In any case, it is possible that public policy issues may arise in case of recognition and enforcement of a judgment falling within the application scope of the Succession Regulation. For example, it is likely that Cypriot public policy may interfere at the stage of recognition of a judgment in cases of foreign same-sex marriages, of polygamous liaisons and/or of unequal allocation of assets between spouses based on their sex et alia.

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<sup>148</sup> Emilianides, C. A., Shaelou, S. L., 2015, § 203.

<sup>149</sup> Emilianides, C. A., Shaelou, S. L., 2015, § 210.

### 3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?

Section 29 of Cap.189 provides that an heir may file a petition to the competent probate registrar asking for the issue of a certificate of succession. This certificate contains the names of the heirs, possible incapacity of an heir for the administration of the census of the estate, the value of the estate and list with the debts of the estate.

### 3.3.5.7. Are there any national rules on international jurisdiction and applicable (besides the Succession Regulation) concerning the succession in your country?

Please see answer in question 3.3.5.3.

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## Czechia

Zdeňka Králíčková, Martin Kornel and Lucie Zavadilová

Zdeňka Králíčková (1. except 1.4., 2. except 2.3.)

Lucie Zavadilová (1.4., 2.3.)

Martin Kornel (3.)

### 1. Social perspective.

#### 1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without *affectio maritalis*).

Due to the political, social and economic changes in 1989, the portrait of family in the Czech Republic, or former Czechoslovakia, has undergone a complete change. In general, there are fewer marriages being concluded (however, this trend seems to be slightly changing) and children being born. On the other hand, there are a lot of divorces, single mothers and single people living alone or together with other people. That all has brought a lot of problems, including those concerning property. Last but not least, free migration of people and the increase of “mixed” couples effect family and family life in the Czech Republic.

Unfortunately, there are no sufficient reports, studies or books describing the evolution of family and family life in the Czech Republic.<sup>1</sup> However, the portrait of a current family in the Czech Republic may appear from the statistical data provided by the Czech Statistical Office, especially for the Eurostat. The key points are as follow:

- a quarter of the population aged 20 and over is single,
- first marriage is concluded on average 4 years later than at the turn of the century,
- there is an increase in divorce rate of long-lasting marriages,
- living in cohabitation has become more popular than marriage only among the youngest couples.<sup>2</sup>

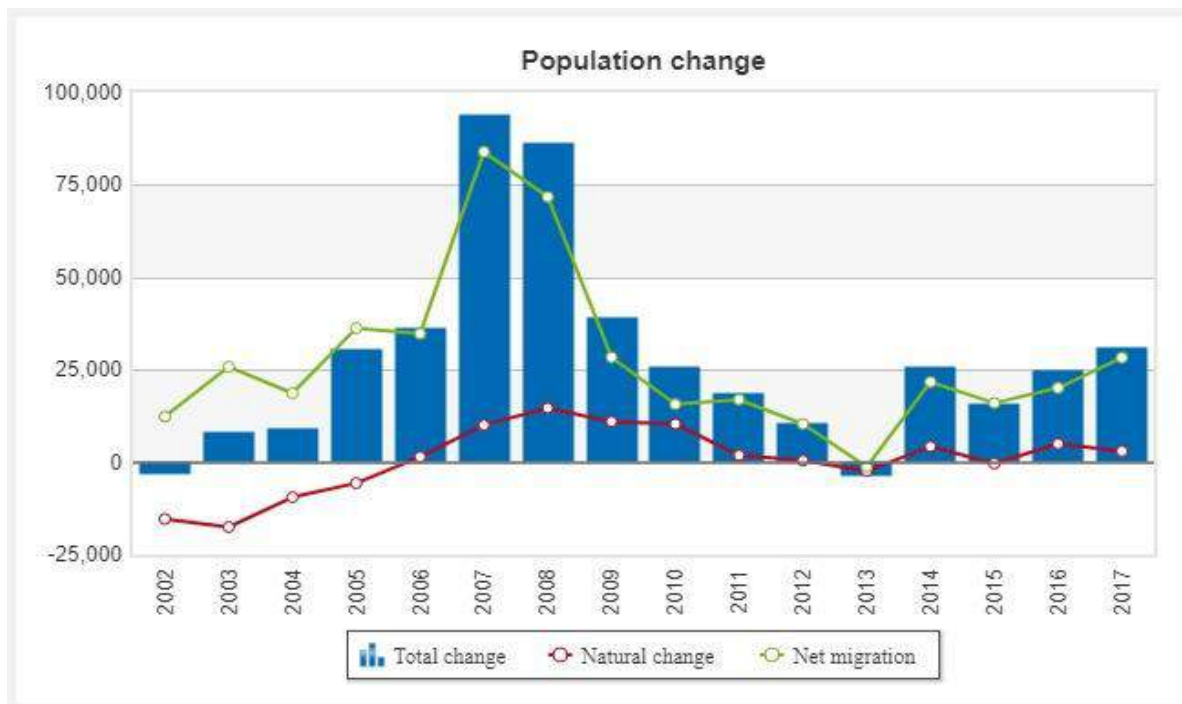
The statistical data and the charts from the Czech Statistical Office are available at: <https://www.czso.cz/csu/czso/population>. Some charts are available in English. The following one shows that the population of the Czech Republic was 10.637,794 at 30<sup>th</sup> September 2018.

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<sup>1</sup> However, there are some exceptions. For instance, see Možný, I., 2011. There are some books in English as well. See Hrušáková, M., 2002 and Hrušáková, M., Westphalová, L., 2011.

<sup>2</sup> See Němečková, M., Kurkin, R., Štyglerová, T.: Marriages and Births in the Czech Republic. Family Pattern in the Czech Republic – First Child latest and outside marriage. See [https://ec.europa.eu/eurostat/statistics-explained/index.php/Marriages\\_and\\_births\\_in\\_the\\_Czech\\_Republic](https://ec.europa.eu/eurostat/statistics-explained/index.php/Marriages_and_births_in_the_Czech_Republic) (18.2.2019). Data extracted in December 2015.

It was reported that after sharp changes, which began in the early 1990s, the demographic pattern of the Czech Republic is now stabilising. People marry less often and later, remain single more frequently and prefer cohabitation. However, still more than half of the population aged 20 and over is married. The divorce rate as a general trend stopped increasing and stabilised at 45-50 % of marriages terminating in divorce. The total fertility rate reached its minimum value (slightly above 1.1) at the turn of the 21st century, but it partly reflected a significant shift of motherhood to a later age. The level of the "lowest-low fertility" was surpassed only in 2006. The share of children born outside marriage has continually increased and is approaching 50%.



An insight into the history can contribute to the understanding of demographic developments of the society and family law in the Czech Republic as well.<sup>3</sup>

The communist take-over in 1948 was followed by many changes. There is no doubt that those changes influenced both the character of family and family law. According to the communist family policy, the family should have looked like a small unit consisting of a husband and a wife, both equal. The emancipation of women was realised through their full employment (including mothers with young children). The role of maintenance duty between the spouses and ex-spouses was underestimated. In any case, there was a need for “two family incomes” with the so-called “consumption” character of life becoming a standard. The man stopped being the head of the family and its supporter. Due to the nationalisation and expropriation, the family existed without property, real estate etc. Family members were allowed to own more or less only things for their personal use. Regarding family dwelling, in most cases, families were meant to have the personal use of flats. The legal order used to distinguish socialist, cooperative, personal and private ownerships. The last one was under the weakest legal protection. Marital property law was regulated by *ius cogens*. There was no possibility of pre-marital and marital agreements (1964 – 1991).

The state policy regarding family dwelling “placed” families in small state or co-operative flats, which reduced the family to the so-called nuclear one: married couple with one or two children. Parents were obliged to raise, bring up and teach their children according to the communist ideology. The social function of family had to be transferred to state institutions: institutional facilities for children’s care, their upbringing and leisure time activities, and institutional houses caring for old grandparents. The paternalistic state proclaimed to help families with great support and many kinds of allowances, mainly for newly established young families. Preferring marriage at a young age to any other form of cohabitation led to a phenomenal marriage rate and a very low average age of new spouses. According to statistics, almost everyone got married once in their life, sometimes twice.

It was very convenient to get married “early” because of various benefits. New young family was granted small loans with almost no interest, small flats in personal use and after the birth of the child – small financial support of the state. The only way a young couple could be allocated a flat was to get married and have a child, a powerful inducement for an early marriage and giving birth to a child.

<sup>3</sup> For a general historical point of view see Bělovský, P., 2009, 463 et seq. For more see Králíčková, Z., 2008, 173 et seq.

The “under age” brides were not exceptional. Since the 1970s, the pregnancy of brides was no longer considered a violation of social standards, being often “included” in life plans of single women. According to sociological surveys, about 51% of brides were pregnant on their wedding day. There were almost no children born out of wedlock, although the discrimination of such children was banned. The average wedding age of brides has increased from 23,2 years in 1993 to 28 years in 2004. The average age of grooms has increased from 25,4 years in 1993 to 30,5 years in 2004 (the first marriage). Nowadays, men and women enter into their first marriage at a later age than before. Mean age at first marriage increased by almost 4 years between 2000 and 2013 for both men and women. In 2013, the mean age at first marriage was 32.3 for grooms (28.9 in 2000) and 29.8 for brides (26.5 in 2000). In 2017 it was 32,2 years for grooms and 29,8 years for brides.<sup>4</sup>

Women enter into marriage on average three years earlier than men. The vast majority (95 %) of the population of the Czech Republic aged 20-24 have never been married. However, the share of never married persons decreases with increasing age – in the age group 30-34 the proportion of single persons is already less than half and married persons has a slight majority. The highest share of married persons – almost 70 % – is in the age group 55 to 64.<sup>5</sup> According to the statistics, until recently, the number of marriages shows a long-term decreasing trend. After 2000, the strongest decline was between 2008 and 2011. While there were 52–53 thousand marriages a year at the beginning of the 21st century, there were 43.5 thousand in 2013, which was the lowest figure in the history of Czech demographic statistics. The crude marriage rate (number of marriages per 1.000 inhabitants) fell from 5.4‰ to 4.1‰ between 2000 and 2013. In 2017, there were 52.567 weddings. According to the Czech Statistical Office it was the highest number in last 10 years.<sup>6</sup>

The birth rate was quite high after 1948. However, after 1989, it reached a historic and prolonged low in the Czech Republic. Women postponed the time of having children (sometimes until it is too late to have them at all), or opted out entirely, as they have become more educated and better integrated into the labour market. New possibilities – interesting labour market, professional opportunities, career, travelling, etc. – provided young people with tantalizing alternatives to family. Birth rates became the lowest in history: 1.13 per woman in 1999. There is – of course, an increase of the age of mothers when giving birth to their first child (22.6 in 1993 and 26.3 in 2004). As a low birth rate became a political issue, the Parliament decided to prolong the length of maternity leave, gave the mothers of new born children more options on how to use it and increased the payments to encourage new births. The Czech Statistics Office announced recently a slow increase of child births. Nevertheless, the increase of birth rate was interpreted by specialists as a result of pro-family behaviour of the so-called strong population born during the baby boom of the mid-1970s. The number of live births started to increase at the beginning of the 21st century and the revival in fertility intensity came particularly in 2004–2008, when the number of live births rose to 120,000 in 2008, corresponding to 1.5 children per woman in 2008. But in the following years the annual numbers of live births fell again, mainly due to the economic crisis and the decrease in the number of women at reproductive age: there were 117–118,000 live births per year in 2009–2010 and 107–109,000 in 2011–2013.<sup>7</sup> According to the Czech Statistical Office, the fertility rate was 1,63 children per woman in 2016.<sup>8</sup> In 2018 it was almost 1,7.

The following charts show total fertility rate and the increasing age of mothers.<sup>9</sup>

<sup>4</sup> See <https://www.czso.cz/csu/czso/svateb-pribyva> (18.2.2019).

<sup>5</sup> See Note No. 2.

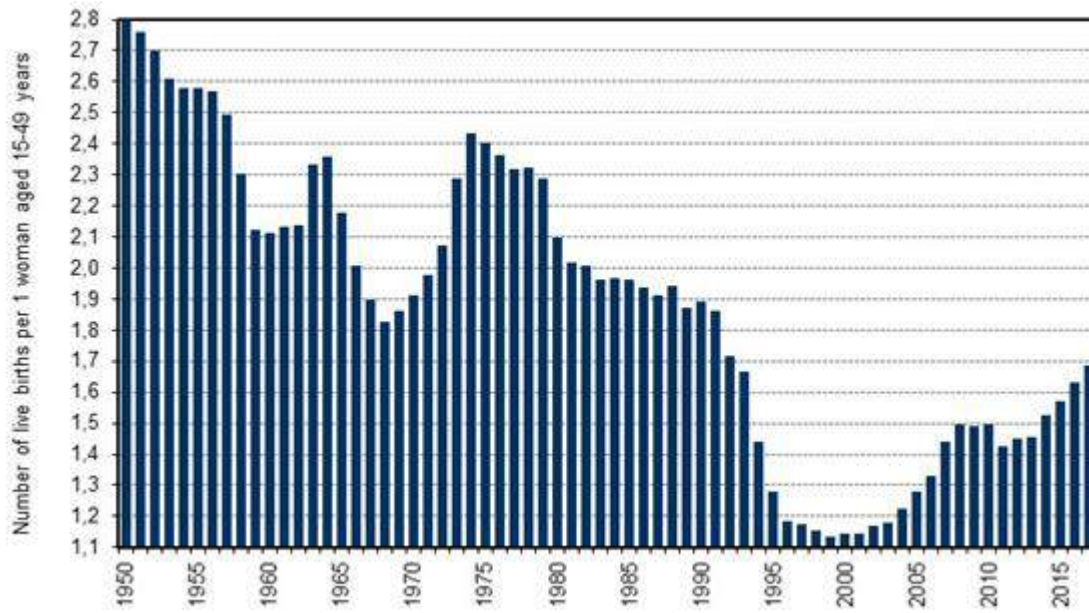
<sup>6</sup> See Note No. 4.

<sup>7</sup> See Note No 2.

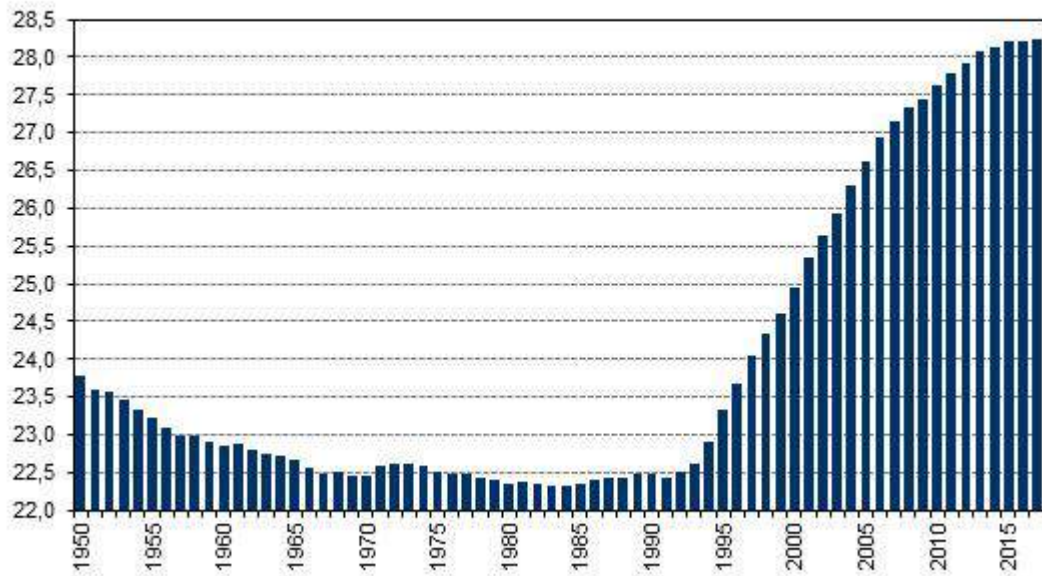
<sup>8</sup> For more see Note 4.

<sup>9</sup> The statistical data and the charts from the Czech Statistical Office are available at: <https://www.czso.cz/csu/czso/population> (20.5.2019). Some charts are available in English.

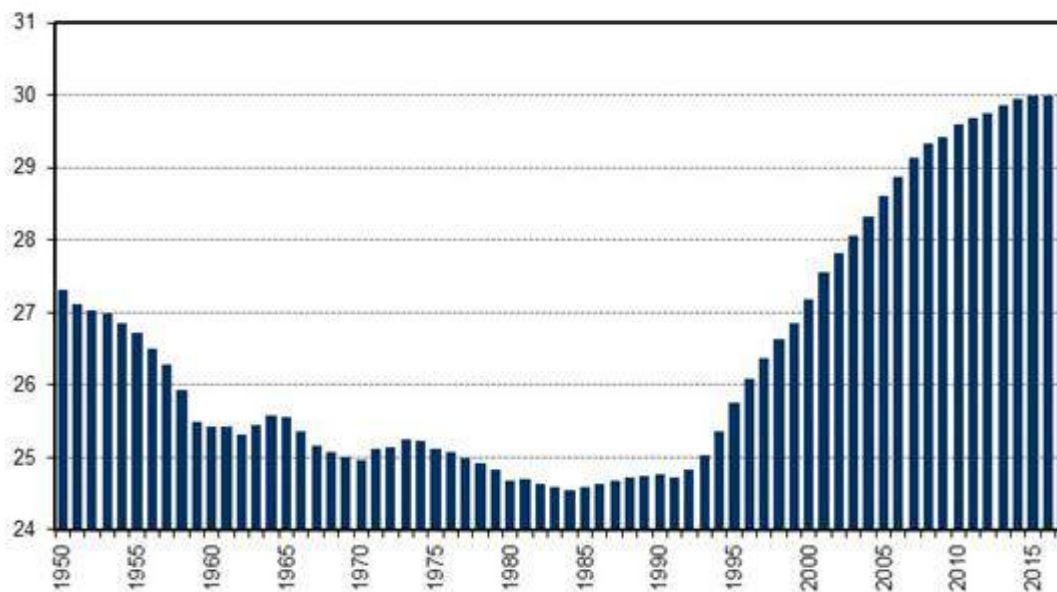
Total fertility rate, 1950-2017



Mean age of women at birth of first child, 1950-2017



Mean age of women at birth, 1950-2017



Along with all the above mentioned political, social and economic changes after 1948, the ban of leaving the country and the impossibility to choose a different life style as the family, one led to the so-called concurrence of life starts: economic activity (both the need and the duty to be employed), marital life and parental responsibilities. That all brought various problems: economic dependence on parents, insufficient social maturity and the resulting high divorce rate in the first three years of marriage.

While between 1919 and 1939 the number of divorces (legal termination of marriage) was about 4,500 divorces a year, after the communist take-over and passing the new law in 1949, the average number of divorces in 1950 - 1954 was as many as 10,535. The divorce rate thus grew rapidly, never dropping again, and by the early 1990s it was growing almost linearly. Divorce became a fully acceptable means of solving matrimonial problems. The strong position of women led to the situation in which divorce proceedings started on their motion. According to experts, women's behaviour in divorce court is more "aggressive" than that of men. Minor children did not prevent couples to get divorced at all. As for the after-divorce-settlement, minor children were as a rule placed to the sole custody of the mothers who were entitled to use the former family flat as an individual tenant.

The divorce rate only stopped growing in 1990 after reaching the historical peak of 32,055 divorces a year. In 1991 and 1992 there was a slight decrease of divorce rate - 29,366 divorces in 1991 and 28,572 divorces in 1992. The decrease of divorce rate in the early 1990s might have been the result of feelings of uncertainty related to fundamental social changes but it was also a result of growing numbers of lawsuits in that period (namely a great impact of restitution disputes with many experienced judges leaving the court practice) causing a considerably longer time needed for court proceedings.

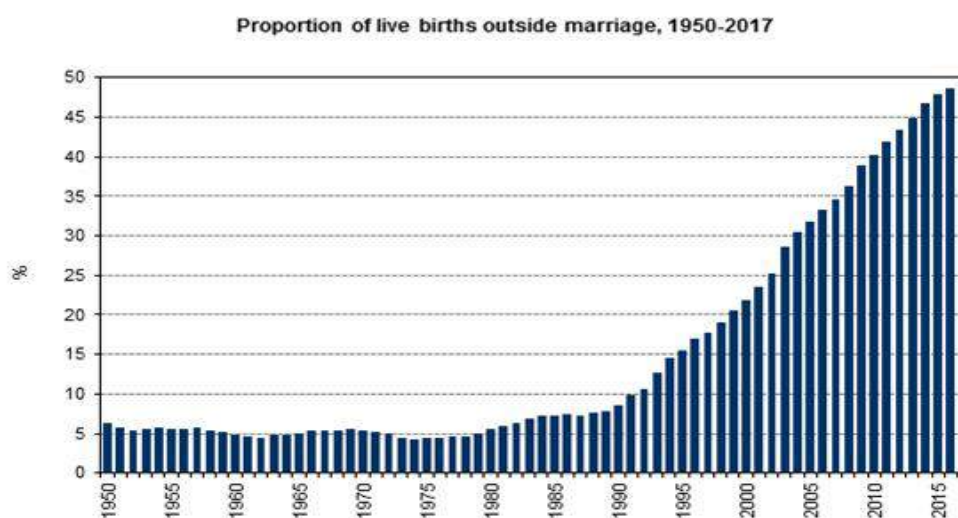
Then the number of divorces started to grow slightly, reaching the peak of 33,113 in 1996. Surprisingly, after passing the great amendment of the Act on Family in 1998, which brought about the key change in divorce rules, there was a slight decrease. Due to the new regulation, the divorce proceedings in the case of spouses with minor children were extended and the divorce rate started to decrease - 23,657 in 1999. Nevertheless, later on we can see an increase of divorce rate again: in 2004 there were 33,060 divorces. Women were still more active in filing the motion for divorce (2004 - women: 22,110 and men: 10,950).

Later on, the number of divorces of long lasting marriages have increased. That brings about new problems with the settlement of common property and maintenance duty. Mainly older women face problems called “feminisation of poverty”. In spite of a slight rise in marriages in 2000, the long-term decline in marriage rate is not in doubt. The increase in 2000 was caused by overpopulated birth cohorts reaching marriage age.

However, as a consequence of a decrease in the number of marriages, the number of divorces decreased too: from 30–33,000 registered in the years 2000–2004 to 26–28,000 in 2011–2013. The crude divorce rate went down from 2.9–3.2‰ to 2.5–2.7‰. However, the divorce rate in the Czech Republic is still one of the highest in Europe. The total divorce rate ranges between 45 and 50%. At the same time, the average duration of marriage at divorce rose (to 13 years in 2013) as a result of an increase in the number of divorces of long-lasting marriages (lasting 20 years or longer), while the share of divorces of short-lasting marriages decreased. In 2017 there was 25,755 divorces.

Curiously, the number of children born out of wedlock has been growing rapidly, too. While in 1989 there were only 8%, in 1996 the share amounted to over 15%. It is similar to the situation in the period of 1918 – 1939. However, there are different reasons for that. The mothers of such children do not live alone but very often with the fathers of their children. According to the poles, there is a great amount of cohabiting couples in the Czech Republic who do not want to get married: some of them simply reject marriage as an old institution, some of them want to take advantage of state benefits designed to support “single” mothers. It is connected with all above mentioned problems and with diversity of incomes and the increase of costs in general. Nowadays, the number of children born out wedlock is almost 50%.

The following chart shows the increasing proportion of the children born out of wedlock.<sup>10</sup>



The so-called single style was not accepted in the period shortly after 1948. It was not convenient to live without marriage. Nowadays, the poles show that there are many one person households. According to the 2011 Population and Housing Census results, a quarter of the population is single (never married or in a registered partnership).<sup>11</sup>

Cohabitation without marriage between young people was quite rare after 1948, especially due to problems with obtaining flats, as young married couples were always preferred in allocating flats to personal use by the state. Informal relationships were mostly considered as a preparation for marriage or a “stage before” marriage. Cohabitation of unmarried couples used to be almost exclusively limited to older couples or surviving spouses taking into consideration adult children and

<sup>10</sup> The statistical data and the charts from the Czech Statistical Office are available at: <https://www.czso.cz/csu/czso/population> (20.5.2019). Some charts are available in English.

<sup>11</sup> See Note No. 2 above.

with regard to retaining the right to widow pensions. Additionally, persons who had experienced several marriages frequently cohabited without marriage.

Since 1989 the number of partners living in cohabitation has been growing significantly. The numbers of non-formal unions have not yet been statistically measured. The increasing number of children born out of wedlock mentioned above and the rising average marriage age corroborate that they are on the increase. The results of the Population and Housing Census 2001 give more detailed information.<sup>12, 13</sup> According to the findings, the proportion of people living in cohabitation was in the population aged 20 and over 5.7% (a total of 473,420 persons). At the age 50 and over, only 2.8% of people lived in cohabitation. Cohabitation was most common in the younger age groups: almost two thirds of people aged 20-24 were living in cohabitation.<sup>14</sup>

Regarding registered partnership of same-sex couples, the Czech Statistical Office does not provide official data in contrast with marriage. Here we can state that the biggest interest in registered partnership occurred right after it was enacted in the Czech Republic in 2006 (for legal development see below). Then the figures slumped, but after a few years, a gradual increase in their number followed. According to non-official sources, registered partnership was concluded by 2,174 couples by the end of the 2015. Gays are more interested in registration of their relationships as lesbians. Registered partnership has been concluded by 1,439 male couples and by 735 female couples. The interest in it has been rising in the past years. On the other hand, registered partnership was ended by some 300 couples.<sup>15</sup>

### **1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.**

Only the statistical data on marriage and average wedding age from 2004 (the access to the European Union) till 2017 (or 2018, if available) are provided here. For more information and comments, see above. Regarding registered partnership and cohabitation, there are no official data. In 2004 there were 51,447 marriages concluded, in 2005 more – 51,829 marriages, in 2006 even more – 52,860 marriages, in 2007 surprisingly many more – 57,157 marriages, in 2008 just 52,457 marriages, in 2009 fewer – 47,862 marriages, in 2010 even fewer – 46,746 marriages, in 2011 45,137 marriages, in 2012 45,206 and in 2013 43,499 marriages, in 2014 a bit more – 45,575 marriages, in 2015 48,191 and finally, we can see a slight increase, in 2016 there were 50,768 marriages and in 2017 just 52,567 marriages.

The average age of brides has increased. The average age of single grooms was 30,5 in 2004 (the first marriage) and of single brides was 28,0 in 2004. These days, men and women enter into their first marriage at a later age than before. The mean age at first marriage increased by almost 4 years between 2000 and 2013 for both men and women. In 2013 the mean age at the time of first marriage was 32.3 for grooms and 29,8 for brides. In 2018 it was 32,2 years of age for grooms and 29,8 for brides.<sup>16</sup>

<sup>12</sup> See <https://ec.europa.eu/eurostat/documents/3888793/5816569/KS-CC-02-002-EN.PDF/00b6ffbb-2da9-4a61-b965-5f25bcb9cebd> (14.2.2019).

<sup>13</sup> For further information see <https://ec.europa.eu/eurostat/documents/2995521/7088499/3-27112015-AP-EN.pdf/969683ce-267d-45eb-8dc4-ae1e95421052> (14.2.2019).

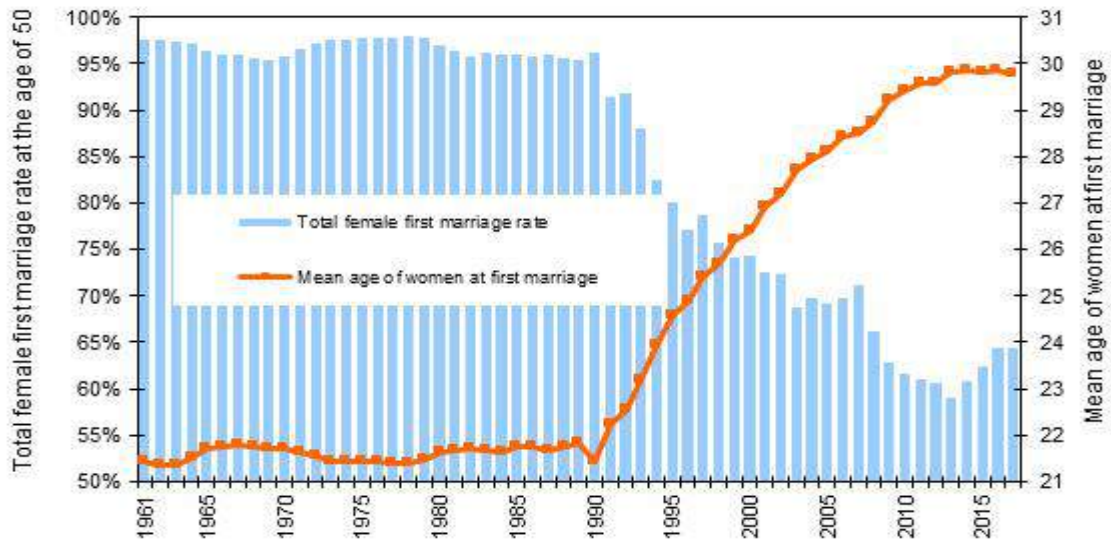
<sup>14</sup> See Note No. 2.

<sup>15</sup> See <http://www.praguemonitor.com/2016/02/05/thousands-czechs-enter-registered-partnership> (14.2.2019).

<sup>16</sup> The statistical data (above) and the charts showing the proportions of marriages and divorces (below) from the Czech Statistical Office are available at: <https://www.czso.cz/csu/czso/population> (20.5.2019). Some charts are available in English.

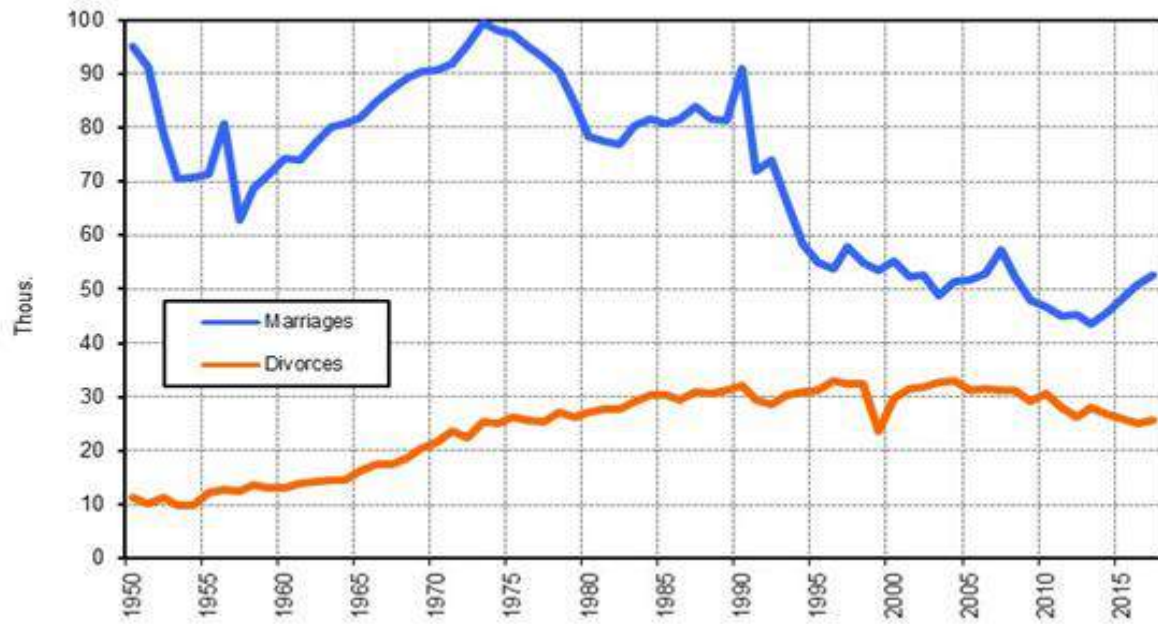


Nuptiality of single women, 1961-2017



Data based on the nuptiality tables.

Marriages and divorces, 1950-2017



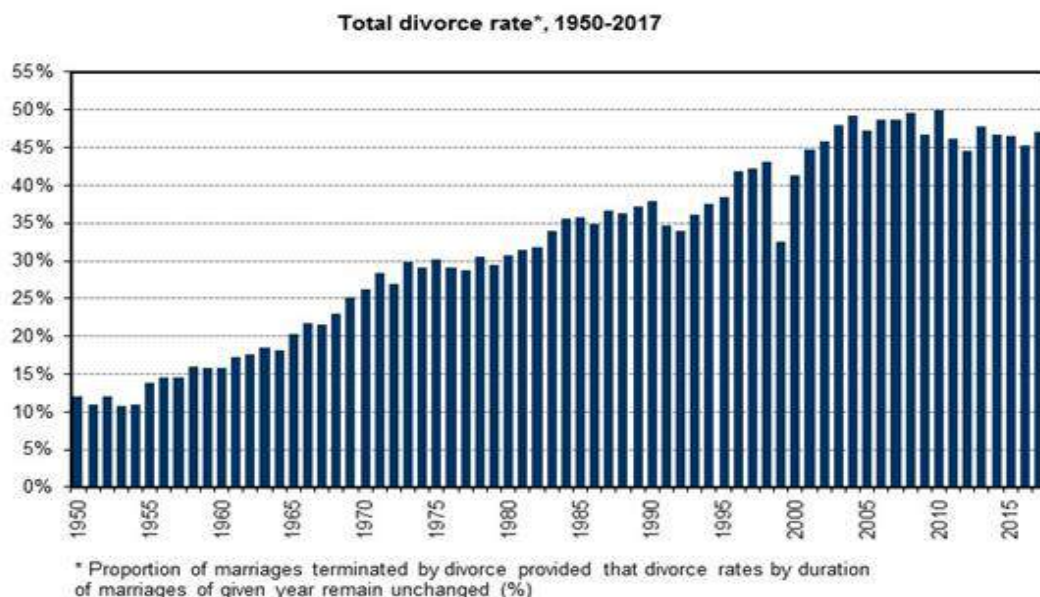
**1.3. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.**

Only statistical data on divorce from 2004 (the access to the European Union) till 2017 are provided here. For more information and comments, see above. Regarding registered partnership and cohabitation, there are no official data.

The number of divorces has dropped since 2004. In 2004 there were 33.060 divorces, in 2005 31.288 divorces, in 2006 31.415 divorces, in 2007 31.129 divorces, in 2008 31.300 divorces, in 2009 29.133 divorces, in 2010 30.783 divorces, in 2011 28.113 divorces, in 2012 26.402 divorces, in 2013 more – 27.895 divorces, in 2014 less – 26.764 divorces, in 2015 even fewer – 26.083 divorces and in 2016 24.996 divorces, in 2017 25.755 divorces.

Regarding numbers of divorces with minor children, a slight decrease can be seen as well since 2004, when the proportion was 62,9%. In 2017 the proportion was 59,0%.

Total divorce rate has decreased since 2004 from 49,3% to 47,2% in 2017.<sup>17</sup>



**1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).**

Since joining the European Union in 2004, the number of foreigners in the Czech Republic has more than doubled (from about 254,000 persons in 2004 to 567,000 foreigners in the end of 2018).<sup>18</sup> Since 2004, a total of 65,600 marriages in which at least one of the spouses has a foreign citizenship were concluded in the Czech Republic. The proportion of marriages in which at least one spouse was foreign represented 9.5% of all marriages concluded in the Czech Republic from 2004 to 2017. During this period, almost 95% of these marriages were mixed marriages – Czech women concluded 37,064

<sup>17</sup> The statistical data (above) and the chart showing total divorce rate (below) from the Czech Statistical Office are available at: <https://www.czso.cz/csu/czso/population> (20.5.2019). Some charts are available in English.

<sup>18</sup> See [https://www.czso.cz/documents/11292/27320905/c01R02\\_201812.pdf/1f054d7a-092e-4d69-be72-d5116334e3ce?version=1.0](https://www.czso.cz/documents/11292/27320905/c01R02_201812.pdf/1f054d7a-092e-4d69-be72-d5116334e3ce?version=1.0) (17.2.2019).

marriages with male foreigners (56.5%), and Czech men concluded 25,185 marriages with female foreigners (38.4%). Only in 3,351 cases both spouses were foreigners (5.1%).

In 2017, a total of 5,093 marriages, which involved at least one foreigner, were celebrated in the Czech Republic. This constituted 9.7% of all marriages concluded that year. For comparison, there were 5,153 marriages of foreigners in 2016 (10.2%) and 5,170 marriages in 2015 (10.7%).

Keeping 2017 as a reference year, there were 2,654 marriages concluded between a Czech female and a male foreigner. Czech women usually married men from Slovakia (33.6%), Germany (9.5%), the United Kingdom (6.8%), Ukraine (3.7%), and France (3.2%). In the same year, the Czech men celebrated 1,994 marriages with women of foreign citizenship. Czech men have mostly chosen women from Slovakia (44.6%), Ukraine (18.1%), the Russian Federation (8.0%), Vietnam (3.0%), and Poland (2.6%). It is obvious that Czech women differ from Czech men in relation to the frequency of marriages with foreigners as well as the citizenship of the spouses. Marriages celebrated in 2017, in which both spouses were foreigners, reached 445 and represented a minority (8.7% of all marriages with a foreign element).<sup>19</sup>

Between 2004 and 2017 there was a total of 27,084 divorces, where at least one of the spouses was a foreigner, which represented 6.7% of all divorces in the Czech Republic. The proportion of divorces of foreigners is growing from 1,523 (4.6%) in 2004 to 1,906 (7.6%) in 2016, respectively 2,041 (7.9%) in 2017. From 2004 to 2017, more than 89.5% divorces related to mixed marriages –Czech women divorced male foreigners in 14,464 cases (53.4%), and Czech men divorced female foreigners in 9,779 cases (36.1%). Divorces, where both spouses were foreigners, reached to 2,841 cases (10.5% of all divorces with a foreign element).

In 2017, a total of 949 Czech women divorced a male foreigner. These men were usually citizens of Slovakia (26.0%), Ukraine (8.2%), Tunisia (5.4%), or the United Kingdom (5%). In the same year, Czech men divorced a woman of foreign citizenship in 667 cases. Country of origin of these women was mostly Slovakia (35.7%), Ukraine (26.2%), the Russian Federation (6.9%), or Poland (5.5%). A total of 425 divorces related to a marriage where both spouses were foreigners. This is almost 20.8% of all divorces with foreign element that occurred in the Czech Republic in 2017.<sup>20</sup>

Unfortunately, statistical data regarding the percentage of the registered partnerships having cross-border elements and their dissolutions are not available.

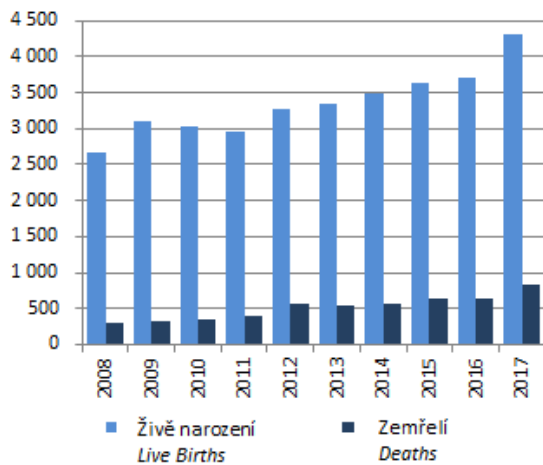
For more details see charts devoted to foreigners (namely the number of their births, deaths, marriages, residence and state citizenship) provided by the Czech Statistical Office available at: <https://www.czso.cz/csu/czso/population>. Some charts are done in English.

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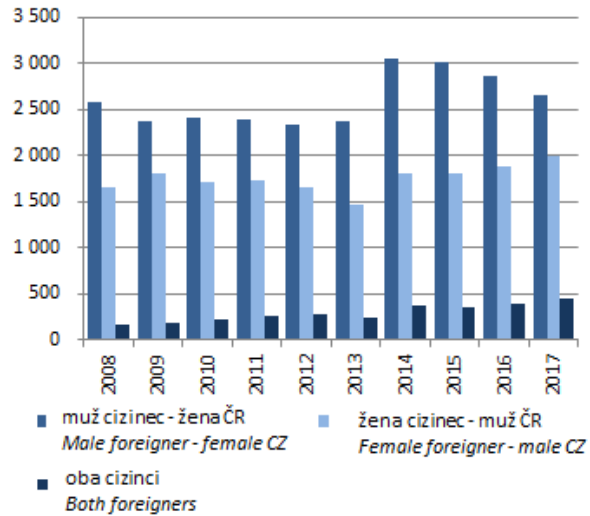
<sup>19</sup> For further details see [https://www.czso.cz/documents/11292/29682397/c08R83\\_2017.pdf/543f377f-5c83-475f-8ead-519d06992795?version=1.0](https://www.czso.cz/documents/11292/29682397/c08R83_2017.pdf/543f377f-5c83-475f-8ead-519d06992795?version=1.0) (17.2.2019).

<sup>20</sup> For further details see [https://www.czso.cz/documents/11292/29682397/c08R84\\_2017.pdf/ed3b914a-7af3-48fb-8afa-db91ca038815?version=1.0](https://www.czso.cz/documents/11292/29682397/c08R84_2017.pdf/ed3b914a-7af3-48fb-8afa-db91ca038815?version=1.0) (17.2.2019).

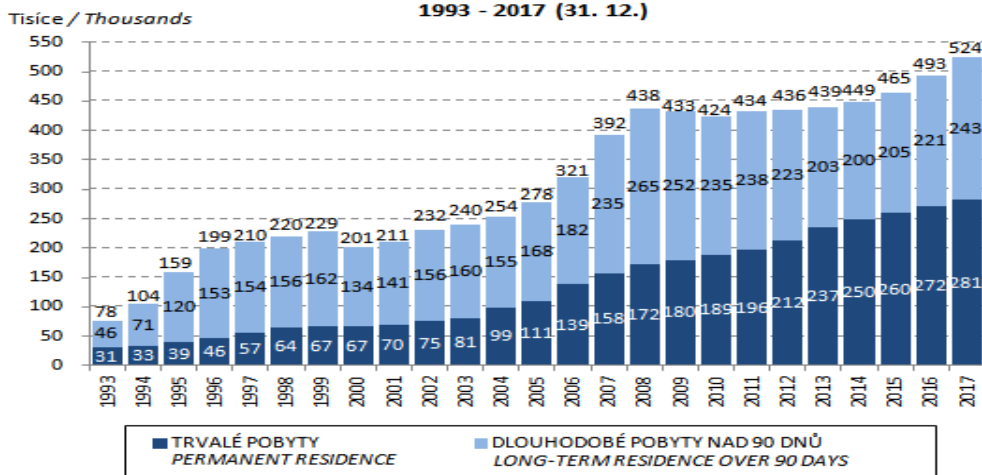
**ŽIVĚ NAROZENÍ A ZEMŘELÍ CIZINCI 2008 - 2017**  
LIVE BIRTHS AND DEATHS OF FOREIGNERS



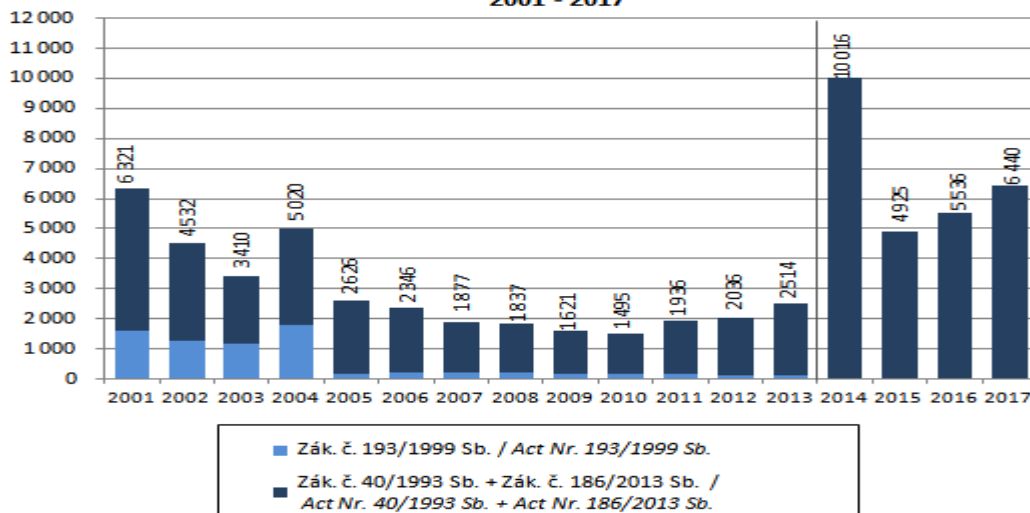
**SŇATKY CIZINCŮ 2008 - 2017**  
MARRIAGES OF FOREIGNERS



**VÝVOJ POČTU CIZINCŮ V ČR PODLE TYPU POBYTU**  
TREND IN THE NUMBER OF FOREIGNERS IN THE CR BY TYPE OF RESIDENCE  
1993 - 2017 (31. 12.)



**STÁTNÍ OBČANSTVÍ ČR NABYTÁ BĚHEM ROKU**  
CZECH CITIZENSHIP ACQUIRED PER YEAR  
2001 - 2017



## 2. Family law.

### 2.1. General.

#### 2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?

In the year 2012, after a long “transitory” period, new *Civil Code* was adopted in the Czech Republic as the Act No. 89/2012 Coll. (further mainly CC). It came into effect on the 1<sup>st</sup> January 2014.<sup>21,22</sup>

However, especially thanks to many *Human Rights Covenants* and the case law of both the Constitutional Court of the Czech Republic and the European Court of Human Rights, new Czech Family Law can be characterized with the word “continuity” with the previous legal regulation, as *many changes* of law occurred shortly after 1989.<sup>23</sup> Of course, more radical changes to Czech Family Law were not expected to take place without a *re-codification* of the Civil Code from 1964, or the Act on the Family from 1963.<sup>24</sup> The authors of the new Civil Code<sup>25,26</sup> did not intend only to include again Family Law into the new Civil Code, but also wanted to return Family Law to the basics of the *General Civil Code* (ABGB, 1811, further mainly GCC)<sup>27,28</sup> and to eliminate ideology and the influence of Soviet Family Law.<sup>29</sup> The comeback to the tested European tradition cannot be linked only to the systematic nature of the new Civil Code but also to its content. Individual instruments incorporate some important *innovations* that have been present in other *European Civil Codes* for a long time and are results of various academic activities originating especially in the *Commission on European Family Law (CEFL)*. That is why the new Civil Code may be said to be “a reasonable compromise” taking into account both *traditions* and *new phenomena, models and tendencies*.

Beside the Civil Code, *the Act on Registered Partnership* (Act No. 115/2006 Coll.) has to be mentioned as a main source of Family Law. The rules regulating the rights and duties of the same-sex partners were not incorporated into new Civil Code in 2012.

Last but not least, the *Constitution of the Czech Republic* (Constitutional Act No. 1/1993 Coll., further mainly Constitution) must be mentioned. According to the Constitution, promulgated treaties to the ratification of which Parliament has given its consent and by which the Czech Republic is bound form a part of the legal order and are directly applicable, prevailing over domestic ordinary law (Section 10, Constitution).

Finally, *the Charter of Fundamental Rights and Freedoms* (Act No. 2/1993 Coll., further mainly Charter) must be added. According to its Article 32, Section 1, *parenthood and the family are under the protection of the law*.

For details, see below.

<sup>21</sup> English translation of original text is available at: <http://obcanskyzakonik.justice.cz/index.php/home/zakony-a-stanoviska/preklady> (20.5.2019). Even though the Civil Code has been amended, the amendments are not relevant to the issue in question.

<sup>22</sup> For more information, see Králíčková, Z., 2014, 71-95.

<sup>23</sup> See Králíčková, Z., 2009, 157-173. See also Králíčková, Z., 2002, 805-825.

<sup>24</sup> See Haderka, J. F., 1996, 181-197. See also Haderka, J. F., 2000, 119-130.

<sup>25</sup> See Eliáš, K., Zuklínová, M., 2001.

<sup>26</sup> See Eliáš, K., Zuklínová, M., 2005.

<sup>27</sup> Viz Allgemeines bürgerliches Gesetzbuch from the 1<sup>st</sup> June 1811 No. 946 Coll., that was taken by the Act from 28<sup>th</sup> October 1918 No. 11 Coll. to the legal order of the newly established Czechoslovakia.

<sup>28</sup> For the theoretical questions Zuklínová, M., 2003, 141 et seq.

<sup>29</sup> For a general point of view see Bělovský, P., 2009, 463 et seq.

### 2.1.2. Provide a short description of the main historical developments in FL in your country.

The authors of the new *Civil Code* wanted to return Czech Civil Law or Czech Family Law back to the traditions represented in the *General Civil Code*.<sup>30</sup> However, there were some spheres, where the comeback was not acceptable due to political, social and economic changes, namely emancipation of women, their almost full employment after the year 1945, or 1948 and changes of roles in families and society. Last but not least, it was not possible to restore legal distinguishing between the children born in and out of the wedlock.

It must be stressed that according to the *Constitution of the Czechoslovak Republic* from the 29<sup>th</sup> February 1920 (Act No. 121/1920 Coll.), which prohibited discrimination based on sex, ancestry and occupation,<sup>31</sup> the provisions of the General Civil Code were interpreted and applied in its light. Especially the provision, which stipulated that “*the man is the head of the family*” (Section 91, the first sentence, GCC) was seen in different light.<sup>32</sup> According to doctrine, the man was not just allowed to run the family and family life, but he rather had the *responsibility for the family, family affairs and family members*, both in personal and property sphere. In accordance with the *Act on Alimony* (Act No. 4/1931 Coll.), he had to take care in order to have adequate incomes accordingly to his social status and he had to use his revenues proportionately in favour of the common household.<sup>33</sup>

The General Civil Code strictly distinguished between personal relations and property relations between the spouses.

As regards personal relations, beside informal agreement on engagement (*Eheverlöbniß*, Section 45, GCC, in Czech: *zasnoubení*), there were two types of contracts regulating: *marital contract* (*Ehevertrag*, Section 44, GCC, in Czech: *smlouva manželská*) and *contract for the purpose of voluntary divorce* (Section 103, GCC).

Regarding property aspects, the code regulated two types of contracts as well: *wedding contract* (*Ehepact*, Section 1217, GCC, in Czech: *smlouva svatební*) and *contract on the settlement of property relations between the spouses in relation to voluntary divorce* that could be construed as a wedding contract as well. When writing *the wedding contract*, the spouses or would-be spouses were quite free: the wedding contract could regulate especially dowry (*dos and antidos*), morning gift, *community of property*, management and use of common and separate property, hereditary succession or lifelong enjoyment of the assets destined for death, and the widow's salary (Section 1217, GCC).<sup>34</sup>

If there was *no wedding contract*, the *regime of separation of property* would apply by operation of law.

In 1948,<sup>35</sup> the traditional distinction between Public Law and Private Law was abandoned. According to the Soviet model, the Czech legal order was divided into relatively separated legal branches.<sup>36</sup> Not only *the Constitution of Czechoslovakia* from the 9<sup>th</sup> May 1948 (Act No. 150/1948 Coll.), but many new acts were passed in the so-called juridical two-year-plan (in Czech: *právnícká dvouletka*) to found communist law.<sup>37</sup> The destructive character of traditional values of law was pointed out in the series of the International Encyclopaedia of Family Law.<sup>38</sup>

<sup>30</sup> For details see Veselá, R., 2011, 154 et seq.

<sup>31</sup> See the Act No. 121/1920 Coll., Constitutional Bill of Czechoslovakia, especially Section 106, Sub-Section 1.

<sup>32</sup> See Rouček, F., Sedláček, J., 1937, vol. I.

<sup>33</sup> Op. cit., 463–466.

<sup>34</sup> For details see Králíčková, Z., 2011, 413–422.

<sup>35</sup> The problematics of property aspects of marriage during the 2<sup>nd</sup> World War is not examined in this contribution due to its rather limited space.

<sup>36</sup> See Bělovský, P., 2009, 463 et seq.

<sup>37</sup> For more see Králíčková, Z. in Vojáček, L., Schelle, K., Tauchen, J. et al., 2011, 168 et seq.

<sup>38</sup> For the general view on the communist Family Law, compare Mladenović, M., Janjić-Komar, M., Jessel-Holst, C., 1998, 3–151.

Provisions of Family Law were enacted in the new *Act on Family Law* (Act No. 265/1949 Coll., further mainly AFL),<sup>39</sup> which was passed beside the new Civil Code (Act No. 141/1950 Coll.).

The aim of the new Act on Family Law was to *purify* Family Law from characteristics known in the bourgeois society and its law.<sup>40</sup> The communist family based on marriage was pronounced as a basis of communist state by the Constitution of Czechoslovakia. Because the communist society and the communist law intended to eliminate the influence of the Catholic Church on social life, the civil marriage was stipulated as obligatory. The concept of marriage as a contractual relationship (see marital contract, Section 44, GCC) was disregarded and marriage was concluded by the affirmation of spouses in front of a national committee. The hate against the clergy escalated into criminalisation of priests.<sup>41</sup> Beside the Act on Family Law, a discriminating law regulating marriages with foreign nationals was passed (Act No. 59/1952 Coll., On Marrying Foreign Nationals).<sup>42</sup>

Both, the Constitution of Czechoslovakia and the Act on Family Law stipulated *equality of a man and a woman* in marriage and family. As for personal rights and duties, the spouses had equal rights and duties, they were supposed *to live together, to be faithful to each other and to help each other*.

As for marital property law, the regulation was based on *community of property*. The community of property consisted of *assets acquired during the marriage* by any of the spouses, *except for inheritance and gifts and what served to personal needs or profession of one of the spouses* (Section 22 ff., AFL). It was possible to modify the legal scope of community of property by a *wedding contract* (Section 29, AFL). However, no ante-nuptial agreements were allowed. Husband and wife had *mutual maintenance duty* based on the “same living standard”.

Marriage dissolution was considerably simplified. The old construction of separation was repealed. Marriage was terminated by *death or divorce* based on an *objective principle*, which was the *irretrievable breakdown* of relations between the spouses. This principle was modified by the principle of a breakdown due to one of the spouses’ fault, namely in the case of granting divorce and its legal consequences. Married spouses could not be divorced without a consent granted by the so-called exclusively faultless spouse. If so petitioned by both spouses, the court could omit the fault from the decision.

The Act on Family Law was amended twice: in relation to divorce (Act No. 61/1955 Coll.) and adoption (Act No. 15/1958 Coll.).<sup>43</sup>

*After-divorce maintenance* was constructed as an *exceptional measure*.

Due to the passing of the *Constitution of Czechoslovak Socialist Republic* from the 11<sup>th</sup> July 1960 (No. 100/1960 Coll.) proclaiming the victory of socialism in Czechoslovakia, all codes from previous period were substituted by new acts: the *Act on the Family* (Act No. 94/1963 Coll., further mainly AF) and the *Civil Code* (Act No. 40/1964 Coll., further mainly CC). The new Act on Family and the Civil Code are said to be even *more simplified* than the older ones. Some experts speak about *further vulgarisation of legal culture* in Czechoslovakia.<sup>44</sup>

As the main change, new regulation of marital property law and divorce law needs to be mentioned.

<sup>39</sup> See Andrlík, J., Blažke, J., Kafka, A. (eds.), 1954, 13 et seq.

<sup>40</sup> See Khazova, O., 2007, 97 et seq.

<sup>41</sup> In details see Tureček, J., 1950, 71–82.

<sup>42</sup> Under this law marrying a person with other than the Czechoslovak citizenship was only possible on approval of the Ministry of Home Affairs or an authority empowered by it. Without such an approval marriage could not be concluded. The Act was in force until 1964.

<sup>43</sup> Let’s add some positives regarding children. The Act on Family Law was considered to be “Code of the Rights of the Child”. The law maker established equality between children born in the wedlock and children born out of wedlock. The institution of “pater familias” was changed into “power of parents”. Unfortunately, the Act on Family Law did not regulate due to political reasons any individual personal substitute care of children, for instance foster care that was widespread and very successful between the world wars.

<sup>44</sup> Towards criticism of the concept Eliáš, K., 1997, pp. 105 ff.

The rules of *undivided co-ownership of spouses* were introduced into Civil Code as a basic institution of marital property law.<sup>45</sup> Only *things* belonging to “personal ownership” *acquired during the marriage* by any of the spouses, *except inheritance and gifts and what served to personal needs or profession* of one of the spouses, could be the object of undivided co-ownership of spouses (Section 143, CC<sup>64</sup>). The law was *rigid, without any possibility of writing a wedding contract*, which was changed later on in 1992 and 1998. See below.

*Maintenance duty* between the spouses was constructed on the “same living standard” (Section 91, AF).

*Divorce* regulated by the Act on the Family was based only on *irretrievable breakdown*.

Regarding *maintenance duty between former spouses*, the scope was described by the words “adequate maintenance” and maintenance duty was not limited in time (Section 92 ff., AF).

The Civil Code was amended several times. The Act on the Family was amended too in 1982 (Act No. 132/1982 Coll.) and then mainly after the politic, economic and social changes following the year 1989. See below.

The favourable atmosphere of the post-revolution period of the early 1990s provided the lawmakers with a great space for a re-codification of the basic codes, mainly the Act on the Family and the Civil Code. There were some projects of Family Law reform. Unfortunately, that advantage was missed as systematic changes were rejected. On the contrary, the most important codes were amended many times, partially and lacking any proper concept, which created a lot of problems for practice.

Nevertheless, thanks to the role of the *Constitutional Court*,<sup>46</sup> “old law” from the 1960s started to be newly interpreted in harmony with the *Constitution of the Czech Republic* from 16<sup>th</sup> December 1992 (Constitutional Act No. 1/1993 Coll., further mainly Constitution) and mainly in the light of the *Charter of Fundamental Rights and Freedoms* from 16<sup>th</sup> December 1992 (Act No. 2/1993 Coll., further mainly Charter). Additionally, according to the Constitution of the Czech Republic, promulgated treaties to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order and are directly applicable, prevailing over domestic ordinary law (Section 10, Constitution).

Other changes of major importance, which need to be mentioned:

- the so-called great amendment to the Civil Code (Act No. 509/1991 Coll.), according to which the spouses were again *allowed to modify a legal scope of undivided co-ownership by a wedding contract*,
- the so-called small amendment of the Act on Family (Act No. 234/1992 Coll.), which re-introduced religious marriage into the legal order,
- the Act on Socio-Legal Protection of Children (Act No. 359/1999 Coll.),
- the so-called great amendment of the Act on Family and Civil Code (Act No. 91/1998 Coll.), which brought the *reform of divorce, maintenance duty between ex-spouses and mainly matrimonial property law: community of property* was reintroduced into the legal order and the law *allowed again conclusion of wedding contracts*, even before entering into marriage as well as during marriage and in case of divorce,<sup>47</sup>
- the law concerning “hidden” child delivery (Act No. 422/2004 Coll.),
- the Act on Registered Partnership (Act No. 115/2006 Coll.),<sup>48</sup>
- the Act against Domestic Violence (Act No. 135/2006 Coll.),<sup>49</sup>

<sup>45</sup> But not into the Act on the Family, which due to ideology regulated just personal right and duties, except maintenance.

<sup>46</sup> See mainly Rulings of the Constitutional Court No. Pl. ÚS 15/09 and No. ÚS 72/1995, available on <http://nalus.usoud.cz/Search/Search.aspx> (20.5.2019)(only in Czech).

<sup>47</sup> See Zuklínová, M., 1998, 258; Haderka, J. F., 2000.

<sup>48</sup> For details and critical comments see Holub, M., 2006, 313–317.

<sup>49</sup> On the necessity of establishing not only the penal rules against domestic violence but also the civil law regulations see Králíčková, Z., 2003, 84 et seq.



- the Act on Health Services (Act No. 372/2011 Coll.) and the Act on Special Health Services (Act No. 373/2011 Coll.),
- the new Civil Code (Act No. 89/2012 Coll., further mainly CC).

### 2.1.3. What are the general principles of FL in your country?

Despite the fact that *Family Law* is dealt with in a separate part of the new Civil Code, the *Book Two*, it is necessary to interpret and apply its rules in the light of the Book One, i.e. the General Part where *the basic principles, values, starting points, interpretation and application rules* can be found.

New Civil Code puts emphasis on the application of *autonomy of the will*, contrary to the legal regulation from the sixties. See above. New Civil Code provides for the principle that, unless expressly prohibited by the law, persons may agree upon rights and duties that differ from the law; only agreements contravening “*good manners, public order or rights relating to the status of persons including right to protection of personality are prohibited*” (Section 1, Sub-Section 2, CC). Autonomy of will is fully manifested in Family Law especially in *marital property law* (Section 708, CC). Nevertheless, there are *reasonable limits*, e.g. the special regime for things forming the usual equipment of the family household (Section 698, CC). For more see below (Part III d).

*Doctrine of horizontal effect of constitutional law* belongs among most important principles of contemporary family law. By this, the new Civil Code respects the human rights dimension of Civil or Family Law.<sup>50</sup> This had been considered by many Family Law experts to be the key value since the adoption of a number of international covenants, especially by the Council of Europe, such as *the Convention for the Protection of Human Rights and Fundamental Freedoms*.<sup>51</sup> The new Civil Code also establishes that each provision of private law may only be interpreted in compliance with *the Charter of Fundamental Rights and Freedoms*<sup>52</sup> and with the *constitutional order*, with the principles on which it is based, and with values, which are protected by that. If an interpretation of an individual provision, according to its very wording, is divergent with this order it must be abandoned (Section 2, Sub-Section 1, CC).

Last but not least, it is also necessary to mention *the establishing of prohibition of abuse of law* (Section 8, CC) and *prohibition of interpretation and application of a provision in contradiction with good manners* (Section 2, Sub-Section 3, CC) and *with protection of honest conduct and good faith* (Section 7, CC). The new Civil Code then expressly mentions a subsidiary option of applying analogies and principles of justice and principles on which it is based so that a good arrangement of rights and duties can be achieved with respect to customs of private life and with respect to both the state of jurisprudence and the established decision-making practice (Section 10, CC).

However, for Family Law provisions establishing that *private law protects dignity and freedom of humans and their natural right to pursue their happiness and happiness of their families or close persons* in such a way that does not *groundlessly cause others any harm*, are especially important (Section 3, Sub-Section 1, CC). Further, it is important that the new Civil Code expressly states that private law is based on the following principles (Section 3, Sub-Section 2, CC):

- a) everyone has right to protection of their life and health as well as freedom, reputation, dignity and privacy,
- b) family, parenthood and marriage enjoy special legal protection,
- c) no one may suffer groundless harm due to their insufficient age, reason or dependant position; however, no one may groundlessly take advantage of their incapability to the detriment of others,
- d) a promise given is binding and contracts shall be performed.

<sup>50</sup> See Králíčková, Z., 2009.

<sup>51</sup> The Convention was adopted in 1950. Czechoslovakia did not accede to it until the fall of the Communist regime. It was published under No. 209/1992 Coll.

<sup>52</sup> For details see Wagnerova, E., Šimíček, V., Langášek, T., Pospíšil, I. and coll., 2012.

No matter how redundant the above mentioned provisions of the new Civil Code may seem, we hold the view that it was necessary to establish them. They create a room for a new approach to Family Law and especially to its values. *Prohibition of discrimination, protection of the weaker party, solidarity, etc.*, are key principles that will be important for interpretation and application of rules of the new Family Law.<sup>53</sup> We may say that for lawyers educated at the time of the rule of the communist law the explicit establishment of these civilization values will be quite beneficial.

Besides general principles of Private and Family Law, it is necessary to mention *special principles* governing key institutes of Family Law, e.g. the *principle of dissolubility of marriage* (Section 755, CC) which is a specification of the general principle according to which *"nobody cannot be forced to stay in a union"*, or of the *non-patrimonial character of maintenance*, which the parents are obliged to provide to their children (Section 915, Section 917, CC).

**2.1.4. Define "family" and "family member" in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

*The Convention for the Protection of Human Rights and Freedoms* protects the right to respect for private and family life (Article 8, the Convention, in connection with Section 2, Sub-Section 2, CC, referring to the constitutional order). *The Charter of Fundamental Rights and Freedoms* includes general rules and stipulates: *„Parenthood and the family are under the protection of the law.“* (Article 32, Section 2).

As already mentioned above, new Civil Code expressly protects the family established by marriage (cf. Section 3, Sub-Section 2, Para b), CC). Nonetheless, it includes no definition of family and family members. The Civil Code establishes that *kinship is a relationship based on a blood tie or originating from adoption* (Section 771, CC), *which is seen as a status change* (cf. Section 794 ff., CC). Marriage can be concluded only between a man and a woman. See below.

Civil Law rules regulating who are the child's mother and father and other relatives are relevant for the whole legal order.

**2.1.5. Family formations.**

**2.1.5.1. Define the "spouse" in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

The new Civil Code stipulates that marriage may be concluded *only between a man and a woman*.<sup>54,55</sup> The law provides that marriage is *a permanent union* of a man and a woman originating in a manner as prescribed by the law. The main purpose of marriage is *establishing a family, proper upbringing of children* (even if marriage may also be entered into by people who are not in the "fertile" age) and *mutual support and help* (Section 655, CC), which fully reflects the principle of solidarity. Despite the fact that marriage is characterized by the word "permanency", divorce is a legitimate manner of terminating marriage.

<sup>53</sup> On this see Zoulík, F., 2002, 109 et seq.

<sup>54</sup> As for transsexuals, the new law regulates change of sex (Section 29, CC), establishing that the change of sex of a person occurs on the surgical operation disabling the reproduction functions and changing the sex organs. It is presumed that the day of the change of sex is the day recorded in the certificate issued by the provider of health services. The change of sex does not affect the personal state of a man/woman or their personal and property situation; marriage or registered partnership ceases to exist, though. Details are included in the Act No. 373/2011 Coll., on Specific Health Services.

<sup>55</sup> For more see Hrušáková, M., Králíčková, Z., Westphalová, L. et al., 2014, 1 et seq.

The legal definition of marriage and of the spouses are applicable for the whole legal order. So called gender-neutral marriage was not discussed during the preparation of the new Civil Code at all despite recent development in European countries.<sup>56</sup> Nevertheless, there are some pending drafts in the Parliament of the Czech Republic in these days, both in favour of gender-neutral marriage on the one side and to support traditional and rather conservative concept of marriage on the other side. For details see below (2.1.7).

Although *The Principles and Starting Points of the New Code of Private Law* and many *Drafts of the new Civil Code* also contained the *registered partnership of persons of the same sex*, rules regulating this matter were taken out from the final version of the Draft of the new Civil Code. Thus, the special *Act on Registered Partnership* is still in force. For details see below (2.1.5.2).

**2.1.5.2. What types of relationships/unions between persons are recognised in FL of your country? In particular, formal (registered) and informal (*de facto*) unions, heterosexual and same-sex unions, unions with and without *affectio maritalis*. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

The Act on the Registered Partnership from the 26<sup>th</sup> January 2016 (Act No. 115/2006 Coll., further mainly ARP) continues to be effective, although the norms regulating same-sex unions should have been incorporated into new Civil Code.<sup>57</sup> For details see above. Only same-sex couples are allowed to enter into registered partnership.

The legal definition of registered partnership is applicable for the whole legal order.

According to the Act on Registered Partnership, *some rights and duties* of registered partners are *similar to rights and duties of spouses* (for instance provisions against domestic violence and regulating mutual maintenance duty). However, in many aspects *the rights and duties* are *identical* with the position of *informal unions*. For instance, there is *no community of property, no common lease of flats* by operation of law, *no protection of family dwelling and no protection by the provisions regulating usual equipment in the common household*.

However, there is one provision in the new Civil Code that stipulates that “*The provisions of Book One, Book Three and Book Four on marriage and on the rights and duties of spouses apply by analogy to registered partnership and the rights and duties of partners*” (see Section 3020, CC). This means, for instance, that in case of *death*, the surviving partner has the *same hereditary right as the surviving husband or wife* as the relevant provision was included into Book Three (Absolute Property Rights), Title III Law of Succession. For details see below.

No matter how the new Civil Code expressly protects the family established by marriage (cf. Section 3, Sub-Section 2, Para b), CC), it is necessary to mention that *informal unions* of a man and a woman, or same-sex couples, also enjoy *protection* in connection with *the Convention for the Protection of Human Rights and Freedoms* as they are guaranteed the right to respect for private and family life (Article 8, the Convention, in connection with Section 2, Sub-Section 2, CC, referring to the constitutional order) and *the Charter of Fundamental Rights and Freedoms*, which provides for protection of *the family* without specifying it (Article 32 Section 2, Charter).

There are *no articles* in the new Civil Code that would establish *mutual right and duties* between the cohabitants (e.g. there is no duty to help, no community of property, no protection of family dwelling

<sup>56</sup> See Sörgjerd, C., 2012, 167 et seq, Scherpe, J. M., 2016, 40 et seq.

<sup>57</sup> There was a change recently. The Constitutional Court cancelled rather discriminative provision that provided that registration of itself is an obstacle for single adoption by one of the registered partners (Section 13, Sub-Section 2, ARP). See Ruling of the Constitutional Court No. Pl. ÚS 7/15, available on <http://nalus.usoud.cz/Search/Search.aspx> (20.5.2019) (only in Czech). There were 4 dissenting opinions. However, registered partners are not still allowed to adopt jointly a minor child or become jointly foster parents of minors.

and of a common household and no mutual maintenance duty). Due to traditions, there are *no differences between the children at all*, neither in personal, nor property spheres in the Czech legal order. The law protects property claims of unmarried mother of the child. The new Civil Code regulates “*Maintenance and support, and provision for the payment of certain costs for an unmarried mother*” (Section 920, CC).

The legal definition of registered partnership and of the registered partners are applicable for the whole legal order.

**2.1.6. What legal effects are attached to different family formations referred to in question 2.5.?**

The community of property may arise only between a husband and a wife. If registered partners or cohabitants own “something together”, there can be only co-ownership with shares between them. There is no special statutory regulation. For details, see above.

**2.1.7. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/*de facto* family formations? Explain briefly.**

At the moment, there are two drafts pending in the Parliament of the Czech Republic.

The first pending draft lodged by the group of deputies is very conservative. It suggests an amendment to the Charter of Fundamental Rights and Freedoms.<sup>58</sup>

As it was mentioned above, the Article 32, Section 1 of the Charter provides: *Parenthood and the family are under the protection of the law*. According to the draft amendment, the new version should state *expressis verbis* that: *Parenthood, the family and marriage as a union of a man and a woman are under the protection of the law*. If this amendment was passed, it would probably ban any future changes to the Civil Code according to the second pending draft. In other words, the marriage would remain as the traditional concept.

The second pending draft can be seen by some as progressive and modern, others will view it as a step undermining the traditional family values. A more correct expression could be *alternative*. According to the second pending draft lodged by another group of deputies, the concept of marriage regulated by the Civil Code should be changed radically.<sup>59</sup>

The Section 655 CC provides that: *Marriage is a permanent union of a man and a woman formed in a manner provided by this Act*. Should the pending draft be passed, the relevant Section would provide: *Marriage is a permanent union of two people formed in a manner provided by this Act*.

In addition, the pending draft would not change the current regulation, which states that affiliation will not be used for establishing parentage of the same sex couples. There should be no gender neutral parentage in gender neutral marriage.

Finally, according to the draft, the Act on Registered Partnership should be repealed.

**2.2. Property relations.**

**2.2.1. List different family property regimes in your country.**

New Civil Code paraphrases the previous provisions establishing that each spouse *contributes to the needs of the family and the family household* according to each’s personal and property conditions, abilities and possibilities so that the *standard of living* of all members of the family can be *the same*. Providing property has the same importance as *personal care* for the family and its members (Section 680, CC). Besides the duty to contribute to the needs of the family, the law also establishes a *mutual*

<sup>58</sup> Parliament of the Czech Republic, Chamber of Deputies, Parliamentary term No. VIII., Draft No. 211/0.

<sup>59</sup> Parliament of the Czech Republic, Chamber of Deputies, Parliamentary term No. VIII., Draft No. 201/0.

*maintenance duty* of the spouses, to the extent of a right to the “same living standard” (Section 697, CC).

There is an innovation: the law regulates the institution of *the usual equipment forming the common household* (Section 698, CC). It is established that, regardless of the ownership of things that fulfil the necessary life needs of the family, a spouse needs consent of the other one when dealing with them; this does not apply if the thing is of negligible value. A spouse may *claim invalidity* of a legal act with which the other spouse disposed, without his or her consent, with a thing belonging to the usual equipment of the family household.

There is another innovation: the regulation of *a family enterprise* (Section 700, CC). It is defined as an enterprise where the spouses work together, or at least one of the spouses works with their relatives up to the third degree, or with persons related with the spouses by marriage up to the second degree, and the enterprise is owned by one of these persons. Those of them who permanently work for the family or the family enterprise are considered members of the family participating in the operation of the family enterprise. Members of the family participating in the operation of the family enterprise also participate in its profits and in things gained out of those profits as well as in the growth of the enterprise to the extent corresponding to the amount and kind of their work. This right may only be waived by a person with full legal capacity by making a personal declaration (Section 701, CC).<sup>60</sup>

Regarding *marital property regimes*, there can be three different property regimes:

- the statutory one (community of property, see 2.2.2 below),
- contractual one (for details see 2.2.3. below)
- and one decided by the court.<sup>61</sup>

As regards registered partners and cohabitantes, no community of property is available.

**2.2.2. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?**

The key concept of marital property law is *community of property*, which was re-introduced into the Czech legal order in 1998 by the amendment to the previous Act on the Family and Civil Code.<sup>62</sup> The *legal regime of community of property* is regulated as first in the New CC. It includes *what* one of the spouses has gained or what both spouses have *gained in the course of their marriage except for* (Section 709, CC):

- a) what serves the personal needs of one of the spouses,<sup>63</sup>
- b) what only one of the spouses has gained by gift, succession or bequest unless the donor or the testator in the will expressed a different intention,

<sup>60</sup> If the family enterprise is to be divided, a member participating in its operation has a pre-emptive right to it (Section 704, Sub-Section 1, CC).

<sup>61</sup> See Section 724, CC:

(1) In case of a serious reason, a court shall, on the application of a spouse, cancel community property or reduce its existing scope.

(2) A serious reason shall always mean the fact that a spouse’s creditor requires his claim to be secured to an extent exceeding the value of what belongs exclusively to that spouse, that a spouse may be considered prodigal, or that the spouse constantly or repeatedly takes unreasonable risks. The fact that a spouse has started pursuing business activities or become a partner of a legal person with unlimited liability may also be considered to be a serious reason.

<sup>62</sup> For details see Psutka, J., 2015.

<sup>63</sup> Since 1998, the things one uses for the performance of one’s job have not been excluded from the scope of the legal regime of community of property. For a different attitude, see Boele-Woelki, K., Ferrand, F., González-Beilfuss, C., Jänterä-Jareborg, M., Lowe, N., Martiny, D., Pintens, W., 2013.

- c) what one of the spouses has gained as compensation for a non-proprietary infringement of his or her natural rights,
- d) what one of the spouses has gained by legal dealings relating to his or her separate property,
- e) what one of the spouses has gained as compensation for damage to or loss of separate property.

Besides that, community of property includes *profit* from what is separate property of one of the spouses. It does not include an interest of a spouse in a company or a cooperative if that spouse has become a member of the company or the cooperative in the course of the marriage, with the exception of housing cooperative (Section 709, CC).

Community of property also includes *debts* assumed in the course of the marriage unless:

- a) the debts concern the separate property of one of the spouses – to the extent of the profit from that property, or
- b) only one of the spouses has assumed them without the other spouse's consent and it was not within the fulfilment of everyday or common needs of the family (Section 710, CC).

**2.2.3. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a "new regime just for them"?**

The new Civil Code enables *modifications* of the legal regime of community of property as follows:

- a) a regime *postponing* the creation of community property as of the date the marriage terminates, and
- b) a regime constituting *an extension* of the scope of the statutory regime of community property,
- c) a regime constituting *a reduction* of the scope of the statutory regime of community property.

Besides that, the would-be spouses and the spouses are allowed to create *an agreed regime* (Section 716, CC) and establish *a regime of separated property* (Section 729, CC).

As an innovation brought about by the new Civil Code, they are allowed to make *arrangements for the case of termination of marriage due to divorce or death* by making a *contract of succession* (Section 718, Sub-Section 2, CC).

Both would-be spouses and spouses may do so at *any time*: before entering into marriage as well as during the marriage. The lawmakers fully respect the principle of *autonomy of will* to create a *wedding contract*, which was completely curbed in the 1960's legal regulation. See above.

The parties to the contract are only required to keep the formality of *a public deed*. A record in the *Public Register is optional* (Section 721, CC). For details see below.

**2.2.4. Explain briefly the rules on the administration of family property and compare if there are difference for different property regimes.**

As mentioned above, there can be *three different property regimes*: the statutory one, the contractual one and the one decided by the court. Just a basic overview of the legal regulation for the purpose of facilitating comparison is provided below.

A. Administration under the statutory regime

The law provides first of all that rights and duties associated with community property or parts thereof pertain to both spouses *jointly and severally*. Both or one of the spouses use, enjoy the fruits and revenues of, maintain, dispose of, manage and administer the community property as agreed. Juridical acts relating to community property or parts thereof oblige and entitle both spouses *jointly and severally* (Section 713, CC).

In matters relating to community property and parts thereof which *cannot be considered common*, the spouses make juridical acts *jointly*, or one of the spouses acts with *the consent* of the other. If one of the spouses *refuses* to give consent without a serious reason and contrary to the interests of the spouses, family or family household or is unable to express his or her will, the other spouse may apply to *a court to substitute* the consent of the spouse. If a spouse makes a juridical act without the consent of the other spouse where consent is required, the latter may invoke *invalidity* of such a juridical act (Section, 714 CC).

If part of the community property *is to be used for business activities* of one of the spouses and the property value of what is to be used exceeds a level appropriate to the property situation of the spouses, *consent* of the other spouse is required upon *the first use*. If the other spouse has not given consent, he may invoke *invalidity* of such an act. If part of the community property is to be used for the acquisition of a share in a company or cooperative, or if the acquisition of a share results in liability for the debts of the company or cooperative to the extent exceeding a level appropriate to the property situation of the spouses, above mentioned rules applies by analogy (Section, 715 CC).

#### B. Administration under *the contractual regime*

According to the Civil Code, fiancés and spouses may conclude *a contract for the administration* of what is part of their community property which derogates from the provisions established for administration under the statutory regime. The contract stipulates, which of the spouses will administer the community property or part thereof (Section, 722 CC).

The spouse who administers community property makes juridical acts *independently* in matters relating to the community property, even in judicial or other proceedings, unless otherwise provided below.

The spouse who administers the entire community property may make juridical acts *only with the consent* of the other spouse:

- a) when disposing of community property as a whole,
- b) when disposing of the dwelling in which the family household of the spouses is located, if the dwelling is part of community property, or a dwelling of one of the spouses or a dwelling of a minor child who has not yet acquired full legal capacity and is in the care of the spouses, as well as when stipulating a permanent encumbrance of an immovable thing which is part of community property. (Section 723, CC).

#### C. Administration under *the regime formed by the decision of a court*

If, when administering community property, a spouse acts in a manner which is clearly *contrary* to the interests of the other spouse, family or family household and the fiancés or spouses have not concluded a contract governing the administration of what forms part of community property, a court may, on the application of the other spouse, decide how community property will be administered (Section 728, CC).

### 2.2.5. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.

**A)** As mentioned above, a record (registration) in the Public Register is optional (Section 721 CC). If a contract on matrimonial property regime is not registered (and there is no consent of the third person), it has effect only *inter partes* (Section 719 CC). If a contract on matrimonial property regime is registered, it has effect *erga omnes*.

It does not matter whether or not third parties have been aware of the content or whether they actually know the existence of the contract. Anyone must be able to get to know the existence of a contact (in Czech: Seznam listin o manželském majetkovém režimu).<sup>64</sup>

It is possible to do so with the help of any notary or remote access in electronic form. The specific content of the contract can be seen from a copy of it, which can be made by any notary on request.

<sup>64</sup> See Sections 35j – 35l, Act No. 358/1992 Coll., on Public Notaries and their Agenda (Notarial Act).

Entry into the Public Register has also effects when a court's judgement against one of the spouses is enforced.<sup>65</sup>

Civil Code states that the consequences of a contract on matrimonial property regime may not exclude spouse's ability to provide for the family. The content or purpose of a contract on matrimonial property regime may not affect the rights of a third person, unless the third person has consented to the contract; such a contract concluded without the consent of the third person has no legal effects with respect to the third person (Section, 719 CC).

A contract on matrimonial property regime is registered in a public register if so stipulated therein, or otherwise at the request of both spouses. Everything that changes the statutory property regime of the spouses is registered in the Public Register. The registration is made without undue delay by the person who prepared the contract, and if this is not possible, by the person who maintains the Public Register (Section 721, CC).

**B)** Beside an optional recording (registration) in the Public Register (Section 721 CC), the law provides for the obligatory evidence (enrolment) of a contract on matrimonial property regime in the Database (in Czech: Evidence listin o manželském majetkovém režimu).<sup>66</sup> It shall be carried out by a notary public who has drawn up the contract on matrimonial property regime by means of remote access. The purpose is to retain data for future succession proceedings. The database includes not only contracts on matrimonial property regime, but on regime formed by a court. Third parties are not allowed to inspect this Database and the evidence does not have effect against them.

#### **2.2.6. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

Protection of an *economically weaker spouse* and *third persons* is expressly established in the new Civil Code in a special provision.

It is regulated that a contract of matrimonial property regime *may not*, due to its consequences, *exclude* the spouse's ability to maintain the family and may not affect, by its content or purpose, rights of a third person unless the third person agrees with it; the contract made without the third party's consent has no legal force for such a party (Section 719, CC).

The law further establishes that if during the existence of community property *a debt* has arisen only for one of the spouses, *the creditor may achieve satisfaction in the execution of the judgment recovering the debt also from the community of property* (Section 731, CC).

If *a debt* has arisen only for one of the spouses *against the will* of the other spouse who communicated his or her disagreement to the creditor without unnecessary delay after coming to know about the debt, *the community of property may be affected only up to the amount* which would be the share of the debtor if the community property were cancelled and divided (pursuant to Section 742, CC). This also applies in the case of the spouse's duty to pay maintenance or if the debt comes from an illegal act of one of the spouses or in the case of the debt of one of the spouse having arisen before entering into marriage (Section 732, CC).

If one of the spouses assumed an obligation within six months before the statutory property regime was changed or excluded, either by a contract between spouses or by a court decision, the claim of his or her creditor may be satisfied from anything that would have been part of community property had the contract between the spouses not been concluded or had the court decision not been rendered (Section 733, CC).

If a contract between spouses or a court decision changing or excluding the statutory property regime affects a right of a third person, in particular of a creditor, the person concerned may assert his or her right on the occasion of the settlement of what was formerly part of community property

<sup>65</sup> According to the Section 262a, Act No. 99/1963 Coll., Civil Procedure Code, and the Section 42, Act No. 120/2001 Coll., Enforcement/Execution Act.

<sup>66</sup> See Section 35d, Act No. 358/1992 Coll., on Public Notaries and their Agenda (Notarial Act).



in the same manner as if no contract between spouses has been concluded or no court decision has been made; in this context, rules mentioned above apply (Section 734, CC and Section 742, CC).

**2.2.7. Describe allocation and division of property in case of divorce, separation or dissolution of the union.**

If the marriage is terminated by *divorce*<sup>67</sup> it is necessary, first of all, to settle and adjust the community property of the spouses.

As a rule, the law prescribes an *agreement* between the divorced spouses. If the agreement is not achieved, the *court* will decide on the basis of both *quantitative and qualitative criteria* such as the interests of unsupported children or the extent to which a spouse was involved in achieving and maintaining the property values falling within the community of property of the spouses (Section 742, CC).

If within three years from the divorce no agreement is made or petition filed, a *legal presumption* will be applied. The spouses or former spouses are conclusively presumed to have settled as follows:

- a) corporeal movable things are owned by the spouse who uses them exclusively as an owner for his own needs or the needs of his family or family household,
- b) other corporeal movable things and immovable things are under undivided co-ownership of both spouses; their shares are equal,
- c) other property rights, claims and debts belong to both spouses jointly; their shares are equal (Section 741, CC).

There is *no legal separation* in Czech legal system regulated, just *de facto* one.

Finally, there are some *special rules* regarding termination of community of property of spouses in special acts.

The community of property of the spouses is terminated when the court imposes in criminal proceedings a *penalty for the forfeiture of property* of one of the spouses or both of them (see Section 66, the Criminal Code);<sup>68</sup> the marriage continues and community of property of the spouses can be subsequently restored by a court decision (Section 726, CC).

The community of property of spouses is also terminated by a *declaration of bankruptcy* on the property of the spouse (Section 268, Sub-section 1, the Bankruptcy/Insolvency Act);<sup>69</sup> for the duration of the effects of the bankruptcy declaration the new community of property of the spouses cannot be established, even if the debtor has entered into a new marriage.

Regarding registered partners and cohabitants, there are no special rules.

**2.2.8. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?**

No. There are general rules. See above.

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<sup>67</sup> If the court states that marriage is null, the rules mentioned above apply as well. However, in the case of *matrimonium putativum* (no marriage, no community of property), the law provides that marriage was not formed (Section 677, CC).

<sup>68</sup> See Act No. 40/2009 Coll., Criminal Code.

<sup>69</sup> See Act No. 182/2006 Coll., Bankruptcy/Insolvency Act.

### 2.3. Cross-border issues.

#### 2.2.1. Is your country participating in the enhanced cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?

The Czech Republic decided to join the enhanced cooperation procedure with regard to both Regulations on cross-border property regimes (1103/2016 and 1104/2016). The enhanced cooperation was authorised by the Council Decision (EU) 2016/954 of 9 June 2016. The two Regulations apply in the participating Member States since 29 January 2019.

#### 2.2.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as “marriage”, “matrimonial property agreement”, “partnership property agreement” etc.?

In general, the adoption of the two Regulations on cross-border property regimes is seen as a step forward that brings considerable benefits to the couples, who are dealing with the property relations disputes that have cross-border implications.<sup>70</sup> Nevertheless, some questions still remain open and ask for a practical solution.

Because the Regulation 1103/2016 does not define the notion of “marriage” and both Regulations are gender neutral in application, it is not clear which of the two Regulations shall apply to the property consequences of same-sex marriages.<sup>71</sup> As has already been stated above, the Czech substantive law only provides marriage for the opposite-sex couples (2.1.5.1). Even though there is no explicit provision dealing with this matter, same-sex marriages will probably be downgraded to same-sex registered partnerships, provided for by Czech law. In the Czech courts, the property consequences of same-sex marriage concluded abroad will therefore, presumably, be dealt with according to the Regulation 1104/2016.

It should however be stated that the solution is not even clear under Czech private international law, as the commentaries are not unanimous on this matter. While some authors consider that the property effects of same-sex marriage shall be handled in the conflict of laws as “registered partnership and similar regimes”<sup>72</sup>, others propose that the provision concerning “matrimonial property regimes”<sup>73</sup> shall apply.

#### 2.2.3. Are you expecting any problems with the application of the rules on jurisdiction?

The system of jurisdictional grounds set out in the two Regulations is rather complex. Jurisdiction in “connected cases” (Article 4, 5 of the Regulation 1103/2016) corresponds to Czech national regulation.

Under the Czech private international law rules, a choice of court is allowed in matters of cross-border property relations. Prorogation of jurisdiction will be more limited under the two Regulations.<sup>74</sup>

Risk of forum shopping may arise with regard to the property effects of same-sex marriages.

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<sup>70</sup> Zavadilová, L. in Staničková, M., Melecký, L., Kovářová, E., Dvoroková, K., 2018, 1605-1612.

<sup>71</sup> For further details, see Dutta, A., 2018, 145-158.

<sup>72</sup> See Břicháček, T., Fišerová, Z., 2014, 342.

<sup>73</sup> See Zavadilová, M., Grygar, J., 2013, 438.

<sup>74</sup> For details see Hrnčířiková, M., 2016, 527-540.

**2.2.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

In accordance with the temporal scope of application of the two Regulations, there will be parallel conflict-of-law regimes on cross-border property relations, i.e. both the national conflict-of-law rules and the unified conflict-of-law rules will apply to determine the law applicable.

As far as the objective connecting factors are concerned, it may be problematic that the two Regulations are based on the principle of immutability and that the application of an escape rule is only limited. In some cases, these solutions do not have to correspond to the legitimate expectations of the couples.

A choice of the applicable law in matters of agreements on matrimonial property regimes is already allowed under the Czech private international law rules. Therefore, party autonomy is not a novelty in matters of matrimonial property regimes.<sup>75</sup> However, a possibility to choose the law applicable for immovables (*lex rei sitae*) under the two Regulations would be preferable.

**2.2.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

The two Regulations provide sufficient safeguard mechanisms (namely option to decline jurisdiction and the public policy exception) for the Czech courts in order to deal with unknown foreign institutions (same-sex marriages, marriages with minors etc.). Moreover, the recognition and enforcement of a decision on cross-border property regime should not imply the recognition of the marriage or registered partnership underlying the property regime which gave rise to the decision.

**2.2.6. Are there any national rules on international jurisdiction and applicable (besides the Regulations) concerning the cross-border property relations in your country?**

The fundamental national source of Czech private international law is Act No. 91/2012 Coll., on Private International Law, as subsequently amended ("PILA"), which entered into force on 1 January 2014. While the jurisdiction of Czech courts in matters of cross-border property regimes shall be determined based on the general provision on jurisdiction (Section 6, PILA), there are special conflict-of-law rules for the determination of the law applicable to property relations between spouses (Section 49, Sub-Section 3, PILA), agreements on matrimonial property regimes (Section 49, Sub-Section 4, PILA), and registered partnerships and similar relationships (Section 67, Sub-Section 2, PILA). However, the Czech national rules apply only as far as they are compatible with the two Regulations.<sup>76</sup>

### **3. Succession law**

#### **3.1. General.**

**3.1.8. What are the main legal sources of Succession Law (SL) in your country? What are the additional legal sources of SL?**

CC adopted in the year 2012 that came into effect on the 1st January 2014, its title III (sec. 1475 - 1720) is the main legal source of substantive SL.

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<sup>75</sup> For details see Pfeiffer, M., 2012, 291-305; Zavadilová, L., 2017, 120-139.

<sup>76</sup> In details see Pauknerová, M., Rozehnalová, N., Zavadilová, M., 2013, lxxiii, 853; Bříza, P., Břicháček, T., Fišerová, Z. et al., 2014, xxi, 745.

Act No. 292/2013 Coll., on special court proceedings adopted in 2013 and effective since 1st January 2014 is the main source of procedural law on succession. Act No 358/1992 Coll. on notaries and their activities also governs some procedural aspects of SL.

**3.1.9. Provide a short description of the main historical developments in SL in your country.**

Communist *coup d'état* that took place in 1948 strongly influenced civil law in the Czechoslovakia for over 40 years, including succession law. Communist doctrine as restrictions of private ownership resulted to adoption of Act No. 141/1950 Coll., Civil Code that came into effect on 1 November 1951. Since that moment SL was marginalized and reduced. Intestate succession was preferred over individual testator's last will, circle of heirs were significantly reduced and consequently the property of the deceased fell very often in the state ownership as collectivization of property was strongly promoted. Those trends were even strengthened after the adoption of Act No. 40/1963 Coll. that came into force in year 1964. After the events of the Velvet revolution in year 1989, the SL started to change and those changes culminated in the adoption of the CC. The primary purpose of the new inheritance legislation adopted in 2012 was to strengthen "rights of the deceased person" in a sense that some traditional instruments were reintroduced and some new instruments on how the person can influence the disposition of his assets after his/her death were adopted. Among the most notable new institutes belong in particular the (i) new approach to the liability for debts of the deceased person, (ii) possibility to execute an inheritance agreement, (iii) possibility to make a bequest, (vi) possibility to include conditions under which the inheritance shall be distributed.

**3.1.10. What are the general principles of succession in your country?**

Principle of preserving values reflects the fact that property values do not occur suddenly, but are usually the result of the activities of many generations. Therefore, the work of the past generations (ancestors) should be retained for the next generation (successor, follower) by the means of SL.<sup>77</sup>

Principle of universal succession means that the heir enters into all rights and duties of his predecessor, with the exception of those rights or duties that are extinguished by the death of the deceased. According to the previous legal regulation, the heir's liability was limited to the amount of the acquired inheritance passed to him by the testator's death. Contemporary regulation provides that the heir in principle shall pay all the testator's debts (sec. 1704 CC). However, the heir may limit his obligation to pay debts if he exercises the right of reservation as to estate inventory. In that case he pays the testator's debts only up to the value of the acquired inheritance (sec. 1706 CC).<sup>78</sup>

Principle of freedom of testator in the choice of heirs. The decedent may determine freely to whom his property is left. Freedom of the testator is limited only to a certain extent by the rights of the indispensable heirs (cf. § 1643 (2) and § 1644 CC). But still, the deceased may exclude even an indispensable heir from his right to a compulsory part or reduces it by disinheriting him.<sup>79</sup>

The principle of the heir's freedom to acquire or reject an inheritance. One of the fundamental principles of inheritance stipulates that no one can be forced to refuse or accept inheritance, with some exception to the contracting heir.<sup>80</sup>

<sup>77</sup> Svoboda, J., Klička, O., 2014, 200.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

**3.1.11. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.**

A district court has the jurisdiction to handle all succession proceedings. The court instructs a notary to manage the succession proceedings. That notary chosen by the court then acts and takes decisions in the proceedings on behalf of the court.<sup>81</sup>

The court initiates succession proceedings on its own motion as soon as it learns of the death of the deceased. Deaths are notified to the competent court by the registry. However, the court may learn of the death of a deceased person by other means, e.g. from the police, from a healthcare facility or from any heirs.

Firstly, in its preliminary enquiries the notary ascertains information about the deceased, his or her assets and debts, the group of heirs and whether the deceased left a will or other disposition of property upon death. The notary typically extracts such information from public lists, from the register of legal acts upon death, from the register of documents on marital assets and, by questioning the person in charge of the deceased's funeral. Where required by law or for other reasons, the court also takes urgent action to secure the estate.

Once the preliminary enquiries are over, the notary orders a hearing and instructs potential heirs of their right of succession and their right to demand that an inventory of estate assets be drawn up. If any of the heirs seeks an inventory of estate assets, this is ordered by the court.

If the deceased had joint marital assets, the notary – following a communication with the parties – draws up a list of these assets and a list of joint liabilities, and determines the value of the assets. Assets disputed by the parties are disregarded. The surviving spouse then has the opportunity to reach an agreement with the heirs on the settlement of joint marital assets. That agreement stipulates which assets accrue to the estate and which are to remain with the surviving spouse (the principle that the shares of both spouses are equal need not be respected). It is also possible to enter into an agreement under which all joint assets accrue to the surviving spouse, with none of those assets forming part of the estate. The agreement on the settlement of joint marital assets property between the heirs and the surviving spouse must not contradict the law or the deceased's instructions set out in the disposition of property upon death. Otherwise the notary will not approve the agreement.

If the notary does not approve the agreement on the settlement of joint marital assets, or if no such agreement is concluded, the notary settles joint marital assets itself.

After settling joint marital assets, the notary draws up a list of the estate's assets and liabilities. In doing so, any contentious assets or liabilities are disregarded. The notary then appraises the value of assets in the estate, as a rule, according to concurring statements provided by heirs. It is very rare for expert opinions to be commissioned for such valuations.

If the deceased did not leave a disposition of property upon death, the heirs may reach agreement on how to divide the estate in any way they wish. The court confirms the heirs' acquisition of inheritance under that agreement. In the absence of such an agreement, the court confirms their inheritance according to ratios derived from the law for intestate succession.

If the testator, in the disposition of property upon death, provides instructions on how to divide the estate, the court confirms the heirs' acquisition of the estate according to those instructions. Otherwise, the heirs may agree on how to divide the estate between them. Nevertheless, the heirs may agree on differing levels of shares in succession only where this possibility has been expressly conceded by the testator.

If a mandatory heir asserts the right to a reserved share, the other heirs may reach an agreement with that heir on the settlement of the reserved share (a severance payment). Otherwise, an inventory of the estate must be ordered to calculate the reserved share.

Before a decision on the estate is handed down, proof must be provided to the court that due legacies have been resolved and that other legatees have been notified of their right to a legacy.

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<sup>81</sup> In details see Lavický, P., 2015, 257-517.

**3.1.12. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?**

A decedent may designate the other contracting party or a third person to be an heir or legatee by an inheritance contract (sec. 1582 - 1593 CC) if the other party accepts that. The inheritance contract has priority over other legal bases for succession, but disposition of the entire decedent's estate is not allowed under such contract. At least a quarter of the decedent's estate must remain vacant so that the decedent may make disposition thereof according to his specifically expressed will. Where a decedent also wishes to leave this quarter to a contractual heir, he may do so in his testament. The testament as a revocable expression of will made by a decedent to leave to one or several persons at least a share of decedent's estate has priority over statutory - intestate succession. Where there is no succession of heirs under an inheritance contract or testament, statutory succession of heirs to the decedent's estate or part thereof arises. If there is no statutory heir or if he does not acquire the inheritance, legatees become heirs in proportion to the value of their legacies. Cumulative application of legal titles is possible; it happens usually in case when the decedent did not include all of his estate into the testament.

**3.1.13. What happens with the estate of inheritance if the decedent has no heirs?**

Where no heir inherits, the inheritance shall devolve to the Czech Republic, which is considered to be the statutory heir (escheat). The state does not have the right to refuse inheritance or the right to legacy. With respect to other persons (especially in relation to deceased debts), the state has the same status as an heir who has made a reservation as to estate inventory (meaning that the debts should be paid by the state only up to the value of the estate of inheritance) (sec. 1634 CC).

**3.1.14. Are there special rules or limitations concerning succession with reference to the deceased's (or heir's) culture, tradition, religion or other characteristics?**

There are no special rules of such kind.

**3.2. Intestate succession.**

**3.2.7. Are men and women equal in succession? Are domestic and foreign nationals equal in succession? Are decedent's children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?**

Men and women are equal in succession. There is no distinction between domestic and foreign nationals, they are also equal in succession. There is no difference in treatment between children born in or out of wedlock.

Adopted children in general are in the same position in relation to succession.

Child conceived but not yet born at the time of death of his/her parent is capable of inheriting.

Spouses have precedence in case of intestate succession over extra-marital partners. A spouse inherits in the first class of heirs together with decedent's children equally (sec. 1635 CC). Czech law does not provide any possibility to register extra-marital partnership of different sex couples. Thus, extra-marital partner may inherit in second class of heirs only if decedent's descendants do not inherit and if such partner lived with the decedent in the common household for at least one year before his death and, as a result, cared for the common household or was dependent on maintenance of the decedent. In such case the partner will inherit equally together with:

- other persons fulfilling the conditions of living with the deceased and caring of common household or dependency on the decedent,
- the spouse and
- the decedent's parents;

however, the spouse shall always inherit at least half of the decedent's estate even in case that the spouse was not living with the deceased at the time of death (sec. 1636 CC).

If neither the spouse nor any of the parents inherit, the extra-marital partner shall inherit equally together with:

- other persons fulfilling the conditions of living with the deceased and caring of common household or dependency on the decedent,
- and decedent's siblings

in the third class of heirs (sec. 1638 CC).

Same-sex couples who entered into registered partnership are intestate heirs in the same position as the spouses.

### **3.2.8. Are legal persons capable of inheriting? If yes, on which basis?**

Legal persons are not capable to inherit as heirs in case of intestate succession, but they are capable of inheriting based on testament or inheritance contract.

### **3.2.9. Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.**

A person is excluded from his succession right if he commits an act having the nature of an intentional criminal offence against the decedent, his ancestor, descendant or spouse, or a despicable act against the decedent's last will, especially by forcing or deceitfully seducing the decedent to express his last will, frustrating his expression of last will, or concealing, falsifying, forging or intentionally destroying his testament, unless he was expressly forgiven for such an act by the decedent (sec. 1481 CC).

If, on the date of the decedent's death, divorce proceedings initiated on the application of the decedent are in progress, where the application was filed because his spouse committed an act constituting domestic violence against the decedent, the decedent's spouse is excluded from succession rights as a statutory heir (sec. 1482 (1) CC).

If a parent has been relieved of his parental responsibility because he abused or was at fault for seriously neglecting such responsibility or its exercise, the parent is excluded from the succession right entitling him to inherit from his child by statutory succession of heirs. (sec. 1482 (2) CC)

### **3.2.10. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?**

There are six classes of heirs *ex lege*. (sec. 1635 – 1640 CC)

If the first class of heirs the decedent's children and spouse inherit in equal shares. If any of the children does not inherit, his share is acquired equally by his children; the same applies to more distant descendants of the same ancestor.

If the decedent's descendants do not inherit, the second-class heirs inherit. They consist of the spouse, the decedent's parents and those who lived with the decedent in the common household for at least one year before his death and, as a result, cared for the common household or were dependent on the maintenance of the decedent. Second class heirs inherit equally; however, the spouse shall always inherit at least half of the decedent's estate.

If neither the spouse nor any of the parents inherit, the third class of heirs, which consists of decedent's siblings and those who lived with the decedent in the common household for at least one year before his death and, as a result, cared for the common household or were dependent on the maintenance of the decedent, will inherit in equal shares. If one of the decedent's siblings does not inherit, his share of inheritance is acquired by his children equally.

If no heir inherits in the third class, the heirs from the fourth class, which includes the decedent's grandparents, will inherit equally.

If none of the fourth-class heirs inherits, only the grandparents of the decedent's parents inherit in the fifth class. The grandparents of the decedent's father are entitled to half of the inheritance and the grandparents of the decedent's mother to the other half. Both couples of grandparents shall equally divide between them the half to which they are entitled. If one of the grandparents from a couple does not inherit, the vacant eighth shall devolve to the other grandparent. If a couple does not inherit, their quarter shall devolve to the other couple from the same side. If none of the couples from the same side inherits, the inheritance shall devolve to the couples from the other side in the same proportion as they divide the half of the inheritance to which they are entitled to directly.

If none of the fifth-class heirs inherits, the sixth class of heirs shall include the children of the decedent's siblings' children and the children of the decedent's grandparents. They inherit equally. If any of the children of the decedent's grandparents does not inherit, his children shall inherit.

### **3.2.11. Are the heirs liable for deceased's debts and under which conditions?**

General rule (based on principle of universal succession) is that heirs that acquired inheritance are liable for deceased's debts (sec. 1670 CC).

Yet, the heir that acquired inheritance may exercise his right to demand an inventory of the estate. In such case, the heir is liable for the deceased's debts only up to the value of the inheritance received. In some specific cases, the court may order an inventory of the estate even if no heir requests this, primarily for the protection of minor heirs, heirs whose residence is unknown, and the testator's creditors (sec. 1674 – 1676 CC).

Heirs who do not seek an inventory of the estate are liable for the deceased's debts fully, jointly and severally.

An heir has also the right to refuse inheritance after the decedent's death. He/she may do so within one month from the date on which a court has notified him/her of the right to refuse inheritance and the consequences of refusal.

### **3.2.12. What is the manner of renouncing the succession rights?**

A succession right may be renounced in advance by a contract with the decedent in the form of notarial deed (public instrument) (sec. 1484 CC). The renunciation has effects against the descendants, unless stipulated otherwise. By renouncing his succession right, a person also renounces his right to the forced share; however, a person who only renounces his right to the forced share does not renounce his right arising from testate or intestate succession. The rights and duties under such an agreement may be extinguished in writing (notarial deed is not necessary for extinguishing).



### 3.3. Disposition of property upon death.

#### 3.3.2. Testate succession.

##### 3.3.1.1. Explain the conditions for testate succession.

Czech law (sec. 1532 CC) stipulates that a testament must be in written form (as private instrument or public instrument), unless it was made with concessions.

The following concessions are allowed by the law (sec. 1542 – 1549 CC):

- A person who is under imminent threat to life due to a contingency has the right to make a testament orally before three witnesses present at the same time.
- A person in a place where usual social intercourse is paralysed as a result of a contingency and who cannot be reasonably required to make a disposition mortis causa in another form has the same right.
- If a decedent wishes to make testament in the form of public instrument and there is a reasonable concern that he would die before he can do so, his last will may be recorded, in the presence of two witnesses, by a mayor of the municipality in whose territory the decedent is located.
- Due to a serious reason, last will of a decedent may be recorded in the presence of two witnesses aboard a naval vessel sailing under the national flag of the Czech Republic or an aircraft registered in the Czech Republic by the commander of the naval vessels or aircraft, or by his representative.
- When participating in an armed conflict or military operations, the last will of a soldier or another member of the armed forces may be recorded in the presence of two witnesses by a commander of a military unit of the Czech Republic or another soldier at the rank of officer or higher.

##### 3.3.1.2. Who has the testamentary capacity?

Generally, persons with full legal capacity have testamentary capacity. An individual acquires full legal capacity upon reaching the age of majority, which is eighteen years of age. Before reaching the age of majority, full legal capacity is acquired by being granted legal capacity or by entering into marriage.

However, children over the age of fifteen may make *dispositions mortis causa* (testament or succession agreement) in the form of a public instrument (sec. 1525 – 1528 CC).

A person whose legal capacity has been limited (e.g. by a court's decision due to mental illness) may, within the relevant limitations, only make dispositions mortis causa in the form of a public instrument.

A person whose legal capacity has been limited due to a pathological addiction to alcohol consumption, use of psychotropic substances, or similar products or toxins, or due to a pathological addiction to gambling which constitutes a serious mental disorder may, within the relevant limitations, make dispositions mortis causa in any form prescribed, but of no more than half of the decedent's estate. The remaining share of the decedent's estate shall devolve to the statutory heirs; however, where only the State is to inherit as a statutory heir, a decedent may make disposition mortis causa of the entire decedent's estate.

##### 3.3.1.3. What are the conditions and permissible contents of the will?

A decedent may provide a condition, determination of time or a mandate in the will. If a clause aims to apparently harass an heir or legatee as a result of the decedent's manifest arbitrariness, it is disregarded (typically it would be forbidden to make a condition asking an heir to get divorced, to give consent to child adoption etc.). Also a clause which is clearly contrary to public order or is

incomprehensible is disregarded. Impossible resolutive condition is disregarded as well. If a testament contains impossible suspensive condition when granting a right to a person, such clause deems to be invalid.

The will may contain selection of executor of testament or administrator of the estate or its part. Moreover, by the last will the decedent may indicate tutors for his children.

**3.3.1.4. Describe the characteristics of will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a will?**

A testament is a revocable expression of will whereby a decedent personally leaves to one or several persons at least a share in his decedent's estate and also legacy, where appropriate, to be received upon his death.

Private instrument testaments shall be (sec. 1533 – 1536 CC):

- written and signed by decedent's own hand; or
- signed by decedent's own hand and at the same time expressly declared before two witnesses that the instrument contains his last will; or
- if a decedent is blind, he shall express his last will before three witnesses present at the same time in an instrument that must be read aloud by a witness who has not written the testament. A decedent shall confirm before the witnesses that the instrument contains his last will;
- if the decedent is a person with a sensory disability and he cannot read or write, he shall express his last will before three witnesses present at the same time in an instrument whose contents must be interpreted in a special method of communication of the decedent's choosing by a witness who did not write the testament.

A decedent may express his last will in a public instrument - notarial deed certified by notary public (sec. 1537 CC).

**3.3.1.5. Is there a (public) register of wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

The Central Register of Wills was established in 2001. From 1 January 2014, following the general recodification of private law in the Czech Republic, the register of wills was replaced by a Register of Legal Acts upon Death. This register is a private computerised list maintained, run and administered by the Notarial Chamber of the Czech Republic.

If a notary draws up one's last will in the form of a notarial deed or if a notary has taken receipt of such an instrument not in the form of a notarial deed for notarial safekeeping, he or she enters information on that instrument and on the person drawing it up in the abovementioned register by electronic data transmission.

**3.3.2. Succession agreement (*negotia mortis causa*). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.**

Succession agreements are among legally regulated basis for succession according to Czech law (sec. 1582 – 1592 CC). In an agreement on succession, a testator who is of age and has full legal capacity may appoint an heir or a legatee, who may be the other contracting party or a third party. The testator cannot cancel an agreement on succession unilaterally.

A testator may dispose of no more than three-quarters of his or her estate by an agreement on succession; a quarter of the estate must remain free, although the testator may make a will regarding that remaining estate.

Spouses may appoint each other as heirs under an agreement on succession. It may be agreed that the rights and obligations under an agreement on succession are annulled upon divorce. An agreement on succession may be drawn up only in the form of a notarial deed.

**3.3.3. Are conditions for validity of wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

Majority of conditions for validity are governed by specific SL rules (Incapacity to make dispositions mortis causa, effects of error, form of testament etc.) but some general civil rules would apply as well (requirement of freewill etc.).

**3.3.4. Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

Decedent's children and, if they do not inherit, their descendants are protected as so-called forced heirs and are entitled to a forced share (sec. 1642 – 1645 CC). Only persons who have renounced inheritance or the forced share, lack the capacity to inherit or if they have been disinherited by the decedent, they are not entitled to the forced share.

If a forced heir is a minor, he must inherit at least three-quarters of his statutory inheritance share. If a forced heir is an adult, he must inherit at least a quarter of his statutory inheritance share.

**3.3.5. Cross-border issues.**

**3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?**

Czech experiences in application of the Succession Regulation 650/2012 are still quite limited. Neither Czech Supreme Court nor Constitutional Court has reviewed in the practice any case related to application of the Succession Regulation yet. Nevertheless, Czech authorities commonly issue European Certificate of Succession and the certificates issued in other member states are valid documents for the recording of succession property in the relevant registers in the Czech Republic.

**3.3.5.2. Are there any problems with the scope of application?**

There has been reported that Czech Cadastral Offices demand the precise identification of inherited immovable property in the Certificate of Succession issued by authorities from other EU countries to register heirs as new owners of such property but e.g. German courts refuse to provide the Certificate with such data.<sup>82</sup>

**3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country had experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?**

There are no public data available.

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<sup>82</sup> Heidenhain, S., Zápis pozemků do evropského dědického osvědčení z Německa. Available at <https://www.pravniprostor.cz/clanky/mezinarodni-a-evropske-pravo/ht-zapis-pozemku-do-evropskeho-dedickeho-osvedceni-z-nemecka> (20.5.2019).

**3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?**

No problems arising in practice have been reported.

**3.3.5.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?**

There is no information available.<sup>83</sup>

**3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?**

Section 288a of the Act on special court proceedings provides respective regulation and assigns the competence to issue certificate to the notary public (if proceeding dealing with the succession is still pending) or the court (if the proceeding has been finished).

**3.3.5.7. Are there any national rules on international jurisdiction and applicable (besides the Succession Regulation) concerning the succession in your country?**

Yes, sec. 74-75 of the Act No 91/2012 Coll governing private international law contains relevant provisions.<sup>84</sup> However, these shall apply only in if the Succession Regulation is not applicable. Moreover, there are also many bilateral international conventions regulating the jurisdiction on succession (e.g. with Russia, Cuba, Ukraine).

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<sup>83</sup> See Pfeiffer, M., 2017, 375.

<sup>84</sup> English translation of the full Act is available at <http://obcanskyzakonik.justice.cz/images/pdf/Act-Governing-Private-International-Law.pdf> (20.5.2019).

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## Denmark

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Manuela Giobbi (2.1.1; 2.1.3; 2.1.4; 2.1.5; 2.1.5.2)

Giovanni Russo (2.2 – 2.2.8)

Paolo Quacquareni (2.3 – 2.3.6)

Vincenzo Bonanno (3.1.5 – 3.1.7; 3.2.1; 3.2.6; 3.3.1.1 – 3.3.1.3; 3.3.4; 3.3.5.1 – 3.3.5.3; 3.3.5.6, 3.3.5.7)

Giovanna Di Benedetto (3.1.1– 3.1.4; 3.2.2 – 3.2.5; 3.3.1.4; 3.1.5; 3.3.2, 3.3.3; 3.3.5.4, 3.3.5.5)

### 1. Social perspective.

#### **1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without *affectio maritalis*).**

The classification into unipersonal families, nuclear families and complex families applies to the quickly-changing Danish society as well. Most Danish families are small, of the nuclear type. Today marriage is no longer a prerequisite to form a family. Many couples live together without legalising the arrangement with marriage. Children are raised to be independent from an early age; most are put in day care centres at about 1 year old.

The relatively high fertility rate in Denmark for the last few decades is regarded to be a result of the welfare policies, which enable citizens, both men and women, to balance work and family life. Such welfare system is pre-eminently geared towards the individual, which makes it significantly different from the more family-oriented systems in Southern Europe.

In general, state support towards gender equality is a staple of the Danish model. In particular, female economic autonomy and respect for individual choice is increasing. Fertility has been rising among women over 30, while declining among women younger than 30 years.

Danish youth leave their parental home early, girls even earlier than boys, normally by the time they have completed school education and before entering further education. Occasionally they come back to their parents' home for a limited period in-between studies, but this is not very common. By the age of 20-21, about half of them live independently or have entered into a civil partnership; while, just some of them have opted for marriage.

Until recently, a family was constituted through the legal event of contracting a marriage, but today marriage is far from being the only type of family-creating act. The predominance of the legal marriage has in fact been substituted by a diversity of family types.

#### **1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.**

Since 2014, there is a constant increase in the number of marriages and registered partnerships in Denmark, which enjoy the same legal status. In 2014 28337 unions were registered, while in 2018 the number grew up to 32530. Heterosexual marriages have increased from 27967 in 2014 to 32045

in 2018. In 2014 were registered 155 marriages between two men; 187 in 2018. In 2014 there were 209 marriages celebrated between two women; while 293 in 2018. The number of registered partnerships between two men remained the same since 2014, totalling to 3 in 2018. Similarly, registered partnerships between two women have also been statistically insignificant: only 2 were celebrated in 2018.

In 2018, the number of marriages taking place in a civil ceremony doubled compared to those celebrated in church<sup>529</sup>.

**1.3. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.**

The number of divorces has been declining in Denmark: from 19387 instances in 2014 to 14936 in 2018. Contrary to the general trend, divorces between two men have increased from 12 in 2014 to 34 in 2018, while those between two women have gone from 36 in 2014 to 64 in 2018.

In the period 1988-2008 the divorce rate on registered marriages has steadily declined from 46.17 % to 44.77 %. In the range 2014-2018, from an initial higher figure of 54.39 %, it has decreased constantly to reach a figure of 46.51%.

The number of dissolved same-sex partnerships has been following the same trend: 70 unions between men were dissolved in 2014, while only 21 in 2018; 134 partnerships between two women were cancelled in 2014, while only 46 in 2018. In total, there were 19639 divorces and dissolved partnerships in 2014 and 15101 in 2018.

In 2016 in Denmark the crude marriage rate (marriages per 1,000 inhabitants per year) was 5.4, while the crude divorce rate (divorces per 1,000 inhabitants per year) was 3.0. In the EU in 2015 the crude marriage rate was 4.3 and the crude divorce rate 1.9. In 2016 the Danish divorce-to-marriage ratio was 56. Compared to the EU-28 average, in Denmark the crude marriage rate is lower, while the crude divorce rate is quite higher<sup>530</sup>.

**1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).**

In Denmark, heterosexual marriages involving foreign grooms have registered an increase from 5101 instances in 2014 to 5419 in 2018. Similarly, those with a foreign bride have gone from 6560 in 2014 to 6775 in 2018. While homosexual marriages celebrated in Denmark by foreigners went from 364 in 2014 to 476 in 2018, same-sex marriages between Danish parties celebrated abroad slightly declined from 6 in 2104 to 4 in 2018.

It should be noted that some of these figures could be affected by the fact that foreign parties might not have been accounted for in the Danish population register.

Similar is the trend concerning divorces involving a foreign male: from 2903 cases of 2014, they have gone up to 6620 instances in 2018. On the other hand, divorces involving a foreign female have decreased from 3323 cases in 2014 to 3032 in 2018<sup>531</sup>.

<sup>529</sup> belg [www.dst.dk/en/Statistik/emner/befolkning-og-valg/vielser-og-skilsmisser/vielser](http://www.dst.dk/en/Statistik/emner/befolkning-og-valg/vielser-og-skilsmisser/vielser) (16.5.2019).

<sup>530</sup> Eurostat, Marriage and divorce statistics, [https://ec.europa.eu/eurostat/statistics-explained/index.php/Marriage\\_and\\_divorce\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php/Marriage_and_divorce_statistics) (16.5.2019).

<sup>531</sup> [www.statbank.dk/10001](http://www.statbank.dk/10001) (16.5.2019).



## 2. Family law.

### 2.1. General.

#### 2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?

The Danish legal system could be considered as a hybrid between the civil and the common law<sup>532</sup>. Regarding to civil law, there is not just one code, but legal sources could be found in multiple and separate Acts of Parliament<sup>533</sup>.

In particular, regarding to marriage, they are:

- The Marriage and Matrimonial Causes Act No. 148 of 8 May 1991, which has been modified by Consolidated Act No. 1818 of 23 December 2015.
- The Act on Spouses' Financial Matters No. 548 of 30 May 2017, with effect from 1 January 2018, replacing The Act on the Legal Effects on Marriage.
- The Act on Division Spouses' Asset No. 594 of 2011.

Concerning the children, the most important acts are:

- The Children Act No. 460 of 7 June 2001, modified by The Consolidated Act No. 1817 of 23 December 2015.
- The Parental Responsibility Act No. 388 of 14 June 1995, modified by The Consolidated Act No. 1820 of 23 December 2015.

It must be also mentioned that in 2012 gender-neutral marriage was introduced in Denmark by the Act No. 532 of 12 June 2012. This Act did not enter into force in Greenland and Faroe Island.

It must be noted that, even though there is not a formal recognition of the precedent (*stare decisis*) principle, case law is also important in interpreting legislation<sup>534</sup>.

#### 2.1.2. Provide a short description of the main historical developments in FL in your country.

During the 19<sup>th</sup> century, due to the industrialisation, the husband often worked outside the house and the family transformed herself and became more similar to the current one. It lost his nature of production unit and the extended family shifted to the nuclear family. However, marriage was still decisive for the status of spouses and children and it was the only accepted form of family. Divorce was strictly limited and occurred only for serious reasons.

Until the 20<sup>th</sup> century, the father was in charge of the family and his decisions were dominant. He was the only working party, so that he was responsible for providing the needs of the wife and the children. During the 1920's, due to the liberal ideals and the women's liberation movements, it was introduced the Act no. 276 of 30 June 1922, regarding the conclusion and the dissolution of the marriage. By the Act no. 56 of 18 March 1925, there was also the possibility to introduce the separate property regime and the separate liability for debts incurred during the marriage<sup>535</sup>. This Act, which is still regulating matrimonial property law today despite the amendments, represents a form of equality between the spouses for what concerns either the economic or the personal matters<sup>536</sup>.

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<sup>532</sup> Lund-Andersen, I., 2015, 147-148.

<sup>533</sup> Scherpe, J. M., 2016.

<sup>534</sup> Lund-Andersen, I., 2015, 147-148.

<sup>535</sup> Nielsen, L., Study on matrimonial property regimes and the property of unmarried couples in private international law and international law, National Report Denmark, Juridiske Fakultete Kobenhavens Universitet, 4, [www.ec.europa.eu](http://www.ec.europa.eu) (16.5.2019).

<sup>536</sup> Scherpe, J. M., 2016.

Afterwards, new social changes occurred. Unmarried cohabitants gradually supplemented married couples and the number of divorces increased. Meanwhile, the family reduced his functions towards his member's care, because it was partly replaced by public day care centres. Thus, recent decades have brought about extensive changes in formation, functions and support of the family<sup>537</sup>.

For these reasons, the Act no. 256 of June 1969 modified the Act no. 276/1922: spousal support was introduced in case of divorce<sup>538</sup>.

Some decades later, the Act no. 372 of 7 June 1989, with effect from 1 October 1989, recognised same-sex couples. They could register their union before the civil status officer, in order to obtain the same effects of the marriage<sup>539</sup>. In 2012, the Act no. 532 of 6 June has recognised the same-sex marriage. From this date, registered couples can convert their partnership into marriage or they can decide not to. However, it is no longer possible to register new same-sex unions<sup>540</sup>.

### **2.1.3. What are the general principles of FLX in your country?**

The specific aim of Danish marriage legislation is that spouses are considered two independent persons having equal rights. The Marriage Act 2 provides that both husband and wife shall support each other during the marriage and safeguard the family interests. These obligations can be fulfilled either by financial contribution or by housework. Nevertheless, both the spouses are obliged to contribute to maintaining a standard of living for the family, according to their financial resources<sup>541</sup>.

### **2.1.4. Define “family” and “family member” in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

Family may be defined either inside or outside the framework of marriage. Same sex couples and cohabitants have been included in the family concept as well.

### **2.1.5. Family formations.**

According to the Danish legal system, family formations are currently represented by married couples (either opposite-sex or same-sex), same-sex registered unions not converted into marriage yet and informal cohabitation partners (either opposite-sex or same-sex)<sup>542</sup>.

#### **2.1.5.1. Define the “spouse” in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

About definition of the term ‘spouse’, it must be mentioned that Danish law also includes same-sex registered partners, even though there is no possibility of registering new unions any longer. Regarding the marriage, in Denmark there is no sex requirement in order to get married, because same and opposite sex marriages are both recognised.

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<sup>537</sup> Scherpe, J. M., 2016.

<sup>538</sup> Nielsen, L., Study on matrimonial property regimes and the property of unmarried couples in private international law and international law, National Report Denmark, Juridiske Fakultete Kobenhavens Universitet, 4, [www.ec.europa.eu](http://www.ec.europa.eu) (16.5.2019).

<sup>539</sup> Colangeli, D., 2004, 8.

<sup>540</sup> Nielsen, L., 4, Donati, P., Ferrucci, F., 1994, 64, Lund-Andersen, I., 2015.

<sup>541</sup> Scherpe, J. M., 2016.

<sup>542</sup> Scherpe, J. M., 2016.

Regarding the other requirements, the Matrimonial Causes Act, at Chapter 1, sections 1-11 (b) states that marriage is legally valid when is between two single parties who are not under 18 years old, capable and not related. At the same time, marriage must be a voluntary act<sup>543</sup>.

**2.1.5.2. What types of relationships/unions between persons are recognised in FL of your country? In particular, formal (registered) and informal (*de facto*) unions, heterosexual and same-sex unions, unions with and without *affectio maritalis*. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

Danish legal system recognises several types of relationships, such as the marriage (either opposite-sex or same-sex), same-sex registered unions not converted into marriage yet and informal cohabitation partnerships. For what concerns marriage, Danish legal system completely defines it according to personal and economic effects, but also regarding to the effects of dissolution.

At the same time, the informal cohabiting couples are also recognized. They are legally defined in specific areas, by several laws. They are The Danish Inheritance Act, The Danish Administration of Estates Act and The Danish Insurance Contracts Act.

For what concerns the legal relation between parents and children, The Danish Children's Act and The Danish Parental Responsibility Act does not make any distinction between children born in an informal relationship and those born during the marriage. In 2014, The Consolidation Act No. 1821 of 23 December 2015, modifying The Danish Adoption Act, gave to the cohabitants the right to adopt<sup>544</sup>.

**2.1.6. What legal effects are attached to different family formations referred to in question 2.5.?**

Danish law system recognises several and different legal effects to the married couples and the *de facto* families. Concerning to the patrimonial effects, the latter ones are not equalized to the married unions, even though there some specific laws about. For instance, no financial support to each other is provided. On the contrary, both the unions have the same rights and obligations towards the children's care and they are entitled to adopt. The cohabitants have fewer rights upon inheritance. In fact, they have the right to inherit only in case of a specific will. Nevertheless, the informal unions have some rights in respect of social security, compensation, taxes and housing<sup>545</sup>, as well as the married couples.

**2.1.7. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/*de facto* family formations? Explain briefly.**

Denmark already reformed family formations few years ago, by equalizing same-sex marriages to the opposite-sex ones. At the same time, cohabitating couples who are not married are defined in specific areas and they are almost equalized to the married unions. No proposal reform is in place, at the moment.

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<sup>543</sup> Lund Andersen, I., 2015, 157-158.

<sup>544</sup> Scherpe, J. M., 2016.

<sup>545</sup> Nielsen, L. Study on matrimonial property regimes and the property of unmarried couples in private international law and international law, National Report Denmark, Juridiske Fakultete Kobenhavens Universitet, 4, [www.ec.europa.eu](http://www.ec.europa.eu) (16.5.2019).

## 2.2. Property relations.

### 2.2.1. List different family property regimes in your country.

In Denmark, the legal property system is represented by the deferred community property. The second property regime is represented by the separation of assets, which must be defined by the spouses through a specific agreement. It can partially or totally derogate the default regime.

### 2.2.2. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?

The legal property regime provides that the community of assets is deferred. It means that the community does not enter into effect until the end of the marriage, by legal separation, divorce or death. During marriage, each spouse can dispose of property, which he/she has bought or acquired. However, the other party, in case of a risk of loss or a misuse, can ask that the property be divided and claim for a compensation too<sup>546</sup>. In absence of an agreement stipulating otherwise, the default system does not include non-transferable rights and personal rights, such as some forms of copyright and personal goodwill connected with business activities. Besides, in case of dissolution of marriage, the spouses maintain some forms of their own pension rights<sup>547</sup>.

### 2.2.3. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a “new regime just for them”?

Spouses can enter into pre-nuptial or post-nuptial agreements, which need to be submitted to the court for their registration. Spouses can agree for several property systems through them, in alternative to the legal community property regime. Generally, the chosen different regime is the separation property system, which can be modulated by the spouses through the agreement. For instance, they can agree that they own property separately, even in case of divorce and death, or they can agree that they own separate property only in case of termination of the wedding<sup>548</sup>.

It could be mentioned that spouses are free to create a different kind of property regime, in which the default regime rules could take place or not. Nevertheless, there are some limits and distinctive traits to consider. First of all the spouses cannot make valid agreements for spousal maintenance obligations or lump-sum compensations, in order to protect the weaker spouse. Second, it is observed that there is case law where the validity of the nuptial agreements is not settled on the general principles of contract law. Therefore, the courts tend to consider the agreements legitimate, even though they are concluded without full awareness about the effects. However, the courts could demand more proofs about the acquainted consent of the spouses, in case of post-nuptial

<sup>546</sup> Nielsen, L., Study on matrimonial property regimes and the property of unmarried couples in private international law and international law, National Report Denmark, Jurisdike Fakultete, Kobenhavens Universitet, 4.

<sup>547</sup> [www.coupleseurope.eu/it/denmark/topics/3](http://www.coupleseurope.eu/it/denmark/topics/3) (16.5.2019).

<sup>548</sup> Nielsen, L., Study on matrimonial property regimes and the property of unmarried couples in private international law and international law, National Report Denmark, Jurisdike Fakultete, Kobenhavens Universitet, 4.

agreement, when one of the party is already aware of the risk of a divorce<sup>549</sup>. Considering the aforementioned rules, it is possible to the spouses to create a new kind of regime just for them.

**2.2.4. Explain briefly the rules on the administration of family property and compare if there are difference for different property regimes.**

Under the default regime, during the marriage spouses can dispose of the property, which both of them has personally bought and acquired. Nevertheless, they cannot abuse the right to dispose of the assets. In case of detriment of the other party, he/she can ask for the dissolution of the regime and the division of the property.

Special rules are defined for the matrimonial home and its furniture. They cannot be disposed without the consent of the other spouse.

Under the separation of property, spouses are completely free to dispose of their property, without any risk of misuse. At the same time, there is no restriction upon the disposal of the matrimonial home<sup>550</sup>.

**2.2.5. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

Yes, there is. Spouses should ask for the registration at the public registry. In particular, the agreement is published in *Statstidende*<sup>551</sup>. In case of a pre-nuptial agreement, it enters into effect only when the parties get married, while in case of a post-nuptial agreement the effects are settled from the day of the registration<sup>552</sup>.

**2.2.6. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

Under the default regime, the creditor can only take proceedings against the property of the single debtor, as a general rule. However, both the spouses may be liable in case of debts incurred for the household or the needs of the children. In addition, a husband can be liable for the debts incurred by his wife, despite for her own needs. There is no opposite rule.

For what concerns the separation of property system, the marriage agreement need to be registered not only for its validation, but also to have legal effect towards creditors. Spouses are only liable for their single debts, but spouses are both liable in case of purchases bought for the household or the children's needs, even in separate property<sup>553</sup>.

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<sup>549</sup> [Uk.practicallaw.com](http://Uk.practicallaw.com) (16.5.2019).

<sup>550</sup> Nielsen, L., Study on matrimonial property regimes and the property of unmarried couples in private international law and international law, National Report Denmark, Jurisdiske Fakultete, Kobenhavens Universitet, 4,.

<sup>551</sup> Nielsen, L., Study on matrimonial property regimes and the property of unmarried couples in private international law and international law, National Report Denmark, Jurisdiske Fakultete, Kobenhavens Universitet, 4.

<sup>552</sup> [Uk.practicallaw.com](http://Uk.practicallaw.com) (16.5.2019).

<sup>553</sup> Nielsen, L., Study on matrimonial property regimes and the property of unmarried couples in private international law and international law, National Report Denmark, Jurisdiske Fakultete, Kobenhavens Universitet, 4, [www.ec.europa.eu](http://www.ec.europa.eu) (16.5.2019).

**2.2.7. Describe allocation and division of property in case of divorce, separation or dissolution of the union.**

In case of the termination of marriage, the rules are different depending on what kind of regime is applied. Under the default regime, the community of assets ceases and the net estate has to be divided. The net estate includes some money held by the spouses, the value of the family home, investments, business assets etc. Personal assets, such as clothes, or personal rights, such as copyrights, compensation for injury, are not included.

The division of the property could be made by a personal agreement or by the local court, even though the latter option is not frequent. If a spouse owns an asset, he/she can demand possession of it. However, where the value of the owned asset exceeds the value of the division shared, the spouse has to pay the difference to the other party.

Courts can deny the equal division of the property where there was a short duration of the marriage (less than 5 years) and a spouse brought into marriage more assets than the other one.

Under the alternative regime, the separation of the assets does not take place, because they are already personal. Only in special cases, the court can order the spouse to share the value of his own property with the other party, if the latter one could end up with a precarious financial situation after the divorce<sup>554</sup>.

**2.2.8. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?**

There are not any local special regimes in Denmark. However, a different family law system is applied in Greenland and Faroe Islands, in order to preserve their traditions.

**2.3. Cross-border issues.**

**2.3.1. Is your country participating in the enhanced cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?**

No. It is not. Denmark did not agree on the enhanced cooperation.

**2.3.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as “marriage”, “matrimonial property agreement”, “partnership property agreement” etc.?**

Denmark does not participate in enhanced cooperation regarding two Regulations.

**2.3.3. Are you expecting any problems with the application of the rules on jurisdiction?**

Denmark does not participate in enhanced cooperation regarding two Regulations.

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<sup>554</sup> Nielsen, L., Study on matrimonial property regimes and the property of unmarried couples in private international law and international law, National Report Denmark, Jurisdiske Fakultete, Kobenhavens Universitet, 4, [www.ec.europa.eu](http://www.ec.europa.eu) (16.5.2019).

**2.3.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

Denmark does not participate in enhanced cooperation regarding two Regulations.

**2.3.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

Denmark does not participate in enhanced cooperation regarding two Regulations.

**2.3.6. Are there any national rules on international jurisdiction and applicable (besides the Regulations) concerning the succession in your country?**

As a State Member of EU, Denmark has adopted the Regulation (EC) 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

At the same time, Denmark has ratified multiple Hague Conventions involving family law, such as the Hague Convention of 1 June 1970 on the Recognition of Divorce and Legal Separation, the Hague Convention of 15 April 1958 concerning the maintenance obligations towards children and the Hague Convention of 2 October 1973 on the maintenance obligations. Regarding international jurisdiction on divorce, some distinctions could be established, depending on which State Denmark is relating to. When there is a legal conflict between a Danish party and another from the Northern Europe Countries, the jurisdiction rules are deriving from the Nordic Conventions.<sup>555</sup>

On the other hand, when there is a conflict between a Danish party and another from a different country, Danish Administration of Justice Act comes into play. It states that there is domestic jurisdiction when the respondent has its domicile in Denmark, when the petitioner is a Danish subject and he/she cannot file for divorce when he/she resides, or when he/she has had a Danish domicile for the past two years. At the same time, there could be domestic jurisdiction when the petitioner and the respondent are both Danish subjects and the last one does not oppose that the divorce is handled in Denmark. Finally, when the petitioner and respondent have obtained legal separation from Danish authorities within the past five years.

As noted, there is no application of the Regulation (EC) 2201/2003 on cross-border divorce. Regarding the matrimonial property regime, the international rules on jurisdiction are stated by Act on Division of Matrimonial Property, in sections 4 and 5.

It provides that there is the Danish forum when the petitioner or the responder have their residence in Denmark or one of them has a connection with this country and the other party does not oppose. Despite this rules, it could be possible that more proceedings are instituted in several courts of different countries. In this case, the Danish courts generally apply the principle of *lis pendens*, but not the *forum conveniens* principle<sup>556</sup>.

Regarding to the nuptial agreements, it should be considered that the new Act on the Financial Relationship between spouses allow the parties to choose the law of the country where one of them is resident or citizen to govern the property regime. At the same time, if the spouses do not choose any country law, the Act states that the property regime is determined by the law of the State where they get married. If they do not live in the same country when they marry, the law of the state where they are both citizen should be applied. If they have got different citizenships, the law of the state which they have the nearest connection should be applied.

Beyond the cases mentioned above, the Act states that after 5 years of communal residence in Denmark, the property regime is regulated by Danish law. The Act does not specify whether the

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<sup>555</sup> Convention of 6 February 1931, revised in 2006; Convention of 19 November 1934, revised in 2012; Convention of 11 November 1977.

<sup>556</sup> [Uk.practicallaw.com](http://Uk.practicallaw.com) (16.5.2019).

property regime law should be applied for all the assets or whether it takes effects only for the assets acquired from the moment the five years have passed.

### 3. Succession law

#### 3.1. General.

##### 3.1.1. What are the main legal sources of Succession Law (SL) in your country? What are the additional legal sources of SL?

The succession law is governed by the LOV nr 515 af 06/06/2007, inheritance law, published in the Journal of Law A, issue of the journal of the Ministry of Justice, jnr. 2005-775-0002.

The inheritance law LOV nr 515 af 06/06/2007 was subsequently modified by:

- LOV nr 168 af 12/03/2003 § 3;
- LOV nr 221 af 21/03/2011 § 3;
- LOV nr 652 af 12/06/2013 § 7;
- LOV nr 628 af 08/06/2016 § 23;
- LOV nr 550 af 30/05/2017 § 5;
- LOV nr 1711 af 27/12/2018 § 19.

##### 3.1.2. Provide a short description of the main historical developments in SL in your country.

Denmark since the 1700s have utilized the *uskifte*. The *uskifte* allows the marital property community to continue until the surviving spouse also dies. The Inheritance Act, Law n. 515 of 6 June 2007 is the source of all inheritance issues. Denmark has ratified the Hague Convention on Testamentary Dispositions<sup>557</sup>.

##### 3.1.3. What are the general principles of succession in your country?

The estate is distributed evenly on each family line of the relatives. The Succession Law in Denmark recognises the "representation principal".

##### 3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.

The succession procedure begins at the time of the death of the subject whose inheritance is involved. The procedure ends with the merger of the estate with the estate of the heir and the payment of the creditors of the deceased. The competence of the authorities involved is determined on the basis of the place where the succession is opened. The court in which the subject made a will is also involved in the case of a succession governed by a will.

##### 3.1.5. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?

When the testator does not dispose of the will by testament or when the testator, in case of illness or emergency, arranges by means of a holographic will without providing for the conversion of the

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<sup>557</sup> Reid, K., De Waal, M., Zimmermann, R., 2015, 307-309.



same into a public will within the terms of the law or when he disposes, by testament only of part of his own patrimony, the succession of the person in question is governed exclusively by inheritance law.

In particular, the norms of the LOV nr 515 af 06/06/2007 are applied, from kapitel 1 to kapitel 5. When the testator disposes in whole or in part of his estate the succession is governed by the will of the testator within the limits set by the succession law. In particular, the norms of the LOV nr 515 af 06/06/2007 are applied, from kapitel 6 to kapitel 14<sup>558</sup>.

### **3.1.6. What happens with the estate of inheritance if the decedent has no heirs?**

According to the succession law, if there are no heirs *ex lege* or according to the testamentary will the wealth of the deceased belongs to the State. In this case, the Minister of Justice or a person authorized by him can, upon request, decide that the inheritance be distributed according to the presumed dispositions of the deceased.

If special circumstances justify it, the Minister of Justice or a person authorized by him may, upon request, renounce the inheritance in whole or in part in favour of the cohabitant of the deceased, of persons raised by the deceased, of persons raised together with the deceased, to relatives of the deceased, other persons or institutions close to the deceased<sup>559</sup>.

### **3.1.7. Are there special rules or limitations concerning succession with reference to the deceased's (or heir's) culture, tradition, religion or other characteristics?**

In Greenland, the inheritance law is subject to wide derogations and lack of application given the autonomy and independence recognized to the island and the cultural peculiarities of its people.

## **3.2. Intestate succession.**

### **3.2.1. Are men and women equal in succession? Are domestic and foreign nationals equal in succession? Are decedent's children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?**

Yes, men and women receive equal treatment in inheritance law. Succession law does not distinguish between man and woman. In fact, the succession law does not make a gender distinction and does not specifically refer to men and / or women, husband and / or wife. The succession law generically refers to "aegtefaellers" who join in marriage. The inheritance law does not distinguish the subjects involved in the proceeding according to citizenship. The succession is regulated by the law of the place where the succession is opened. The inheritance law provides that the Government may enter into agreements with other States concerning the relationship between Danish succession laws and foreign succession laws.

Succession law does not distinguish between children born out of wedlock or children born within marriage. The inheritance law provides that the adopted children and the heirs of the adopted children participate in the succession of the adoptive parents and the family members of the adoptive parents. Is a child conceived prior to and yet not born at the time of entry of succession capable of inheriting? Succession law does not distinguish children based on the moment of

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<sup>558</sup> Lov nr 515 of 6 June 2007.

<sup>559</sup> Law nr 5 of 3 March 1972 (arvelova).

conception. The child, provided that he comes to life, participates in the succession of the parent like a child already born at the time of the opening of the succession.

No, extramarital partners do not receive the same treatment as spouses in the Succession Law<sup>560</sup>. The extramarital partner can receive the same treatment as the spouse united in marriage through the formulation of explicit testamentary provisions<sup>561</sup>.

Yes, homosexual couples united in marriage receive equal treatment in inheritance law. Succession law makes no distinction based on sexual preferences. Inheritance law generally refers to "ægtefaeller", that is, subjects who join in marriage regardless of the sex of the same. The law expressly prohibits discrimination based on sexual orientation.

### 3.2.2. Are legal persons capable of inheriting? If yes, on which basis?

Yes, legal persons are able to inherit. There is no express prohibition in this sense in the Danish inheritance law.

### 3.2.3. Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.

Yes, the institution of exclusion and cancellation of the inheritance is present<sup>562</sup>. When a person has committed a deliberate violation of the penal code and caused the death of another person with it, a sentence can be decided to lose the right to receive the inheritance, insurance sums, pensions or other benefits that depend on the succession of the victim.

In the same way it is possible to decide that the inheritance or the share of inheritance due in insurance sums, pensions or other benefits in any case due cannot be increased as a result of crimes. Anyone who has attempted to kill a person from whom he descends or has in any way seriously violated or threatened the person in question in a criminal way can be deprived of the right to inherit, to the sums of insurance of pensions or other benefits however due.

A person excluded or cancelled from the inheritance may, however, be re-entered in the succession by explicit provision.

### 3.2.4. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?

The heir *ex lege* are<sup>563</sup>:

- spouse, children, any *ex filii* grandchildren in the case of pre-dead children;
- parents, brothers, any *ex fratre* grandchildren in the absence of spouse and children;
- grandfather, possible uncles in case of one or more pre-dead grandparents.
- in the absence of one of the heirs classes described above inherits the Danish state.

Yes, there are different classes of heirs provided for in the succession law.

Yes, according to inheritance law, there is a priority among heirs.

No member of a subsequent class can assume the position of heir if the relative of the previous class is alive.

Three succession classes *ex lege* are available:

First class of heirs:

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<sup>560</sup> § 23 Danish Act on the Legal Effects of Marriage.

<sup>561</sup> Broberg, M., 1996, 149-156.

<sup>562</sup> Viggo Godsk Pedersen, H., Lund-Andersen, I., 2016.

<sup>563</sup> Lov nr 515 of 6 June 2007.

- the spouse alone, in the absence of children;
- the spouse and children;
- the spouse and any *ex filii* grandchildren, if one or more children are pre-dead.

Second class of heirs, in the absence of spouse and children:

- parents;
- parents and any brothers, in the event that one or more parents are pre dead.

Third class of heirs, in the absence of spouse, children, parents, brothers:

- grandparents;
- one of the grandparents and any uncles, in the event that one or more grandparents are pre dead.

The shares are determined by the succession law, from kapitel 1 to kapitel 5, of the LOV nr 515 of 06/06/2007.

The surviving spouse is entitled to half of the estate while the children are entitled to the remaining half, distributed in equal shares<sup>564</sup>. The surviving spouse will inherit the entire estate in the absence of descendants. The estate will pass to the relatives of the deceased, in case of absence of a surviving spouse.

### **3.2.5. Are the heirs liable for deceased's debts and under which conditions?**

Yes, the heirs are responsible for the debts that have fallen in succession. The heir has the right to renounce the inheritance.

### **3.2.6. What is the manner of renouncing the succession rights?**

It is possible to renounce the inheritance. The renunciation of inheritance must be made before any act of disposal and / or division of the estate. The waiver must be addressed to the other heirs or to the Court. The waiver of the inheritance must be registered with the Court.

## **3.3. Disposition of property upon death.**

### **3.3.1. Testate succession.**

#### **3.3.1.1. Explain the conditions for testate succession.**

The hereditary succession can be regulated by the will. The condition for the testamentary succession is to have the testamentary capacity.

#### **3.3.1.2. Who has the testamentary capacity?**

Anyone who has reached the age of 18 or has a marriage contract.

#### **3.3.1.3. What are the conditions and permissible contents of the will?**

A will should always be notarised. The Notary will record a copy of the will and will make a legal control of the contents of the testament<sup>565</sup>.

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<sup>564</sup> Lov nr 515 of 6 June 2007.

<sup>565</sup> Euréseau –An international network of lawyers, <http://eureseau.com/home.html> (16.5.2019).

**3.3.1.4. Describe the characteristics of will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a will?**

In Danish succession law, two types of will are recognized: public will by and testament in case of emergency or illness. No the succession inheritance law does not divide wills into public and private. The Notary takes part in the formation of the will as a public authority.

**3.3.1.5. Is there a (public) register of wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

It exists at the Court where the notary receives the deed. The Notary who receives the will must deposit as soon as possible<sup>566</sup>.

**3.3.2. Succession agreement (*negotia mortis causa*). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.**

According to succession law an heir cannot sell, commit or otherwise transfer the planned inheritance.

**3.3.3. Are conditions for validity of wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

The Inheritance Act, Law n. 515 of 6 June 2007 is the source of all inheritance issues.

**3.3.4. Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

The successor interests of the members of the family circle are protected with respect to the testamentary wills of the deceased. According to inheritance law, the spouse and direct descendants are entitled to a reserved portion of 1/5 of the estate. In other words, the deceased has the right to dispose of 3/4 of his estate by testamentary will.

The part reserved for the spouse is equal to 1/8 of the property. The other 1/8 of the estate is distributed evenly among the direct descendants. If the deceased does not leave direct descendants, the surviving spouse must receive 1/4 of the assets. The part reserved for descendants is also limited to 1/8 of the estate, if the deceased has bequeathed a cohabiting partner. Furthermore, the deceased has the right to limit the reserved portion of the descendants to the sum of 1.100.000 DKK. This is not possible with respect to the part reserved for the spouse<sup>567</sup>.

**3.3.5. Cross-border issues.**

**3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?**

The Succession Regulation 650/2012 is not applicable in Denmark.

<sup>566</sup> The Council of the Notaries of the European Union (CNUE), <http://www.cnue.eu> (16.5.2019).

<sup>567</sup> [www.cesifo-group.de/ifoHome/publications/docbase.html](http://www.cesifo-group.de/ifoHome/publications/docbase.html) (16.5.2019).

### 3.3.5.2. Are there any problems with the scope of application?

The Succession Regulation 650/2012 is not applicable in Denmark.

### 3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country had experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?

The Scandinavian Convention provides special rules on choice of law in cross-border succession cases<sup>568</sup>.

### 3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?

The law applicable is the law of the country in which the deceased was a resident at the time of death.

### 3.3.5.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?

The Succession Regulation 650/2012 is not applicable in Denmark.

### 3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?

The Succession Regulation 650/2012 is not applicable in Denmark.

### 3.3.5.7. Are there any national rules on international jurisdiction and applicable (besides the Succession Regulation) concerning the succession in your country?

The Succession Regulation 650/2012 is not applicable in Denmark. The Scandinavian Convention provides special rules on choice of law in cross-border succession cases.

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<sup>568</sup> The Denmark Embassy in Italy, Ministry of Foreign Affairs of Denmark, <http://italien.um.dk/it.aspx> (16.5.2019).

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## Estonia

Susann Liin

### 1. Social perspective.

#### 1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without *affectio maritalis*).

The Constitution of Republic of Estonia (Eesti Vabariigi põhiseadus<sup>1</sup>) has a list of fundamental rights, freedoms and duties. Provisions that are mainly related to family law are right to inviolability of private and family life (PS § 26) and rights related to family (PS § 27). However, the notion of family is not legally defined in constitution or in any other legal act.

When analysing official statistics, family is defined as people people living in the same household, who are connected as spouses, non-marital couples (including same-sex couples) or as a parent and a child. A family that is included on official statistics may be:

- legally married couple or non-marital couple without children;
- legally married couple or non-marital couple with children (children do not have to be common);
- single parent with child or children.<sup>2</sup>

Similarly to the tendencies in Europe, in Estonia the model of multigenerational families has been replaced by a model of single family household. In all Europe married couples form the largest part of single family households, but in Estonia the number of married couples is only a bit over 50%, compared to e.g Cyprus, Greece or Malta, where the number is 80%.<sup>3</sup> In Estonia the number of members living in the same household is usually small. There are 40% of people living in a household with only one member, 29% of people have two members and only 16% of all the households have three members.<sup>4</sup>

Compared to other European countries, the tendencies in Estonia differ from other countries by the fact that there is a high percentage of couples living in non-marital cohabitation and the number of single mothers is high. Every fourth single family household lives in non-marital cohabitation and every fifth of them is a single mother. Estonia is similar to Scandinavia in respect of widespread trend of non-marital cohabitation and similar to Slovenia, Poland, Hungary and Czech in respect of the percentage of single mothers.<sup>5</sup>

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<sup>1</sup> Eesti Vabariigi põhiseadus (PS) – RT 1992, 26, 349; RT I, 15.05.2015, 2; translation to English published 21.05.2015.

<sup>2</sup> Raid K., Tammur, A., 2018.

<sup>3</sup> Tõnurist, A., 2015.

<sup>4</sup> Tõnurist, A., 2015.

<sup>5</sup> Tõnurist, A., 2015.

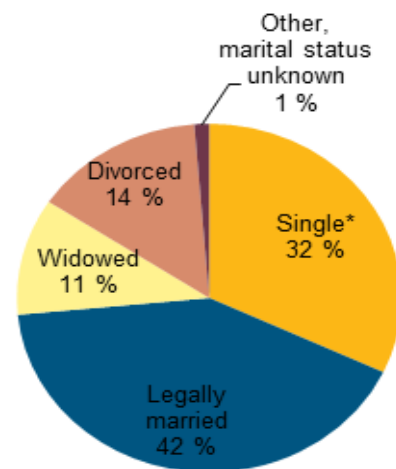
Last official census of population took place in 2011. According to the Population and Housing Census 2011, there were 1 026 925 inhabitants aged 20 and over in Estonia.

The largest proportion of them, 41.5 %, were legally married and the share of single people in the population was 32.0 %.<sup>6</sup>

90% of men and 80% of women aged 15–24 are living without a partner. The time of starting cohabitation is between 25–34 years of age, in this age group almost half of men and nearly 61% of women live with a partner.

Cohabitation with a legal spouse is the most common marital status among men and women aged 36–49. About 59% of women aged 50 and older live without a partner, but 59% of men of the same age group live with a legal spouse.<sup>7</sup>

**Population aged 20 and over in Estonia by marital status, 31.12.2011<sup>8,1</sup>**



(\*) Persons never been legally married

### 1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.

In 1970, the number of marriages contracted was 12,373 and the marriage rate remained relatively stable until the beginning of the 1990s. The number of marriages declined considerably in the first half of the 1990s. In 1990, the number of contracted marriages was 11,774, in 1993, it was 7,745 and in 1996, it declined even further and was 5,517.<sup>9</sup>

A significant decline in the number of marriages at the beginning of the 1990s was affected by the overall decline in the population due to emigration, especially in the age groups of younger persons of family-forming age. Also the number of couples who preferred consensual union to marriage increased.

Later the number of marriages increased, though economic situation had impact on the contraction of marriages. In economically more difficult times, the contraction of marriages declined (e.g 2008–2010). On the other hand, when the economy grew, there were more marriages (e.g 2006–2007). Generally, the number of marriages has remained between 5,000 and 7,000 since the year 2000.<sup>10</sup>

The number of divorces began to grow some time before the 1970s, when the new code on marriage and family took effect, which made divorce significantly easier (Ainsaar 1997). There has been an attitude of tolerance towards divorce in Estonia compared to other European countries, and neither was it condemned in Soviet times (Tiit 2000). For instance, in 1970, the number of divorced marriages was 4,379 and it has increased ever since.<sup>11</sup>

The economic situation has influenced the number of marriages as stated above, but the number of divorces remained mainly on the same level. Twenty-three years ago, the number of divorces was

<sup>6</sup> Servinski, M., 2015.

<sup>7</sup> Tõnurist, A., 2011.

<sup>8</sup> Servinski, M., 2015.

<sup>9</sup> Haugas, L., Hennoste, H., 2018, 5.

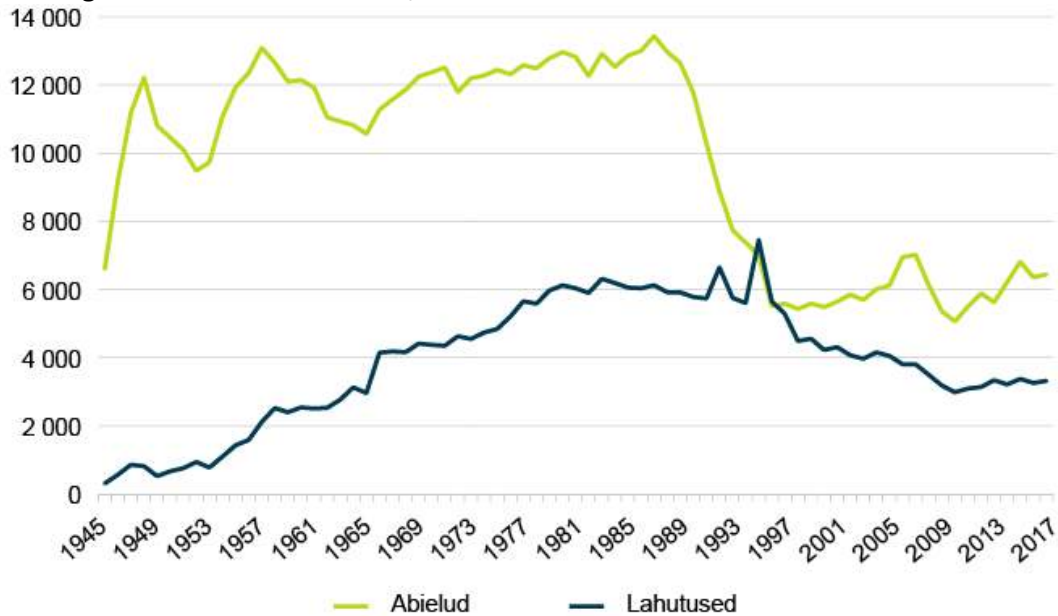
<sup>10</sup> Haugas, L., Hennoste, H., 2018.

<sup>11</sup> Haugas, L., Hennoste, H., 2018.



bigger than now. There was 5000–6000 divorces per year. For example Estonia had the highest rate of divorces in Europe in 1997 with the average of 3,8 divorces per 1000 people (*crude divorce rate*).<sup>12</sup> In the last ten years the number of marriages and divorces has been quite stable, but there is a correlation between economic situation and the number of marriages and divorces. In the period of economic boom, the crude marriage rate increased, while the crude divorce rate decreased; during the recession, however, both indicators dropped. The correlation between the GDP and the crude divorce rate in Estonia is  $-0.566$ , which is entirely appreciable.<sup>13</sup>

**Marriages and divorces in Estonia, 1945–2017**<sup>14</sup>



**Marriages and divorces in Estonia 2008–2017**<sup>15</sup>

	Marriages	Divorces	Crude marriage rate (per 1000 people)	Crude divorce rate (per 1000 people)
2008	6 127	3 501	4,58	2,62
2009	5 362	3 189	4,02	2,39
2010	5 066	2 989	3,80	2,24
2011	5 499	3 099	4,14	2,33
2012	5 888	3 142	4,45	2,38
2013	5 630	3 343	4,27	2,54
2014	6 220	3 218	4,73	2,45
2015	6 815	3 382	5,18	2,57
2016	6 360	3 262	4,83	2,48
2017	6 447	3 323	4,89	2,52

<sup>12</sup> Statistics Estonia. Eesti ei ole abielulahutuse osas enam Euroopa meister (05.11.2018), online [here](#).

<sup>13</sup> Servinski, M., 2015.

<sup>14</sup> Green line states the number of marriages and blue line the number of divorces (abielud – marriages, lahutused – divorces); Statistics Estonia. Eesti ei ole abielulahutuse osas enam Euroopa meister (05.11.2018), online [here](#); Haugas, L., Hennoste, H., 2018.

<sup>15</sup> Statistics Estonia (18.05.2018) online [here](#).

**1.3. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.**

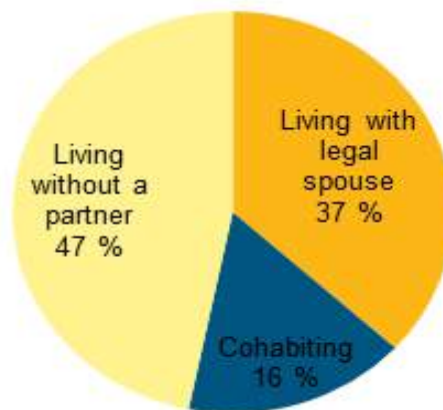
Among the population aged 20 and over, 47 % live without a partner, 37% are married and 16% are cohabiting.<sup>16</sup> Out of 425 888 legally married persons who are 20 and over, 377 900 persons live with their legal spouse, while 5 556 persons are legally married but live with a cohabiting partner. At the same time 42 432 persons are legally married but live without a partner.<sup>17</sup>

There has been a significant increase in non-marital cohabitation in recent decades in Estonia and decrease in the number of people living with a legal spouse. The share of persons living with a legal spouse decreased by 5.4 percentage points and the share of persons living in a consensual union increased by 4.7 percentage points in eleven years.<sup>18</sup>

According to the census in 2011, 0,04% of people were cohabiting with a same-sex partner.<sup>20</sup> Starting from 01.01.2016, couples can conclude registered partnership contracts<sup>21</sup> irrespective of their sex. There are no official statistics, but in 2017 there was information about 59 contracts.<sup>22</sup>

It can also be pointed out that more children are born out of wedlock than for married couples. This has been a trend since 2004 and has not altered. In 2017 53% of children were born for couples in non-marital cohabitation, 41% for married couples and 6% for single people.<sup>23</sup> On the other hand, in 53% of the cases children are raised by married couples, in 31% by couples in non-marital cohabitation and in 16% of cases by single parents.<sup>24</sup>

**Population aged 20 and over in Estonia by de facto marital status, 31.12.2011<sup>19</sup>**



**1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).**

Total number of marriages concluded in the period of 2008–2016 has stayed around 6000. The percentage of prospective spouses who lived in Estonia at the time of contraction of marriage has varied over the years, but has stayed around 95%. Percentage of men who live abroad at the time of getting married is a bit higher than for women living abroad.

Total number of divorces in the period of 2008–2016 has stayed around 3000. The percentage of divorcing spouses living in Estonia has varied over the years, but has been around 97%. Though the percentage of divorcing spouses living abroad does not form a large part of divorcing spouses, a tendency is that the number of divorcing men living abroad is twice as high as for women.

<sup>16</sup> Servinski, M., 2015. Eurostat, online in [English](#).

<sup>17</sup> Servinski, M., 2015. Eurostat, online in [English](#).

<sup>18</sup> Tõnurist, A., 2011.

<sup>19</sup> Servinski, M., 2015. Eurostat, online in [English](#).

<sup>20</sup> Tõnurist, A., 2011. Total persons 15 and older 1 094 564, of which 206 men and 222 women stated that they are cohabiting with a same-sex partner.

<sup>21</sup> Draft of law of Registered Partnership Act 650 SE and explanatory notes, see online [here](#). The application of the act is still complicated, because the implementing [acts](#) haven't been adopted.

<sup>22</sup> Koorits, V., 2017.

<sup>23</sup> Raid K., Tammur, A., 2018, 16.

<sup>24</sup> Raid K., Tammur, A., 2018, 17.

Marriages by residence of prospective spouses in Estonia, 2008–2016<sup>25</sup>

Sex	Residence	2008	2009	2010	2011	2012	2013	2014	2015	2016
Men	<b>Total</b>	<b>6 127</b>	<b>5 362</b>	<b>5 066</b>	<b>5 499</b>	<b>5 888</b>	<b>5 630</b>	<b>6 220</b>	<b>6 815</b>	<b>6 360</b>
	Unknown	1	1	1	4	6	0	0	0	0
	Abroad	221	212	198	262	288	299	492	413	392
	In Estonia	5 905	5 149	4 867	5 233	5 594	5 331	5 728	6 402	5 968
Women	<b>Total</b>	<b>6 127</b>	<b>5 362</b>	<b>5 066</b>	<b>5 499</b>	<b>5 888</b>	<b>5 630</b>	<b>6 220</b>	<b>6 815</b>	<b>6 360</b>
	Unknown	0	0	2	1	3	0	0	0	0
	Abroad	169	169	140	213	254	215	405	319	244
	In Estonia	5 958	5 193	4 924	5 285	5 631	5 415	5 815	6 496	6 116

Divorces by residence of spouses in Estonia, 2008–2016<sup>26</sup>

Sex	Residence	2008	2009	2010	2011	2012	2013	2014	2015	2016
Men	<b>Total</b>	<b>3 501</b>	<b>3 189</b>	<b>2 989</b>	<b>3 099</b>	<b>3 142</b>	<b>3 343</b>	<b>3 218</b>	<b>3 382</b>	<b>3 262</b>
	Unknown	21	13	7	10	7	0	0	0	0
	Abroad	73	78	64	72	75	180	185	167	206
	In Estonia	3 407	3 098	2 918	3 017	3 060	3 163	3 033	3 215	3 056
Women	<b>Total</b>	<b>3 501</b>	<b>3 189</b>	<b>2 989</b>	<b>3 099</b>	<b>3 142</b>	<b>3 343</b>	<b>3 218</b>	<b>3 382</b>	<b>3 262</b>
	Unknown	4	2	1	2	1	0	0	0	0
	Abroad	41	32	36	33	52	105	115	86	80
	In Estonia	3 456	3 155	2 952	3 064	3 089	3 238	3 103	3 296	3 182

There is no official statistics about non-marital cohabitation or about marriages where spouses have moved abroad.

## 2. Family law.

### 2.1. General.

#### 2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?

The Constitution of Republic of Estonia<sup>27</sup> (PS) has a list of fundamental rights, freedoms and duties. Provisions that are mainly related to family law are right to inviolability of private and family life (PS § 26) and rights related to family (PS § 27).

<sup>25</sup> Statistics Estonia database, table RV272, [here](#); see also table at Shmalan, A., 2016.

<sup>26</sup> Statistics Estonia database, table RV32, [here](#).

<sup>27</sup> The Constitution of Republic of Estonia – Eesti Vabariigi põhiseadus (PS) – RT 1992, 26, 349; RT I, 15.05.2015, 2; translation to English published 21.05.2015.

Main source of family law is Family Law Act<sup>28</sup> (*PKS*), where substantial rules concerning marriage, filiation, adoption, parent`s legal relationship with their child and guardianship are regulated.

Registered Partnership Act<sup>29</sup> (*KooS*) comprises substantial law about registered partnerships. But it must be mentioned that the implementation of the regulation can be hindered due to the fact that the draft of law concerning implementation of registered partnership act has not been adopted by the parliament<sup>30</sup> and will mostlikely fall out of parliamentary proceedings after parliamentary elections (03.03.2019).

Besides aforementioned substantial law there are mainly three acts that regulate the composition and functioning of databases that include data related to family law.

- Vital Statistics Registration Act<sup>31</sup> (*PKTS*) regulates the competences of vital statistic office and procedures concerning vital statistics.

Vital Statistics Offices register births and deaths, certify the contraction of marriages and divorces and make entries concerning changes under family law and names law in the population register (*PKTS* § 3 (1)).

- Population Register Act<sup>32</sup> (*RRS*) regulates the functioning of population register. Population register includes data on marital status, on parent`s right of custody, on guardianship and information about the restriction on legal capacity (*RRS* § 21 (1) p-s 10–13).

- Data about matrimonial property regime that spouses have chosen is inserted into marital property register. The content and functioning of this register is regulated by the Marital Property Register Act<sup>33</sup> (*AVRS*).

Marital property register is a state register for the registration of proprietary rights provided for in the marital property contract and the proprietary rights in the cases provided by law (*AVRS* § 1 (1)).

Code of Civil Procedure<sup>34</sup> (*TsMS*) regulates the procedural aspects of family law proceedings in court. Family law proceedings can be either matters on action or matters on petition. Many family law matters are matters on petition (*TsMS* § 475). Law provides for an inexhaustive list of family matters on petition (*TsMS* § 550) followed by special regulation concerning of these types of family law matters on petition.

### 2.1.2. Provide a short description of the main historical developments in FL in your country.

Estonia restored its independence in 20.08.1991. The first Family Law Act<sup>35</sup> in reindepent Estonia was adopted 12.10.1994 and entered into force 01.01.1995. It was mainly based on the Marriage and Family Code of the Estonian SSR<sup>36</sup>. At that time Soviet Civil Code<sup>37</sup> was still in force, but during a civil

<sup>28</sup> Family Law Act – perekonnaseadus (*PKS*) – RT I 2009, 60, 395; RT I, 09.05.2017, 29; translation to English published 07.02.2018.

<sup>29</sup> Kooseluseadus (*KooS*) – RT I, 16.10.2014, 1; translation to English published 27.11.2014.

<sup>30</sup> Draft of law of implementation of registered partnership act – kooseluseaduse rakendamise seaduse eelnõu [114 SE](#).

<sup>31</sup> Vital Statistics Registration Act – perekonnaseisutoimingute seadus (*PKTS*) – RT I 2009, 30, 177; RT I, 30.12.2017, 7; translation to English published 25.06.2018

<sup>32</sup> Population Register Act – rahvastikuregistri seadus (*RRS*) – RT I 2000, 50, 317; RT I, 30.12.2017, 12; translation to English published 25.06.2018.

<sup>33</sup> Marital Property Register Act – abieluvararegistri seadus (*AVRS*) – RT I 1995, 87, 1540; RT I, 04.07.2017, 76; translation to English published 20.02.2018.

<sup>34</sup> Code of Civil Procedure – tsiviilkohtumenetluse seadustik (*TsMS*) – RT I 2005, 26, 197; RT I, 04.07.2017, 31; translation to English published 06.02.2018

<sup>35</sup> Family Law Act (1995) – perekonnaseadus (*PKS 1995*) – RT I 1994, 75, 1326; RT I 2009, 60, 395; see also draft of law and explanatory notes online [here](#).

<sup>36</sup> Marriage and Family Code of the Estonian SSR – Eesti NSV abielu- ja perekonnakoodeks (*APEK*), adopted 31.07.1969; online download version 01.01.1981 [here](#).

law reform step-by-step all the parts of pandectistic Civil Code were renewed and adopted starting with property law and ending with law of obligations<sup>38</sup>.

There was an initiative from the Ministry of Justice to modernise family law to make it compatible with renewed civil law, but also because Family Law Act (1995) was criticised for low regulatory degree with too many declarative norms that do not set out basis for civil claims<sup>39</sup>. A draft of Family Law Act<sup>40</sup> was submitted to the parliament in 2007, but it was never adopted. The reason for that was mainly lack of support in substituting legal matrimonial property regime of community of property with a regime of community of accrued gains<sup>41</sup> following the example of German *Zugewinnngemeinschaft*.

Shortly after parliament rejected the draft of 2007, a new draft of Family Law Act<sup>42</sup> was proposed that was based on the draft of 2007, but where community of property remained the legal matrimonial property regime and community of accrued gains was proposed as an optional regime. The draft that is basis for the Family Law Act in force was adopted 18.11.2009 and entered into force 01.07.2010.

The Family Law Act in force has mainly been changed two times. In 2014 main problems that the interest groups described during the first three years of application of the act were solved<sup>43</sup> and in 2016 the amendments related to the application of Rome-III regulation<sup>44</sup> were adopted<sup>45</sup>.

In 2014 Registered Partnership Act was adopted that came into force 01.01.2016, but as mentioned before the implementing acts have not been adopted by the parliament<sup>46</sup>. So couples can go to the notary and conclude registered partnership contracts, but there can be difficulties on realising the rights via third persons, also restrictions and benefits that apply to married couples, do not apply to persons in registered partnership. Registered partners are not intestate heirs, but there is a provision that permits adoption of a child of other partner (KooS § 15).

In the commentaries to the Constitution the lack of implementing acts is criticised and found that this is a breach of protection of family rights (PS § 27 (1))<sup>47</sup>. Supreme Court stated in a constitutional review case that registered partnership act is an act in force, so rights and obligations can arise from the act. At the same time, Supreme Court did not analyse the unconstitutionality of absence of implementing acts, because for unconstitutionality it is not sufficient to only state that there are no implementing acts, a breach of subjective rights should be brought out. Supreme Court found that appeal is not admissible because courts did not explain what kind of gap of legal regulation there is that cannot be overcome by interpretation, what kind of constitutional obligation is the lawmaker breaching when not adopting implementing acts and found that on those grounds it cannot analyse if the absence of implementing acts is relevant<sup>48</sup>.

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<sup>37</sup> Soviet Civil Code – Eesti NSV tsiviilkoodeks ([Tsk](#)) – RT 1964, 25, 115; RT I, 16.04.2014, 33.

<sup>38</sup> Kull, I., 2008, 122–129.

<sup>39</sup> Draft of Family Law Act 55 SE explanatory notes, p 1, online [here](#).

<sup>40</sup> Draft of Family Law Act 55 SE explanatory notes, online [here](#).

<sup>41</sup> See also Kullerkupp, K., 2001, 78–88.

<sup>42</sup> Draft of Family Law Act 543 SE [RT I 2009, 60, 395](#); see also [here](#). As it was based on the latest version of the draft of 2007, the explanatory notes of draft of 2007 are relevant, see online [here](#).

<sup>43</sup> Draft of changing the Family Law Act – Perekonaseaduse muutmise ja sellega seondvalt teiste seaduste muutmise seadus 546 SE; RT I, 29.06.2014, 3, entered into force 09.07.2014; see draft and explanatory notes [here](#).

<sup>44</sup> Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (*Rome-III*), see online [here](#).

<sup>45</sup> Draft of changing the Family Law Act – Perekonaseaduse muutmise ja sellega seondvalt teiste seaduste muutmise seadus 112 SE; RT I, 10.03.2016, 1, entered into force 01.07.2016; see draft and explanatory notes [here](#).

<sup>46</sup> Draft of law of implementation of registered partnership act – kooseluseaduse rakendamise seaduse eelnõu [114 SE](#).

<sup>47</sup> Commentaries to the Constitution of Republic of Estonia (2017) § 27, p 15 (*PS-comm*); see online [here](#).

<sup>48</sup> RKPSJVKm 10.04.2018 [5-17-42](#), p 40.

Therefore registered partnership contracts can be concluded by cohabitants irrelevant of their sex, the contract creates rights and obligations to the parties, but the applicability of those rights and duties against third parties can be hindered by the fact that there are no implementing acts.

### 2.1.3. What are the general principles of FL in your country?

Estonian Constitution grants a right to inviolability of private and family life (PS § 26) and rights related to family (PS § 27). Estonian Constitution stipulates that family, which is fundamental to the preservation and growth of the nation and which constitutes the foundation of society, enjoys the protection of the government (PS § 27 (1)). This gives a guarantee to the institution of family and gives person positive and negative fundamental rights<sup>49</sup>.

Positive rights of protection of family and family life oblige the state to set out legal framework to protect family life and design appropriate proceedings. Negative rights give subject a right to expect that state does not interfere in family life and obliges the state to refrain from interfering.<sup>50</sup>

The main family law principles in Estonia are:

- equality of spouses
- equality of parents
- equality of children
- supremacy of the best interests of the child

The constitution states that spouses have equal rights (PS § 27 (2)). As the equality of men and women is already covered by fundamental right to equality (PS § 12), then the provision can also be seen as legal guarantee of the institute of marriage<sup>51</sup>. The law does not distinguish between the sexes of the spouses, both have same marital rights and obligations and same possibilities to divorce. Family Law Act also stipulates that spouses have equal rights (PKS § 15 (1)).

Equality of the parents is connected to the principle of equality of the spouses and already guaranteed by protocol No 7 of European Convention of Human Rights<sup>52</sup>. Family Law Act states that parents have equal rights and obligations with respect to their children (PKS § 116 (1)). The rights and duties in parent child relationship depend on who has custody over the child, but principally parents have joint custody and must therefore make decisions and represent the child together (PKS § 118 (1); § 120 (1)).

Equality of children is grounded by the principle that the mutual rights and obligations of parents and children arise from the filiation of children which is ascertained pursuant to procedure provided by law (PKS § 82). The law does not distinguish the rights of child considering their age, sex or the fact if the child is biological or adopted. Adopted children have the same legal relationship with their adoptive parent as the biological children of the parent (PKS § 161).

The act of Protection of Children<sup>53</sup> (*LasteKS*) § 5 brings out the principles of child protection:

- every child has a birthright to survival and development;
- every child has a right to equal treatment without any discrimination;
- in every undertaking the interests of a child have supremacy;
- every child has a right to independently speak and defend his/her views in every question.

The principle of best interests of a child means that in the process of decision-making (planning or declining a decision or choosing between different options), the best interests of a child must be determined and they should be seen as a most important consideration (*LasteKS* § 21). Family Law

<sup>49</sup> PS-comm (2017) § 27, p 1; see online [here](#).

<sup>50</sup> PS-comm (2017) § 27, p 6; see online [here](#). It is also discussed that constitution may be interpreted in a way that negative rights are guaranteed by § 26 that sets out the principle of inviolability of private and family life (see § 27, p 5).

<sup>51</sup> PS-comm (2017) § 27, p-s 4, 24; see online [here](#).

<sup>52</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, online [here](#); protocol No. 7, online [here](#); see also PS-comm (2017) § 27, p-s 4, 24; see online [here](#).

<sup>53</sup> The Act of Protection of Children – *Lastekaitseadus (LasteKS)* RT I, 06.12.2014, 1; RT I, 12.12.2018, 49.

Act states that a court shall make a decision primarily in the interests of the child, taking into account all the circumstances and the legitimate interest of the relevant persons (PKS § 123 (1)). The subjects who have to follow the principle are not just courts, but the principle applies more broadly to every institution or employee that deals with children: state, local government, public and private institutions, specialists and family<sup>54</sup>.

When the well-being of child is endangered then everyone, who has knowledge about it, is obliged to inform local government or court about it. Institutions and courts have an active role in protecting the rights of children, the state can intervene in family life in case of endangering well-being of a child even by removing the child immediately from family home<sup>55</sup>. In case of endangering well-being of a child local governments are involved in the proceedings. Civil courts can start proceedings at their own motion and apply preliminary measures needed. Moreover, Supreme Court supported a possibility for a court to apply measures to avoid the endangering of a child at its own motion in the same proceedings where visitation rights are discussed without the need to start a separate proceeding<sup>56</sup>.

Best interest of the child is a complex concept that mainly comprises three areas: substantive law, interpretation of provisions and procedural rules. Substantive law must guarantee mechanism that would allow taking into account the best interests of the child. When interpreting a provision, an interpretation should be preferred that is more in accordance with the best interests of a child. In the proceedings the procedural guarantees of a child must be set out and it must be evident from the decision what are the best interests of a child, what arguments have been considered and reasoning why the solution is in the best interests of a child<sup>57</sup>. Procedural rights of a child comprise the right of a child to be heard. There is an obligation for the courts to hear personally children over the age of ten, but take can also hear out children under that age, provided the hearing would not be against the well-being of a child. In custodial proceedings, children over fourteen have a veto-right to object the transfer of the right of custody and they have individual right of appeal<sup>58</sup>.

**2.1.4. Define “family” and “family member” in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

There is no legal definition of family provided in Constitution or in any other legal act. The concept of family and family life is discussed in the commentaries to the Constitution related to the right to inviolability of private and family life (PS § 26) and rights related to family (PS § 27).

The constitutional definition of family life definitely includes relations between officially married men and women. In Supreme Court practice it has been said that the Estonian Constitution also protects an unregistered cohabitation between a man and a woman from unfounded intervention by the state as prescribed by law<sup>59</sup>. Constitution mentions that family, is fundamental to the preservation and growth of the nation (PS § 27 (1)). It must be brought out that this does not mean that families ought to be protected only as far as they are the basis for the growth of nation. In legal literature it has been said that overemphasising the function of reproduction in case of marriage would rule out unions of elderly or otherwise infertile people, which was presumably not the intention of

<sup>54</sup> See Aru, A., Paron, K., 2015, 381–386.

<sup>55</sup> Custodial rights of a parent can be restricted or taken away by court (PKS § 134–136). The Act of Protection of Children has a concept of a child who is in need and a child who is in danger (LasteKS § 26–34), competent authorities can act, e.g. offer social services org or make a petition to the court. It has been discussed in literature if immediately removing the child from family (PKS § 135 (4)) is proportional measure, see Ahas, E., 2015, 397–404.

<sup>56</sup> See PKS § 134–136; TsMS §-s 551, 552; RKTkm 11.01.2017 [3-2-1-138-16](#), p 20.

<sup>57</sup> See Aru, A., Paron, K. 2015, 380.

<sup>58</sup> Individual right of hearing of the child TsMS § 552<sup>1</sup>; individual veto right and right of appeal to children that are fourteen or over PKS § 137 (2) p 1; TsMS § 553, see also LasteKS § 21 (2).

<sup>59</sup> See Uusen-Nacke, T., Vahaste-Pruul, S., 2014, 15–16; see note RHKKo 19.06.2000 [3-3-1-16-00](#), p 1.

lawmaker<sup>60</sup>. Fundamental rights related to family are not only collective values to preserve the nation, but the principle grants subjective rights that are protected by the state to every natural person (citizen of Estonia or foreign country, persons with unknown citizenship)<sup>61</sup>.

In court practice a question of defining a family arose in a constitutional review case concerning maintenance obligation of the family (PS § 27 lg 5) in contrast with the obligation of the state to guarantee social welfare system that provides measures and financial state aid to the people in need (PS § 28 (2)). As a prerequisite to be qualified for subsistence benefit is that a person himself (*self maintenance principle*) or his family (*solidarity principle*) cannot provide financial support to the person in need (*subsidiarity of state aid*), the notion of family had to be analysed.

Supreme Court brought out that in the context of subsistence benefits, family members of a person are people living in the same room either on marital or non-marital relationship and their children in need, parents or persons who use one or more sources of income jointly<sup>62</sup>. The law has changed since, but the definition of family remains similar, including people living in the same room with joint household either in marital or non-marital relationships, first degree descendants and ascendants and other persons who are part of joint household<sup>63</sup>.

In the commentaries to the Constitution it has been stated that considering the versatility in family relations nowadays, the constitutional protection of family life cannot be restricted only to persons in legal marriage<sup>64</sup>. Supreme Court has stated that a person has a right to preserve family relations in broad sense<sup>65</sup>.

Supreme Court found that a restriction that a person held in custody cannot have long-term visits from *de facto* spouse is constitutional. Supreme Court found that the restriction has legitimate purpose that includes avoiding ruining evidence or influence witnesses<sup>66</sup>. It can be brought out that a person in custody cannot also have long-term visits from a spouse. Prisoners, at the same time, can have long-term visits from spouse and legal and social ascendants, descendants, brothers and sisters. He can also have long-term visits from a non-marital partner, but on the condition that they have common children or at least two years of cohabitation prior to commencement of serving the sentence<sup>67</sup>. So non-marital relationships are included, but there can be additional conditions that apply.

Supreme Court brought out that according to the case-law of European Court of Human Rights the factual cohabitation of same-sex couples is protected by the right of family life, if the cohabitation is permanent<sup>68</sup>. Supreme Court analysed whether a residence permit to live with a spouse can be denied to one of the spouses in same-sex marriage that was concluded abroad outside EU on the grounds that in Estonia same-sex marriages are not allowed. Supreme Court had to decide whether giving a residence permit as a preliminary measure during court proceedings is allowed. Supreme Court found it admissible, agreeing with the reasoning brought out by district court<sup>69</sup>.

<sup>60</sup> Olm, A., 2013, 108.

<sup>61</sup> PS § 27 (1), § 9; PS-comm (2017) § 27, p 7; see online [here](#).

<sup>62</sup> RKPSJKo 05.05.2014 [3-4-1-67-13](#), p-s 40–41.

<sup>63</sup> Social Welfare Act – sotsiaalhoolekande seadus ([SHS](#)) – RT I, 30.12.2015, 5; RT I, 21.12.2018, 19 § 131 (7).

<sup>64</sup> PS-comm (2017) § 27, p-s 4, 24; see online [here](#).

<sup>65</sup> RKPSJVKo 04.04.2011, [3-4-1-9-10](#), p 43.

<sup>66</sup> RKPSJVKo 16.11.2016 [3-4-1-2-16](#), p 98–136; see Imprisonment Act § 94 (5) and § 25, online in English [here](#); see also RKPSJVKo 04.04.2011, [3-4-1-9-10](#), p 60–61.

<sup>67</sup> See Imprisonment Act § 25, online in English [here](#)

<sup>68</sup> RKHKm 27.06.2017, [3-3-1-19-17](#), p 17.

<sup>69</sup> RKHKm 27.06.2017, [3-3-1-19-17](#), p 19–33.



### 2.1.5. Family formations.

#### 2.1.5.1. Define the “spouse” in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?

Family Law Act stipulates that marriage is contracted between a man and a woman (PKS § 1 (1)), hence, same-sex marriages are not allowed in Estonia. Spouse means a person who is legally married, e.g. has contracted a valid marriage in accordance with Estonian Family Law Act or married abroad so that the marriage is deemed valid in Estonia. Therefore it can be said that throughout the entire legal system the term spouse has the same meaning.

However, when spouses have divorced, it can affect how the will of the testator is interpreted and the validity of the dispositions made in favour of ex-spouse in a will or succession contract. Divorced spouse is also not an intestate heir<sup>70</sup>. Spouse that has outlived the other spouse is called surviving spouse.

Prerequisites to conclude a marriage, competent institutions and the grounds for nullity and possibility to annul marriage are set out at the beginning of Family Law Act (PKS § 1–14), administrative procedure is regulated separately (PKTS).

Prohibitions to marry:

- marriage is contracted between a man and a woman (PKS § 1 (1));
- only adults that have full active legal capacity can get married (PKS § 1 (2)), exceptions are:
  - adults with restricted legal capacity can marry, when court has stated in court decision about guardianship that the person can understand the legal meaning of marriage (PKS § 1 (4), § 203 (2); TsMS § 526, 531);
  - minors that are at least 15 years old, whose active legal capacity has been broadened (emancipation) by a court decision (PKS § 1 (3); TsMS § 570–578)<sup>71</sup>.
- consanguineous marriage is prohibited between ascending and descending relatives, brothers, sisters and half-brothers, half-sisters, also in case of adoption (PKS § 2, 3);
- several simultaneous marriages are prohibited, also valid registered partnership contract is a hindrance (PKS § 4, KooS § 8 (1));
- minister of religion has a specific right to refuse contraction of marriage (PKS § 6).

Marriage can be concluded by notaries and vital statistics officials, including ministers of religion who have acquired the competence. Marriage must be concluded following a procedure that presumes filling a form, expressing will personally not using a representative, also an entry to the population registry is made about marital status and entry to marital property registry about chosen property regime and about marital contract if it was concluded. Marriage can be divorced by vital statistics official, notary or court, dependant on the residence of spouses and if they agree about divorce (PKS § 64–65).

Marriage is automatically void when the marriage has been contracted between persons of the same sex, by a person who did not have competence or when one of the spouses did not express will to marry (PKS § 10). In other cases, the marriage is not automatically void, but is voidable by court, e.g. in case of ostensible marriage. Court annuls the marriage if a person who has right to file an action to the court, does it and the prerequisites to annul marriage are fulfilled and there are no grounds for refusal of annulment (PKS § 11–14).

In 2014 a specification was added that when marriage is annulled due to the reason that persons of the same sex are married (e.g. sex change during marriage), then the marriage is not void *ex tunc*, but

<sup>70</sup> Law of Succession Act – pärimisseadus (*PärS*) RT I 2008, 7, 52; RT I, 10.03.2016, 16, § 16 (4), § 32, § 94, § 97 (2), online in English [here](#).

<sup>71</sup> Emancipation is not really relevant in practice, there are up to 5 cases overall per year. Usually courts grant permission to marry in case of pregnancy.

is considered to have been ended from entry into force of court judgement that annulled the marriage (see PKS § 14 (4)).

**2.1.5.2. What types of relationships/unions between persons are recognised in FL of your country? In particular, formal (registered) and informal (*de facto*) unions, heterosexual and same-sex unions, unions with and without *affectio maritalis*. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

Three types of relationships can be distinguished:

- legal marriage between a man and a woman specified in the last question,
- registered partnership contract between heterosexual or same-sex couple,
- *de facto* partnership that is not legally regulated.

Marriage is valid when it is contracted in accordance with Estonian Family Law Act following administrative procedure by competent authority. Marriage concluded abroad is deemed to be valid in Estonia if it is contracted pursuant to the procedure for contraction of marriage provided by the law of the state where the marriage is contracted and the material prerequisites of the marriage are in compliance with the laws of the states of residence of both spouses<sup>72</sup>. So when evaluating the validity of marriage concluded abroad the law of the state where is the residence of both spouses have to be cumulatively taken into account.

In Supreme Court case about residence permits Supreme Court explained that when marriage is concluded abroad then case cannot be solved by just looking up if Estonia allows same-sex marriages. Rather a private international law question arises about applicable law and the validity of same-sex marriage concluded abroad. Supreme Court emphasised that Estonian law cannot dictate the prerequisites for conclusion of marriages all over the world. Estonian law is not applicable when marriage is concluded abroad and neither of the spouses lives in Estonia<sup>73</sup>.

Registered Partnership contracts are valid when the prerequisites to enter into contract are fulfilled, appropriate procedure is followed and there are no hindrances to conclude a contract. Registered partnership contract has to be concluded in notarially authenticated form, both persons have to be present in person at the same time and make an unconditional declaration of intent (KooS § 3). Prohibitions are similar to marriage, but added to that it is required that one person concluding the contract has residence in Estonia. The regulation is gender neutral that means that couples can conclude it irrelevant if they are of the same or different sex.

Material prerequisites for entry into registered partnership contract:

- registered partnership contract may be entered into between two natural persons of whom at least one has residence in Estonia (KooS § 1(1));
- only adults of active legal capacity may enter into a registered partnership contract (KooS § 1 (2)). Exception is adults with restricted legal capacity, when court has stated in court decision about guardianship that the person can understand the legal meaning of registered partnership contract (KooS § 1 (3); TsMS § 526, 531);
- consanguineous registered partnership is prohibited between ascending and descending relatives, brothers, sisters and half-brothers, half-sisters, also in case of adoption (KooS § 2);
- several simultaneous registered partnerships or registered partnership and marriage are prohibited (KooS § 2 (1), KooS § 8 (1));

Parties to the registered partnership contract are called registered partners (KooS § 7 (1) *registreeritud elukaaslased*) and the term has the same meaning throughout the entire legal system.

<sup>72</sup> Private International Law Act – rahvusvahelise eraõiguse seadus ([REÕS](#)) RT I 2002, 35, 217; RT I, 26.06.2017, 3 § 55 (2), online in English [here](#).

<sup>73</sup> RKKM 27.06.2017, [3-3-1-19-17](#), p 28.

As the implementing acts have not been adopted, it is unclear which provisions in the legal order about spouses or *de facto* partners are applicable to registered partners.

Besides marriage and registered partnership there are no other non-marital relationships that are legally regulated. When couple is in a non-marital *de facto* partnership or lives together for a certain period of time, there are no legal consequences that would apply automatically due to the fact of cohabitation (e.g. as could be in Sweden). Legal consequences apply when partners have e.g. concluded a contract and agreed on the consequences (*contractual model*).

In case-law it has been approved that in some cases the regulation of partnership contract (*seltsinguleping*)<sup>74</sup> can be applied via analogy to non-marital cohabitation, still the mere fact of cohabiting should not bring about the application of partnership contract regulation. Partnership contract regulation could be applied, when partners have acted to achieve mutual purpose and they both made financial contributions that can be identified.

Supreme Court has emphasised that extramarital relationships do not entail similar obligations as those resulting from a marriage, including the fact that the parties are not subject to mutual support and arrangements concerning the common household, in contrast to the situation of spouses<sup>75</sup>. In that decision Supreme Court seemed to be in favour of limiting the application of partnership contract regulation and ensuring that cohabitation would not bring about legal financial consequences when partners have not agreed on it.

Supreme Court stated that non-marital cohabitation should not bring about the liquidation procedure of all the assets acquired during cohabitation, because that could lead to even more extensive consequences than in case of divorce of marriage. It cannot be assumed that the parties will extend to the point that their proprietary and financial relations would be tighter than in case of marriage with community of property regime (joint ownership)<sup>76</sup>.

#### 2.1.6. What legal effects are attached to different family formations referred to in q 2.5.?

Many of the legal consequences of marriage depend on which matrimonial property regime the spouses have chosen (community of property, community of accrued gains, separate property). General legal consequences of marriage apply irrespective of the matrimonial property regime the spouses chose (PKS § 15–21).

General principle is that by marrying a man and a woman commence marital cohabitation which obligates them to respect and support each other (PKS § 15 (1)). Spouses organise their marital cohabitation and satisfaction of the needs of their family together considering the well-being of each other and their children. Both spouses must participate in the organisation of shared household and earning of income to the best of their ability (PKS § 15 (2)). In those provisions the lawmaker has set out a role, what the essence and values of a marriage should be, but it does not give a ground to bring a claim against the other spouse.

Marriage brings with maintenance obligations. Spouses have reciprocal obligations to maintain their family by their work and assets (PKS § 16 (1)). If the spouses do not live together, but are married, then they have to fulfil maintenance obligation by making regular monetary contributions (PKS § 16 (3)). If spouses have divorced one may have maintenance obligation toward the other, when the other spouse is in need on the grounds listed (PKS § 72–79). Satisfying a maintenance claim always presumes that claimant proves that he is in need and cannot maintain himself with his money or assets. By minors the neediness is presumed.

Otherwise, if the spouses live together while married, their contributions can be monetary, but they can also contribute by giving something that belongs to them in family use or fulfil the need of the

<sup>74</sup> See Law of Obligations Act – *võlaõigusseadus* (VÕS) RT I 2001, 81, 487; RT I, 22.03.2018, 4 § 580–609, see online in English [here](#).

<sup>75</sup> See Uusen-Nacke, T., Vahaste-Pruul, S., 2014, 3; see note nr 11 RKTko 03.12.2014, [3-2-1-109-14](#), p 14.

<sup>76</sup> RKTko 03.12.2014, [3-2-1-109-14](#), p 18.

other spouse or family by immediate action needed to cover the common and special needs of the family.

Both spouses are jointly and severally liable for obligations taken to fulfil the needs of the family, even when the contract was concluded only by one of the spouses. The liability of the spouses does not depend on the matrimonial property regime the spouses have chosen (PKS § 18). The liability of both spouses presumes that the obligation was taken for the organisation of shared household, in the interests of children or to satisfy common or special needs of the family and it does not exceed the reasonable rate according to the living conditions of the spouses (PKS § 18 (1)). In Supreme Court practice following obligations have been included: obligations arising from a lease agreement of a car used in the interests of the family, maintenance of the car, communal expenses, loan agreement to buy furniture and house appliances<sup>77</sup>. Usually the liability of the spouses is interpreted quite widely. For example in court practice home loan payments are usually seen as mutual obligations of the spouses. In the explanatory notes of the Family Law Act, the lawmakers will was to exclude bigger financial obligations that have to be paid in lump sum<sup>78</sup>.

Solidarity between the spouses is presumed when managing the everyday life while living together. If one of the spouses makes bigger monetary expenses on the family, it is presumed that he or she does not have the right to require compensation (PKS § 17). At the same time, the level of duty of care expected is lower than by usual contracts. Spouses must exercise such care with respect to each other as they would usually exercise in their own affairs (PKS § 20).

In case of registered partnership, the obligations of the registered partners are similar to the ones that spouses have. Registered partners can choose a matrimonial property regime listed in the Family Law Act and add special provisions if they want (KooS § 16). The general legal consequences of concluding a registered partnership contract are the same in the same wording. Therefore, registered partners have also maintenance obligations toward each other and family, which they can fulfil with money, assets or actions, they are jointly and severally liable for obligations taken to fulfil the needs of the family and the standard of duty of care is also the same (KooS § 7–15). As there are no implementing acts and the law is quite new, there is no case-law about the registered partnership.

As mentioned before, then *de facto* cohabitation does not automatically entail legal consequences and is not regulated in Estonian law. When the prerequisites to apply the regulation of partnership contract are fulfilled, then the liquidation provisions can apply. Supreme Court found that it is appropriate to apply liquidation procedure foreseen to partnership contract in case on non-marital cohabitation when:

- partners have acquired something during the cohabitation that has a bigger value (e.g immovable),
- both parties made important and comparable (financially identifiable) contributions to acquire it or to ameliorate it,
- both parties had an intent when acquiring or ameliorating the item to create lasting joint value, at least economically<sup>79</sup>.

**2.1.7. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/*de facto* family formations? Explain briefly.**

When Registered Partnership Act was discussed in 2014, then there was initiative also to regulate *de facto* cohabitation so it would entail legal consequences automatically. This kind of *opt out* model

<sup>77</sup> See for example RKTko 13.12.2017, [2-15-15138](#), p-d 18.2, 19, 20, 26; RKTko 15.12.2010, [3-2-1-124-10](#), p 19; see also about former Family Law Act [3-2-1-38-14](#), p 13; [3-2-1-42-13](#), p 11; [3-2-1-113-07](#), p 11; [3-2-1-82-05](#), p 15.

<sup>78</sup> Draft of Family Law Act 55 SE explanatory notes, online [here](#).

<sup>79</sup> RKTko 03.12.2014, [3-2-1-109-14](#), p 19.

was also presented as one of the options in a concept of draft of law about non-marital cohabitation<sup>80</sup>. In last years the initiative has not moved forward, though it has been brought out that as there are over 170 000 persons living in *de facto* cohabitation and partnership contract rules are inconvenient and not meant to be applied in case of non-marital cohabitation.

As the draft of implementing acts of Registered Partnership Act will most probably be not adopted in the nearest future, the full applicability of Registered partnership Act remains unclear.

## 2.2. Property relations.

### 2.2.1. List different family property regimes in your country.

Family Law Act comprises regulation about three matrimonial property regimes:

- community of property (jointness of property) (PKS § 25–39),
- community of accrued gains (set-off of assets increment) (PKS § 40–56),
- separate property (PKS § 57–58).

Prospective spouses can choose by an application for marriage from those three applicable matrimonial property regime (PKS § 24 (1)). If the spouses do not make a choice, then community of property as legal matrimonial property regime applies (PKS § 24 (2)).

### 2.2.2. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?

Legal matrimonial property regime is community of property. Three types of assets can be distinguished:

- joint property of the spouses
- separate property of wife
- separate property of husband

Ground rule is that the objects and other proprietary rights of the spouses acquired during the jointness of property shall transfer into the joint ownership of the spouses (joint property) (PKS § 25). Added to that, some claims for compensation related to community of property regime also belong to joint property to balance possible unequal contributions of the spouses at the partition of the joint property. Value of the expenses incurred by both spouses in the form of work and proprietary performance during jointness of property in order to receive benefit from the property (necessary and useful expenses) belong to the joint property (PKS § 27 (3)). Also claims for compensation belong to joint property, if one of the spouses separate property was enriched on the account of joint property (PKS § 34 (1, 3)).

Assets acquired during community of property belong to the joint property of spouses by law, even when only one of the spouses was part of contract that was basis for acquiring the object or when only one of the spouses made monetary contributions to acquire the object<sup>81</sup>.

According to Supreme Court practice, a wide range of assets and proprietary rights can belong to joint property:

- revenue or pension of one of the spouses,
- assets on a bank account of one of the spouses,
- profit of one of the spouses earned as a self-employed entrepreneur,
- right of claim against contract party of one of the spouses,
- contractual rights, e.g. buyout right at the end of lease agreement.<sup>82</sup>

<sup>80</sup> Olm, A., 2009.

<sup>81</sup> See for example RKTko 20.11.2008 [3-2-1-101-08](#), p 14; RKTko 09.12.2009 [3-2-1-117-09](#), p 16.

If there is doubt if the asset belong to joint or separate property, the law sets out a presumption of joint property. An object of property shall be deemed to be included in the joint property of the spouses until the inclusion thereof in the separate property of a spouse is proved (PKS § 27 (6)).

Separate property of one of the spouse includes (PKS § 27 (2)):

- personal belongings of the spouse
- objects which were in the ownership of the spouse before the marriage or objects acquired by the spouse during the marriage by disposal without charge, including as a gift or by succession;
- objects which the spouse acquires on the basis of a right belonging to his or her separate property or as compensation for the destruction of, damage to or seizure of objects included in his or her separate property or on the basis of a transaction entered into with regard to his or her separate property.

According to Supreme Court practice separate property of one of the spouses is:

- contractual rights arising from a mandatory funded pension contract,
- compensation for non-pecuniary (moral) damage,
- assigned support, e.g. disability allowance.<sup>83</sup>

Added to that, claim of compensation when one of the spouses used separate property for the benefit of joint property, also belongs to the separate property of one of the spouses (PKS § 34 (2)).

As only objects acquired during community of property belong to the joint property of the spouses, the objects acquired after the matrimonial property regime has ended, are also separate property.

Assets that are part of joint property, remain joint property when matrimonial property regime ends (PKS § 35) and they have to be managed jointly until they are divided<sup>84</sup> (PKS § 37 (2)).

**2.2.3. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a “new regime just for them”?**

The Family Law Act permits spouses to conclude marital property contract in notarially authenticated form (PKS § 59–60). A marital property contract may be entered into before or during a marriage. A marital property contract entered into before marriage enters into force on the date of contraction of marriage (PKS § 59 (2)). Spouses can also conclude marital property contracts during marriage, but the contract does not have legal consequences *ex tunc*. So the spouses can e.g. alter the matrimonial property regime, but they cannot make the former choices void, the agreement takes affect *ex nunc* that means from the point of contraction of the contract. This view has been approved also in the Supreme Court practice<sup>85</sup>.

In Family Law Act there is a list about the types of agreements spouses can have. Spouses may:

- terminate a selection made upon marriage or a proprietar relationship valid on the basis of a marital property contract;
- establish another proprietary relationship prescribed by law; or
- make alterations in the selected proprietary relationship in the cases prescribed by law (PKS § 59 (1)).

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<sup>82</sup> RKTko 12.10.2016 [3-2-1-92-16](#), p 16; RKTko 07.06.2006 [3-2-1-46-06](#), p 11; RKTko 26.04.2017 [3-2-1-111-16](#), p 38; RKTko 27.03.2017 [3-2-1-108-16](#), p 20; RKTko 01.11.2006 [3-2-1-98-06](#), p 12; RKTko 21.03.2007 [3-2-1-13-07](#), p 16–18, 29; RKTko 13.11.2013 [3-2-1-127-13](#), p 19; RKTko 10.11.2008 [3-2-2-2-08](#), p 11; RKTko 26.04.2017 [3-2-1-14-17](#), p 42.3, RKTko13.12.2017 [2-15-15138/56](#), p 43.1; RKTko 25.10.2017 [2-14-18828/113](#), p 25.

<sup>83</sup> RKTko 27.03.2017 [3-2-1-108-16](#), p 19–20.

<sup>84</sup> See also RKTk 25.02.2015, [3-2-1-164-14](#), p 12.

<sup>85</sup> RKTko 11.04.2013, [3-2-1-36-13](#), p 12.

So the spouses can have unique terms in marital property contract not only choose between the matrimonial property regimes, but they can only make alterations that are permitted by law. Spouses cannot, for example divide joint property during marriage without ending or altering matrimonial property regime. Law enables spouses to agree that:

- one of the spouses can manage joint property alone as an exception from the principle of joint management in case of community of property regime,
- in community of property regime the consent of a spouse is not required in the case of transactions entered into in independent economic activities of the other spouse,
- single objects or certain type of objects are declared to be joint or separate property,
- rule out a requirement that the agreement of both of the spouses is necessary to dispose of shared housing of family or to grant the use of it to third party.<sup>86</sup>

Added to that, spouses can choose applicable law to their proprietary rights in notarially authenticated form. Spouses can choose the law of the state of residence or citizenship of one of the spouses as the law governing their proprietary rights<sup>87</sup>.

**2.2.4. Explain briefly the rules on the administration of family property and compare if there are differences for different property regimes.**

Community of property

In case of community of property ground rule is that spouses exercise the rights and perform the obligations relating to joint property jointly, if they have not agreed that only one of the spouses manages joint property (PKS § 28 (1, 2)). On the other hand spouses administer their separate property independently and at their own expense (PKS § 27<sup>1</sup> (1)).

Spouses may enter into transactions and conduct legal disputes related to joint property only jointly or with the consent of the other spouse PKS § 29 (1). There are some specifications. Consent of the other spouse is not needed for transactions with respect to joint property for the satisfaction of everyday needs of himself and herself and the family. Consent of the other spouse is presumed, when one spouse disposes of a movable or a right (PKS § 29 (1)). Consent of the other spouse is also not needed in case of emergency right of management or when the approval of the other spouse is substituted in court in case of refusal without adequate cause (PKS § 29 (3)). Special rule concerns family housing. Consent of both of the spouses is needed to dispose of shared housing of family or to grant the use of it to third party (PKS § 27<sup>1</sup> (2)).

When one of the spouses made a transaction without having needed consent from the other spouse, the transaction is void unless the spouse without whose consent or participation the transaction was entered into ratifies it later (PKS § 31 (1)). In Supreme Court practice it has been discussed whether in case of joint management of property the spouses must always act and bring an action to the court together. Supreme Court found that one of the spouses can individually bring an action against third party to claim back a thing from illegal possession, if he or she claims it back to the common possession of the spouses<sup>88</sup>. Supreme Court also explained that each of the spouses can conclude obligatory contracts individually, but the fulfilment on the account of joint property can be demanded only if the spouse had the right to oblige the other spouse<sup>89</sup>.

Creditor can demand fulfilment of a contract on the account of joint property of the spouses usually when the obligation was related to the fulfilment of family needs or when it was related to the management of joint property. Spouses are then both liable jointly and severally (PKS § 33 (1)). When one of the spouses took an obligation separately, then the creditor can demand fulfilment of the obligation from the separate property of the spouse and after demanding the division of joint property from half of the value of joint property that would belong to the spouse (PKS § 33 (3)).

<sup>86</sup> See PKS § 27 lg 4, § 27<sup>1</sup> lg 4, § 28 lg 2, § 29 lg 2, § 30 lg 1, § 41 lg 5, § 49 lg 4.

<sup>87</sup> See Private International Law Act § 58, online in English [here](#).

<sup>88</sup> See RKTko 31.10.2018 [2-16-9519/78](#), p 25.

<sup>89</sup> See RKTko 31.10.2018 [2-16-9519/78](#), p 29.

Community of accrued gains and separate property

When spouses chose the community of accrued gains or separate property, then the property acquired before or during marriage remains the property of the spouse that acquired it (PKS § 40, 58). So marriage does not affect the ownership of the spouses.

In case of community of accrued gains, spouses should administer the property belonging to them jointly in accordance with the interests and needs of the family. At the same time, the right to possess, use and dispose of objects belongs to the spouse, who is the owner of the thing (PKS § 41(1)). There is one special requirement, similar to the one in case of community of property. Consent of both of the spouses is needed to dispose of shared housing of family or to grant the use of it to third party (PKS § 27<sup>1</sup> (2)), even when the family housing belongs to one of the spouses.

General consequences of marriage (PKS § 15–23) apply in case of every matrimonial property regime, that means also in the case of community of accrued gains and separate property. The main consequence arising from those provisions is that though the ownership of the assets is not affected, the spouses are jointly and severally liable for obligations arising from a transaction made by one spouse for the organisation of shared household or in the interests of children or in order to satisfy other common needs of the family. Both spouses are liable if the amount of the transaction does not exceed the reasonable rate according to the living conditions of the spouses (PKS § 18 (1)). For those transactions, spouses are solidary obligees with respect to the obligated party of the transaction (PKS § 18 (2)).

**2.2.5. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

In marital property contracts besides choosing matrimonial property regime special agreements can be made that are allowed by law. The purpose of the marital property register is to enable third parties to obtain information about the property relationship between spouses and the rights and obligations arising therefrom. There is a principle of *numerus clausus* about the content of the register, so only data about chosen matrimonial property regime or special agreements allowed by law can be entered into the register.

The register includes data about the type of matrimonial property regime, alteration or termination of it, as well as information about objects or certain types of objects, which are declared to be joint or separate property. Agreements about applicable law are also included application of foreign or Estonian law to the proprietary rights of spouses (AVRS § 17 (2), p 5). If the marital property register contains no data about spouses, it is presumed that community of property regime applies (AVRS § 1 (1)) as it is the legal matrimonial property regime<sup>90</sup>. That also applies when spouses have chosen Estonian law as law applicable to their proprietary rights, but did not specify what matrimonial property regime they would use. If they did not choose any regime, provisions of community of property will apply<sup>91</sup>.

Starting from 01.03.2018 entries into marital property register are done by the vital statistics officials or by the notaries. If the marriage is concluded by vital statistics official, then he makes the entry. If a notary has concluded a marriage or when marital property contract was concluded an notary will

<sup>90</sup> Previous Family Law Act (in force until 30.06.2010) did not have three types of matrimonial property regime, so community of property regime was applied to spouses, who did not have a marital property contract that was rarely concluded. As numerous couples had community of property regime, it was decided that there will not be entries about couples that have chosen community of property regime. Currently, couples who have community of property regime form about 77% of all the married couples. See draft of law [258 SE](#) and explanatory notes. So there is a note about chosen matrimonial property regime only if it is community of accrued gains or separate property.

<sup>91</sup> See draft of law [384 SE](#) and explanatory notes of the second reading (ME II), entry into force 01.07.2017.



make an entry. Vital statistics officials make entries using IT-solutions of population register and notaries use IT-solutions of their own system e-notary<sup>92</sup>.

**2.2.6. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

Marital property register is kept electronically by the Chamber of Notaries. The content of the register is opened to everyone free of charge, if they log in the register with their id-card and enter the name or identification number of the person about who they want to know the data<sup>93</sup>.

Entries are not related to the creation, changing and extinction of the proprietary rights provided by law in the relations between the spouses (AVRS § 7 (4)). At the same time, the purpose of marital property register is third party protection and legal certainty. If spouses change or terminate matrimonial property regime or alter the content, the changes shall have legal effect with regard to a third person only if the changes have been entered in the marital property register as a marital property contract or the third person was aware of the existence of the marital property contract<sup>94</sup>. Though it can be brought out that as an entry is always made when spouses conclude a marital property contract, there really are not many cases when there would be a question about third party rights when there is no entry into marital property register.

The situation can arise though in case of marital property contracts concluded abroad. The law states that if the residence of at least one of the spouses is in Estonia or at least one of the spouses engages in economic or professional activity in Estonia, the spouses can rely on proprietary rights other than those prescribed by Estonian law with regard to third parties only if the third party concerned was or should have been aware of such rights at the time of creation of the legal relationship (REÕS § 59).

Not dependant on the matrimonial property regime, the spouses are both liable for transactions that are concluded in the interests of the family that do not exceed the reasonable living standards of the family (PKS § 18). In case of community of property regime both spouses are also liable for transactions related to the management of joint property (PKS § 33) (see question 2.2.4).

**2.2.7. Describe allocation and division of property in case of divorce, separation or dissolution of the union.**

The general legal consequences of marriage (PKS § 15–23) apply irrelevant of the matrimonial property regime the spouses chose. Added to that general consequences of the ending of marriage apply in all of the cases (PKS § 63–79).

Separation of spouses

In Estonian law there is no concept of legal separation that would have legal effects by court decision. Marriage can be divorced without the need of having a previous court decision where legal separation is established. However, there are two provision that are applicable irrelevant of matrimonial property regime that give spouses an opportunity to regulate the usage rights of family home or household objects (PKS § 22, 23) for the period when they are legally married but factually separated. To date there is no Supreme Court practice about the applications of the provisions.

In case of separation, spouses divide household objects on the basis of the principle of equity, but if they cannot reach an agreement, they can file a petition to the court. The division of usage rights does not affect the right of ownership of the objects, unless otherwise agreed. Court shall decide the matter in proceedings on petition having wider possibilities that in case of proceedings on action. If

<sup>92</sup> See draft of law [258 SE](#) and explanatory notes, p 1. Before 01.03.2018 the entries were done separately by assistant judges when they received a note from a vital statistics official or notary and the register was kept by the court connected to land registry department.

<sup>93</sup> See <https://abieluvararegister.rik.ee/>; before the changes in 01.03.2018 log in with id-card was not needed.

<sup>94</sup> Marital Property Register Act (AVRS) in English [here](#), see § 1 (1), PKS § 61 (2).

necessary, court can determine reasonable charge payable for the use of the objects (PKS § 22 (2, 3)).

If one of the spouses wants to live separately, he or she may request to have family housing or a part of it to his or her sole use, if this is necessary in order to avoid major personal conflicts. Family housing is defined by law as a dwelling where members of a family reside regularly (PKS § 21). When deciding, court takes into account ownership relations and restricted real rights in the immovable where the housing of the family is located. Court may limit the usage rights with a certain period of time, but not for longer than until the termination of marriage. Other spouse can demand equitable user fee (PKS § 23).

#### Termination of marriage

Marriage terminates if one of the spouses dies or the marriage is divorced (PKS § 63). Mainly there can be three categories of claims:

- issues regarding household objects and family housing can be regulated (PKS § 68, 69);
- provision of maintenance can be claimed, when spouse is in need (PKS § 72–79);
- spouses remain jointly and severally liable for transactions made at the interest of the family to cover family needs (PKS § 18);
- dependant on the matrimonial property regime that the spouses had, proprietary claims can arise – division of joint property, monetary claim to set off the value of the assets acquired.

Spouses can have claims related to household objects, family housing or maintenance, irrelevant of the matrimonial property regime they chose.

Analogously to the provisions about separation of the spouses, issues related to household objects and family housing can be decided by the court, if spouses do not reach an agreement. Court can regulate in proceedings on petition the rights and conditions of each spouse to use family housing or common household objects, taking into account the well-being of children and other important circumstances. Obligated spouse can have a claim of compensation. If later the circumstances change in great amount, then court can change the decision<sup>95</sup>.

Claim for provision of maintenance can arise when a spouse is in need after the termination of marriage due to his or her age or state of health or because caring of a child (PKS § 72–79). Main criterion is the extent of the needs of a spouse. The maintenance obligation of divorced spouse or the extent of it, is separate from the proprietary claims arising from property regime. The extent of maintenance does not generally also depend on the grounds for divorce. If both spouses agreed with divorce or had disagreement that had to be settled in court, is irrelevant<sup>96</sup>.

Spouses remain liable for the transactions that they are both liable. Spouses are also both jointly and severally liable for obligations arising from a transaction made by one spouse related to the organisation of shared household, common needs of the family of needed in the interest of the children (PKS § 18). When one of the spouses fulfils the obligation to creditor, he or she has right of recourse against the other spouse except to the extent of his or her own share of the obligation (VÖS § 69 (2)).

#### Community of property

In case of community of property regime, spouses can claim the division of joint property after the termination of marriage. Division of joint property is not a prerequisite to divorce, on the contrary, joint property cannot be divided before the marriage and therefore also the community of property has ended (PKS § 35).

After termination of community of property regime, the spouses can divide joint property between themselves into equal parts pursuant to the provisions concerning the termination of common ownership unless otherwise agreed (PKS § 37 (1, 3)). The assets belonging to the joint property of

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<sup>95</sup> PKS § 68; see also TsMS § 480 online in English [here](#).

<sup>96</sup> See Hallik, L., 2006, 333.

the spouses are determined as of the moment when the proprietary relationship ended, but the value of the assets is determined as of the time of the division of joint property<sup>97</sup>.

Spouses in community of property regime are joint owners of joint property. Joint ownership differs from common ownership. Common owners have legal shares of an ownership to an individual thing that is expressed as a fraction of the thing, e.g.  $\frac{1}{2}$ ,  $\frac{1}{3}$  (AÖS § 70 (3); TsÜS § 56). Joint owners own everything jointly, so extent of their ownership rights to an individual thing cannot be differentiated (AÖS § 70 (4)).

Spouses, as joint owners, are entitled to receive half of the value of the property in case of division. The inequalities arising from different financial contributions of the spouses can be rectified with compensatory monetary claims. The obligations encumbering joint property shall be performed in the course of the division of property or shall be divided between the spouses similarly to other property<sup>98</sup>.

Joint property is divided according to the mutual agreement of the spouses, when they do not reach an agreement, it can be divided in court in proceedings on action choosing between the methods provided for the termination of common ownership (AÖS § 77):

- division in physical shares;
- give asset to one of the spouses and impose him or her to reimburse the other for his or her part in money;
- sell the asset by public auction and divide the money;
- sell the asset by auction among spouses and divide the money.

In the case-law of Supreme Court it has been said that court has to choose the method of division that burdens the parties the least and can only choose a method that a party has demanded in action. Court can refuse termination of joint ownership to an asset only if none of the methods proposed by the parties is suitable. Supreme Court recognised a possibility to end joint ownership to a thing by way of leaving it to the common ownership of the spouses<sup>99</sup>.

When choosing a way to terminate the joint ownership Supreme Court suggested following:

- an asset should not be let to one of the spouses against his or her will, especially when that brings about a duty to reimburse the other spouse,
- if none of the spouses want the asset, the asset should be sold by public auction,
- if both of the spouses want the asset and they have financial possibility to purchase the item, then it should be sold by an auction between the spouses<sup>100</sup>.

If marriage terminates upon the death of one spouse, the share of the deceased spouse in joint property forms part of his or her estate (PKS § 39). Joint property is not divided in separate proceedings, but together with the division of the estate of the deceased spouse<sup>101</sup>, according to the provisions of the Law of Succession Act<sup>102</sup>.

#### Community of accrued gains

In case of community of accrued gains, there can be a monetary claim against the other spouse to set-off the value of the assets acquired during marriage (during the applicability of the rules of community of accrued gains). There is no Supreme Court practice about the community of accrued gains.

Three categories of assets can be differentiated: fixed assets, acquired assets, total assets. At the end of community of accrued gains, the set-off of acquired assets can be demanded (PKS § 53 (1)). Acquired assets are assets by which the total assets of a spouse exceed his or her fixed assets. If the

<sup>97</sup> See PKS § 37 (1<sup>1</sup>); see also RKTko 26.04.2017, [3-2-1-14-17](#), p 47; RKTko 20.11.2008, [3-2-1-101-08](#), p 11; RKTko 03.10.2007 [3-2-1-77-07](#), p 13.

<sup>98</sup> See PKS § 34, § 37 (3), § 38.

<sup>99</sup> RKTko 10.05.2017, [3-2-1-39-17](#), p 10 sqq; RKTko 26.04.2017, [3-2-1-14-17](#), p 16 sqq; RKTko 18.10.2016, [3-2-1-88-16](#), p 12.

<sup>100</sup> RKTko 26.04.2017, [3-2-1-14-17](#), p 16 sqq.

<sup>101</sup> RKTko 18.10.2010, [3-2-1-79-10](#), p 14.

<sup>102</sup> See Law of the Succession Act § 147 sqq; see online in English [here](#).

total assets prove to be less than the fixed assets, the acquired assets shall be deemed to be zero (PKS § 47).

Fixed assets are not basis for the claim of compensation. They mainly comprise the assets that spouses acquired before marriage or respectively before they chose the community of accrued gains and assets acquired during the regime due to succession or as a gift<sup>103</sup>.

Total assets are the sum of the usual value of the things belonging to a spouse and his or her monetarily appraisable rights and obligations as of the termination of the proprietary relationship expressed in money (PKS § 48 (1)).

If the acquired assets of one spouse are greater than the acquired assets of the other spouse, one half of the difference between the values of the acquired assets shall belong to the spouse who received the smaller amount of acquired assets on the basis of a financial claim for set-off (PKS § 53 (1)). The purpose of the monetary claim is to put spouses in the same financial position as they would be in, if they had earned the same amount during the regime of community of accrued gains.

The composition of the acquired assets and the value of total and acquired assets is determined at the time of the termination of the matrimonial property regime (PKS § 51, 52). There are special rules in determination of the value of the assets that protect spouses if one of them has diminished the value of the assets (PKS § 49–51). Only the net income is divided. That means that the amount of a claim for set-off is limited to the value of assets remaining to the obligated spouse after the deduction of obligations upon the termination of the proprietary relationship (PKS § 53 (2)).

If marriage terminates upon the death of one spouse, the claim for set-off goes over to the heirs of the deceased spouse. A claim for set-off may be bequeathed and assigned after the matrimonial property regime has ended (PKS § 53 (3)).

#### Separate property

In case of separate property regime, there is no need to divide property as the property belongs to the spouse who acquired it, unless the spouses acquired something as co-owners. If spouses are co-owners due to a contract, common property can be divided according to the agreement of co-owners. If they disagree then court can divide the common property using the methods described earlier by community of property regime (see AÖS § 77).

Other than having claims arising from some other legal relation than marriage, or arising from general regulation applicable for all matrimonial property regimes, spouses are treated in financial perspective as persons that have not been married (PKS § 58).

#### Registered partners

If persons concluded registered partnership contract, then they can choose one of the matrimonial property regimes to regulate their financial relations (KooS<sup>104</sup> § 16). Depending on the chosen property regime, the same legal consequences arise as in case of marriage: either a claim for division of joint property or monetary claim to set-off the value of acquired assets.

The law gives registered partners a specific possibility to transform the registered partnership contract to marriage (KooS § 24). In that case the assets do not have to be divided or value of acquired assets reimbursed and the property regime can continue, but only if registered partners agree that explicitly while contracting a marriage.

Differently from marriage, the separation of registered partners that would entail possibility to regulate the usage rights of family home or household items, is not prescribed by law (compare PKS § 22, 23). Similarly to marriage, though, registered partners have claims concerning family home and household items when they have terminated registered partnership contract the same way as it was described for spouses (KooS § 22; PKS § 68, 69).

Differently from marriage, registered partners only have maintenance obligations toward each other only if they have added the term in registered partnership contract (KooS § 9 (3); compare PKS § 72–79). Similarly to marriage, they can both be jointly and severally liable for transactions made in the

<sup>103</sup> See more precisely PKS § 49 and 50; compare to separate assets of one of the spouses in case of community of property (PKS § 27).

<sup>104</sup> Registered Partnership Act, see online in English [here](#).

interests of the family even if only one of them concluded the contract (KooS § 11; compare PKS § 18).

As there are yet no implementing acts for Registered Partnership Act, there is also no case-law concerning the regulation of registered partnership contracts.

#### Cohabitation

In case of *de facto* cohabitation, when the persons have not concluded a registered partnership contract, no legal consequences apply automatically. Unless the contributions made by the cohabitees fulfil the prerequisites of a partnership contract (VÕS § 580 sqq), in which case the liquidation provisions of partnership contract can apply according to the Supreme Court practice (see question 2.1.6).

### **2.2.8. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?**

There are no special rules related to culture, tradition, religion or dowry. Estonia has mandatory civil marriage system that means that marriage can only be contracted by competent authorities using a procedure prescribed by law. There are no separate religious marriages. Only those ministers of religion can conclude marriages that have the authority of vital statistics officials.

However, a minister of religion entitled to certify the contraction of marriage has the right to refuse to contract a marriage if a prospective spouse does not meet the requirements for the contraction of marriage according to the religion of the church, congregation or association of congregations<sup>105</sup>.

## **2.2. Cross-border issues.**

### **2.3.1. Is your country participating in the enhanced cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?**

Estonia is not taking part in enhanced cooperation on matrimonial property regimes or registered partnerships.

The Government of Estonia supported in 2011 the original initiative, on the condition that neither of the regulations changes the substantial family law in Estonia nor the legislation concerning property relations related to that<sup>106</sup>. The main idea must have been that Estonia did not want to take an obligation to work out the regulation for same-sex partnerships, as there was none at that point. In 2016, government passed a resolution stating that we support the purposes brought out in the enhanced cooperation and we are planning to take part of it after the implementing acts of the regulations have been passed, on the condition that the regulations are not opposed to the Government resolution of 05.05.2011<sup>107</sup>.

So Estonia is planning to take part of the enhanced cooperation concerning both regulations, but has not yet made necessary legal preparations.

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<sup>105</sup> See PKS § 6; authority of ministers of religion PKTS § 3 (7), § 42 (7–8). See PKTS online in English [here](#).

<sup>106</sup> See documents concerning the statements of Parliament, Ministry of Justice and Government [here](#); see opinion of Ministry of Justice [here](#), p 2.

<sup>107</sup> Government resolution 05.05.2016, see here [16-00861-2.pdf](#).

**2.3.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as “marriage”, “matrimonial property agreement”, “partnership property agreement” etc.?**

The main political concern was that the substantial family law would not be changed. As the regulations concern only private international law questions, then this concern should not rise. Questions related to same-sex couples can arise, e.g to decide whether the prerequisites to conclude a marriage or a registered partnership contract are fulfilled, the validity of marriage or registered partnership contract should be evaluated, as an existing relation would be a preclusive condition. Are same-sex marriages concluded abroad valid in Estonia is yet to be decided by Supreme Court, up to date there is no case-law about it, though the validity of same-sex marriage and public order have been discussed in legal literature<sup>108</sup>.

**2.3.3. Are you expecting any problems with the application of the rules on jurisdiction?**

No bigger issues worth mentioning, considering existing information.

**2.3.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

No. Estonian law has already had for a longer period of time the possibility to choose law applicable to matrimonial property regime and the connecting factors are similar (REÖS § 58) to the ones in the regulation.

**2.3.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

In the regulation, the grounds for applying public policy are wide and a separate rule was added near the end of the working group process, so even countries that do not have same-sex marriages, should not have problems.

As mentioned before, issues related to same-sex couples can pose question, but as there is no relevant Supreme Court practice, the viewpoints are to date unknown.

**2.3.6. Are there any national rules on international jurisdiction and applicable law (besides the Regulations) concerning the succession in your country?**

In case the European Succession Regulation<sup>109</sup> is not applicable and Estonian national regulation applies, there are rules concerning jurisdiction and applicable law to succession matters. In Estonia succession proceedings are not solved by courts, but are dealt with by the notaries.

Jurisdiction is regulated in Law of Succession Act (*PärS*<sup>110</sup>) that states that succession proceedings shall be conducted by an Estonian notary if he bequeather's last residence was in Estonia (*PärS* § 165 (2)). Added to that, there is a specific exception when Estonian notary can conduct territorial succession proceedings concerning the assets in Estonia, in case the last residence of a bequeather

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<sup>108</sup> Jaadla, K., Torga, M., 2013, 598–607; see also an article from a representative of an interest group with religious background. Vooglaid, V., 2018, 67–77.

<sup>109</sup> Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, see online [here](#).

<sup>110</sup> See online in English [here](#).

was in a foreign state. Exception is that Estonian notary shall conduct succession proceedings if the succession proceedings cannot be conducted in the foreign state or the proceedings conducted in the foreign state do not include the property located in Estonia or the succession certificate prepared in the foreign state is not recognised in Estonia (PärS § 165 (3)). Management measures of the estate are applied by the courts, so there is special regulation concerning the jurisdiction of the matter in Code of Civil Procedure<sup>111</sup> (TsMS) § 117. The court of the place of opening of succession has jurisdiction.

Private International Law Act<sup>112</sup> (REÕS) regulates applicable law to succession matters. General rule is that succession is governed by the law of the last state of residence of the bequeather, but the bequeather may make a disposition in will or a succession contract and choose that the law of the state of citizenship applies to the estate (REÕS § 24, 25). There is a list of legal questions that form a part of a scope of law governing the succession (REÕS § 26). Added to that applicable law to wills, to capacity to conclude a will and succession contracts and reciprocal wills is also regulated (REÕS § 27–29).

Jurisdiction in family law matters is regulated by TsMS. In cases on action, the general rules apply, the main principle being that the court of the residence of defendant has jurisdiction (TsMS § 79). In some family law matters, there is special regulation about jurisdiction. Marital actions have variety of connecting factor related mainly to the residence of the spouses (TsMS § 102 (2)). In action related to filiation, connecting factors are the residence or citizenship of the parties (TsMS § 103).

There is separate regulation also about the jurisdiction in family matters on petition (TsMS § 550). For appointment of a guardian (TsMS § 110), adoption (TsMS § 113), emancipation of a minor (TsMS § 114), filiation after the death of the person (TsMS § 115), other family matters on petition (TsMS § 116).

Applicable law in family law matters is regulated in the Private International Law Act. Firstly, questions related to marriage, divorce, matrimonial property regimes and maintenance (REÕS § 55–61), secondly questions related to filiation, adoption and guardianship (REÕS § 62–66).

### 3. Succession law.

#### 3.1. General.

##### 3.1.1. What are the main legal sources of Succession Law (SL) in your country? What are the additional legal sources of SL?

The Constitution of Estonia (PS)<sup>113</sup> states that the right to inherit is guaranteed (PS § 32(4)). The principle is part of a provision that regulates the basic right to property. The property of every person is inviolable and equally protected and the owner has right to possess, use and dispose of his or her property (PKS § 32 (2, 3)). The right to property can manifest in positive and negative rights or as a right to equality, it can also be seen as an institutional guarantee<sup>114</sup>.

The right to inherit is connected to the right to property, because it ensures a person's freedom to determine the fate of his or her property even in case of his or her death. There are two sides to the right to inherit. On one hand it includes the bequeather's right to leave assets to the person that he or she sees fit, on the other hand it gives the heirs right to become owners of the assets<sup>115</sup>.

<sup>111</sup> Code of Civil Procedure – tsiviilkohtumenetluse seadustik (TsMS) – RT I 2005, 26, 197; RT I, 04.07.2017, 31; translation to English published 06.02.2018

<sup>112</sup> See online in English [here](#).

<sup>113</sup> The Constitution of Republic of Estonia, see online in English [here](#).

<sup>114</sup> See PS-comm (2017) § 32, p 3; see online [here](#).

<sup>115</sup> See PS-comm (2017) § 32, p 31; see online [here](#)

Supreme Court has said that the right to inherit is largely a right designed by law. Without legal frames, that guarantee the right to inherit, it would not be possible to exercise it. That applies especially in case of intestate succession, but questions related to testate succession also need to be regulated<sup>116</sup>.

Substantial rules about the succession are regulated in the Law of Succession Act (*PärS*)<sup>117</sup> that sets out the principles of intestate and testate succession, the types of dispositions in case of death, the form requirements thereof and procedural aspects of succession proceedings. Regulation about renunciation and acceptance of the estate, management and inventory of the estate and the keeping of succession register is included.

In Estonia succession proceedings are not in the competence of the courts but notaries. As notaries conduct the succession proceeding, then some questions are also regulated by the acts concerning the competences of notaries, the fees of notarial deeds and regulations by Minister of Justice concerning the procedure related to succession and entries into succession register<sup>118</sup>. In case of inventory of the estate, regulation concerning the competence of bailiff<sup>119</sup> can also be relevant.

### 3.1.2. Provide a short description of the main historical developments in SL in your country.

Estonia restored its independence in 20.08.1991. In 1992 when Estonia prepared its draft law on succession and inheritance, law-makers relied upon the draft Civil Code of Estonia (1940). The draft Civil Code (1940) was presented to the Parliament at the time, but was never adopted due to occupation<sup>120</sup>. The law of succession in this draft was largely influenced by the German BGB, but also by the Swiss, Austrian and Italian civil codes. A great deal was also borrowed from the Baltic Private Law Code (1865)<sup>121</sup>.

The former Law of Succession Act<sup>122</sup> entered into force in 01.01.1997<sup>123</sup>. The former act was in force for twelve years, it was changed for eight times, but in its essence it was quite stable, because none of the changes affected the essential questions of succession law<sup>124</sup>. Shortly after the former Law of Succession Act had entered into force there was an initiative by the Ministry of Justice to change the law and adopt a new act. Present Law of Succession Act<sup>125</sup> entered into force in 01.01.2009<sup>126</sup>.

The main idea of the reform was to create succession law that would be more up to date and more in accordance with the developments in Europe<sup>127</sup>. As the main problems with the former act it was brought out:

- it is problematic that heirs can wait up to ten years before accepting the estate;

<sup>116</sup> See PS-comm (2017) § 32, p 31; see online [here](#); see also cited RKÜKo 22.02.2005, [3-2-1-73-04](#), p 33.

<sup>117</sup> Law of Succession Act, see online in English [here](#).

<sup>118</sup> See Notaries Act – notariaadiseadus (NotS) RT I 2000, 104, 684; RT I, 29.06.2018, 35, online in English [here](#), translation published 02.07.2018; Notarisation Act – tõestamiseadus (TÕS) RT I 2001, 93, 564; RT I, 10.03.2016, 14, online in English [here](#), translation published 06.06.2016. See also regulation of Minister of Justice about the procedure of notarial acts related to succession [here](#), about the procedure of making entries into succession register [here](#) and general regulation about notaries [here](#).

<sup>119</sup> Regulation of Minister of Justice about the competence of bailiff, see [here](#).

<sup>120</sup> See Liin, U., 1998, 105–109.

<sup>121</sup> See Liin, U., 2001, 114–124.

<sup>122</sup> Law Of Succession Act (*PärS 1997*) – RT I 1996, 38, 752; RT I 2008, 7, 52, see online [here](#).

<sup>123</sup> The law was adopted in 15.05.1996, it mainly entered into force 01.01.1997, partly 16.06.1996, see the draft of law and explanatory notes [here](#).

<sup>124</sup> See Liin, U., 2009, 28–29.

<sup>125</sup> See online in English [here](#).

<sup>126</sup> See the draft of law and explanatory notes [here](#); adopted in 17.01.2008 and entered into force in 01.01.2009.

<sup>127</sup> Liin, U., 2009, 28–38.



- the law does not provide for mechanism that would guarantee the preservation of the objects belonging to the estate until the estate is divided;
- it is not clear for which obligations of the bequeather an heir is responsible for and how the inventory of the estate is conducted<sup>128</sup>.

One of the big changes of the reform was substituting a system of acceptance of estate with the system of renunciation of estate, on the grounds that it is largely used in many countries in Europe, it is more modern, it helps to preserve the estate, ensures the reliability of transactions and helps to identify an heir more quickly<sup>129</sup>. Also the regulation about the executor of will, liability of an heir and the procedure of inventory was supplemented<sup>130</sup>. It can also be added that according to former law the person who was entitled to compulsory portion had the status as an heir, in the present law he or she has monetary claim against the heirs (PärS § 104 (5)). In former act the objects part of the estate were in the common ownership of the co-heirs, presently co-heirs have joint ownership, though the management rules are mainly the same as in case on common ownership (PärS 1997 § 141; PärS § 147, 148).

Present Law of Succession Act has mainly been changed three times:

- in 2010 the objective was to make clearer the process of amending the entries on land register in case of death of the owner, but the management and inventory of the estate was also specified;
- in 2013 the management of succession register was handed over to Chamber of Notaries;
- in 2016 the law was amended due to the application of European Succession regulation<sup>131</sup>.

### 3.1.3. What are the general principles of succession in your country?

The main principles of succession law are:

- principle of freedom of testation,
- principle of family heirloom,
- principle of private inheritance,
- principle of universal succession.

The principle of freedom of testation is the manifestation of principle of private autonomy in succession law. The bequeather can choose if he or she wants to make dispositions in case of death or let the receivers of the assets be decided by the rules of intestate succession. The bequeather can choose in which form provided by succession law he or she wants to use for the dispositions, e.g. a will or succession contract. Finally, he or she can also decide which dispositions to make and up to which extent, he or she can leave someone out, who would inherit in case of intestate succession or make dispositions only about certain items, e.g. legacy. Supreme Court has stated that freedom of testation is one of the manifestation of right to dispose property freely, but it is not an absolute right, so it can be restricted by law on any grounds that is not unconstitutional<sup>132</sup>. Regulation about compulsory proportion is one of the manifestations of restriction of freedom of testation.

The principle of family heirloom carries an idea that family, as the closest to the deceased should be entitled to receive part of the estate of the bequeather. This principle mainly manifests in intestate succession and compulsory portion. In case of intestate succession children and their descendants, parents and their descendants and then grandparents and their descendants inherit the assets of the deceased. Added to that, surviving spouse is entitled to inherit. Therefore, closer relatives are favoured by the rules of intestate succession, presuming that the will of the deceased would have been to leave the assets to persons closest to him or her that probably maintained him or her before death. Compulsory portion protects the closer family members of the bequeather with a right to

<sup>128</sup> Liin, U., 2009, 29.

<sup>129</sup> Liin, U., 2009, 29.

<sup>130</sup> See the explanatory notes of the draft of law [here](#), p 1.

<sup>131</sup> See drafts of law and explanatory notes: 2010 – [728 SE](#); 2013 – [440 SE](#); 2016 – [113 SE](#)

<sup>132</sup> See RKÜKo 22.02.2005, [3-2-1-73-04](#), p 18.

claim a portion of the estate, when they have been disinherited or put aside by will favouring a third person. That helps protect the family members and guarantee the maintenance to them.

Principle of private inheritance is a part of the right to property that protects one's private property also in case of death. That is brought out by the fact that the cases when state or local government would inherit the property, are very limited and apply due to law only in cases all the relatives entitled to inherit in case of intestate succession have renounced the succession (see PärS § 18).

Principle of universal succession means that upon death, all the rights and obligations of the bequeather transfer to the successor except those which by their nature are inseparably bound to the person of the bequeather or which pursuant to law do not transfer from one person to another (PärS § 4 (1), § 130 (1)). An heir is an universal successor to whom the estate is transferred in its entirety, that means that not only assets, but also obligation and contractual rights are transferred by law.

The principle of universal succession ensures that objects belonging to a person do not become ownerless at his or her death, and that claims and liabilities do not lapse – there is another person who will recover the claims and be responsible for the liabilities, and there is property out of which to settle the liabilities. It helps to ensure continuity and clarity in legal relations and maintain the integrity of the inheritable estate in the interests of heirs, creditors having claims in respect of the estate, recipients of a compulsory portion<sup>133</sup>.

#### **3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.**

Firstly in case of a person's death competent authority must be notified. Local governments register deaths and make death entries to the population register. Main questions are regulated by Vital Statistics registration Act (PKTS<sup>134</sup>). A death shall be registered in Estonia if the death has not been registered in a foreign state and:

- the person dies in Estonia or
- the last residence of the person deceased in a foreign state was in Estonia or
- the person deceased in a foreign state was an Estonian citizen (PKTS § 31 (2, 3)).

Application to register a death is to be submitted in seven days after the day of death or after finding the person. Application can be submitted by spouse, relative, relative by marriage, person who was living with the deceased, head of an agency that provided health care service, police official, other persons that have data about the death (PKTS § 33 (1)). Death is registered within three business days after receiving an application (PKTS § 32 (6)).

To register a death following documents must be submitted (PKTS § 32, 33):

- an application to register a death (see [form](#)),
- medical death certificate, notice of a police authority, or court decision on establishing the fact of death or regarding declaration of death,
- identity document of the deceased;
- identity document of the submitter<sup>135</sup>.

Succession proceedings is regulated by the Law of Succession Act<sup>136</sup> (*PärS*) and specified by a regulation about notarial proceedings<sup>137</sup>. Succession proceedings are mainly conducted by a notary. Courts, bailiffs, bankruptcy trustees, state and local government may also have some connections:

<sup>133</sup> See Mikk, T., Sein, K., 2018, 117–128.

<sup>134</sup> See online in English [here](#).

<sup>135</sup> See also brief overview in English [here](#).

<sup>136</sup> See online in English [here](#).

<sup>137</sup> Regulation of Minister of Justice „Pärimisseadusest tulenevate notari ametitoimingute tegemise kord“ – RTL 2008, 101, 1435; RT I, 07.02.2014, 13, see online [here](#).

- courts can be seized in a proceeding on petition, when management of the estate is needed (TsMS § 584–590) or an action can be brought to the court due to disputes related to succession, e.g when the validity of the will is questioned;
- bailiff may be involved with succession proceedings, when an inventory of the estate is done; notary will appoint a bailiff for inventory and bailiff conducts it<sup>138</sup>;
- bankruptcy trustee will participate in bankruptcy proceedings in case of bankruptcy of the estate<sup>139</sup>;
- state and local governments may be intestate heirs (PärS § 18), but apart from that, must inform court about the need to apply management of the estate (PärS § 111 (6)).

To initiate succession proceedings a successor, a creditor of the bequeather, a legatee or any other person who has rights in respect of the estate shall submit a corresponding notarially authenticated application to a notary (PärS § 166 (1)). In the application to initiate succession proceedings information known to the initiator should be provided about potential successors, recipients of compulsory portions, wills, succession contracts and bequeather's obligations (PärS § 166 (3)).

An Estonian notary shall (PärS § 166–169):

- determine whether there is jurisdiction to conduct succession proceedings;
- verify on the basis of information entered in the succession register whether succession proceedings have already been initiated in the same succession matter (if needed forward the initiation application to the notary conducting the succession proceedings),
- if succession proceedings have not been initiated by another notary, accept the notarially authenticated application and initiate succession proceedings;
- make an entry concerning the initiation of succession proceedings in the succession register immediately after the acceptance of the application;
- publish a notice concerning the initiation of succession proceedings in the official publication *Ametlikud Teadaanded*<sup>140</sup> not later than two working days after initiation of the succession proceedings;
- open a succession file where documents about the succession matter are gathered (those that are not deposited in the e-notary electronic system);
- verify information about possible successors; if needed conduct calling proceedings for identification of successor and publish a notice in *Ametlikud Teadaanded* (PärS § 169);
- verify information concerning the wills and succession contracts on the basis of information in succession, if needed request documents from depositaries or abroad (PärS § 167 (1, 1'));
- send notice about initiation of succession proceedings to successors known to the notary and in case of testate succession, notify persons to whom rights have been granted and duties have been imposed by the will or succession contract and notify persons who would have succeeded in the case of intestate succession (PärS § 168 (2, 3));
- make inquiries about the rights and obligations of the bequeather to registers, credit institutions and if needed to others, if bequeather was married and community of property was chosen, then inquiries also about the assets of the surviving spouse<sup>141</sup>;
- verify the legal basis for succession, the successor(s), their shares, obliged or entitled persons and the balance of the assets and communicate information (PärS § 170):
  - if needed (e.g the residence of successor is unknown) notify court about the need for management of the estate (PärS § 110–115; TsMS § 584–590),
  - if needed verify the will, hear the witnesses of personal will (PärS § 167 (5)),

<sup>138</sup> See PärS § 138, 139; see also regulation [here](#) and the fees of bailiff [here](#) (§ 49).

<sup>139</sup> See PärS § 142 (6), see also Bankruptcy Act online in English [here](#).

<sup>140</sup> See <https://www.ametlikudteadaanded.ee/>; details about requirements to the notice online [here](#) (§ 8).

<sup>141</sup> See PärS § 167 (2<sup>1</sup>–4); see also the list of registers and credit institutions [here](#) (§ 10).

- if needed (the balance of the rights and obligations is negative; successor is local government, state or with restricted legal capacity; application of an heir) make preparations for the inventory of the estate (PärS § 133–145)
- authenticate notarially applications of renunciation or acceptance of the succession;
- authenticate certificates, if needed after a draft of a certificate (PärS § 174) or “open” certificate (PärS § 171 (6)), if needed after the court proceedings between interested parties have ended:
  - authenticate succession certificate, if sufficient proof is provided concerning the right of succession of a successor and the extent thereof but not before one month after publication of the notice in § 168 (1) (PärS § 171 (1));
  - authenticate certificate of legatee, certificate of recipient of compulsory portion or certificate of executor of will, if requested (PärS § 171–173).
- enter into succession register data concerning wills, succession contracts, estate management measures, succession proceedings, succession certificates, European Certificates of Succession and disposal of a share of the community of an estate and persons performing procedural acts, successors and bequeathers and information about conduct and transfer of succession proceedings, suspension, continuation and termination of succession proceedings conducted on the basis of European Succession Regulation (PärS § 176<sup>1</sup> (2); § 177<sup>1</sup> (1));
- if demanded, authenticate notarially a contract of disposal of a share of the community of an estate (PärS § 148) or divide estate;
- if new circumstances arise, a notary can revoke a certificate (PärS § 175) and if needed conduct new succession procedure and authenticate a new certificate. The certificate has evidential value but it does not constitute rights and obligations. If necessary court resolves the disputes and gives a verdict bindingly about the matter, e.g who is the successor, irrelevant of the facts identified on the certificate.

**3.1.5. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?**

Legal basis for succession can be intestate or testate:

- in case of intestate succession rules are applied that foresee the inheritance rights of relatives in three orders and rules about the right of surviving spouse, state and local government to inherit (PärS § 10–19; § 125);
- testate succession can be based on a will or succession contract; including notarial or personal will, reciprocal will of spouses positive or negative succession contract or reciprocal succession contract (PärS § 19–25; § 89–103).

The basis for succession can therefore be:

- succession contract (succession by succession contract), if not then
- the testamentary intention of the bequeather expressed in a will (testate succession), if not then
- law (intestate succession).

The list is a cascade. It means that following legal basis for succession should be analysed only or to the extent of the former basis does not offer grounds for succession. Succession contract prevails over a will and they both prevail over the rules of intestate succession. Therefore, the rules of intestate succession apply only if the deceased did not leave a valid will or succession contract (see PärS § 9, 10).

Many legal basis can be applicable simultaneously in one succession matter. If a will or succession contract only concerns a share of the estate, rules of intestate succession apply to the remaining

share (PärS § 10 (2); § 39 (2)). Even succession contract, will and rules of intestate succession can apply simultaneously in the same succession matter, if they are covering different parts of the estate. If the succession contract (PärS § 95–103) or will (PärS § 19–27, § 89–94) is made and it is valid at the time of death, it should be analysed if the testamentary disposition covers the whole estate or only a part of it, if not then rules of intestate succession apply to remaining share (PärS § 10 (2); § 39 (2)):

- is there a valid disposition of nomination of a successor(s) for the whole estate: was a successor nominated, is he or she capable to succeed and not unworthy (PärS § 5–8);
- is/are there successor(s) who inherit on the basis of testamentary disposition: valid renunciation of succession (PärS § 116–124), special rules, e.g alternative or subsequent successor (PärS § 42–55), spouse (PärS § 32, § 94) or right of accretion (PärS § 127–129).

### **3.1.6. What happens with the estate of inheritance if the decedent has no heirs?**

Related to the grounds of principle of universal succession, it is not possible that a deceased person does not have an heir according to Estonian law. A succession opens upon the death and the place of opening of a succession is the last residence of the bequeather (PärS § 3). If the deceased did not make a testamentary disposition in case of death and the rules of intestate succession apply, but there are no relatives or surviving spouse that would inherit (PärS § 11 (1)) or if they all renounce succession, then dependant on the place of opening of a succession, state or local government inherits:

- local government of the place of opening of a succession is the intestate successor if there are no successors entitled to inherit according to PärS § 11 (1).
- if a succession is opened in a foreign state and Estonian law applies to the succession, the Republic of Estonia is the intestate successor if there are no successors according PärS 11 (1).

When state or local government is intestate successor, they cannot renounce succession and they are deemed to have accepted the succession regardless of whether the requirements for acceptance of the succession were met (PärS § 125 (1, 2)).

### **3.1.7. Are there special rules or limitations concerning succession with reference to the deceased's (or heir's) culture, tradition, religion or other characteristics?**

Besides the concept of unworthiness (PärS § 5–8), there are no special rules with reference to the culture, tradition, religion or other of the deceased in Estonian law.

## **3.2. Intestate succession.**

### **3.2.1. Are men and women equal in succession? Are domestic and foreign nationals equal in succession? Are decedent's children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?**

Intestate succession regulation in Estonia does not foresee different legal consequences for men and women, for domestic or foreign nationals<sup>142</sup>, for children born out of wedlock or for children who are in legal filiation with their parents due to adoption. For relatives, legally verified affiliation (PKS § 82) is the basis for the right to inherit.

<sup>142</sup> Right to inherit (PS § 32 (4)) is connected to the right to property that is the right of every person according to the constitution, see PS § 32 (1): The property of every person is inviolable and equally protected.

At the same time cohabitantes or registered partners are not entitled to inherit, only the surviving spouse is. Added to that the right of surviving spouse to inherit presumes that marriage is valid upon death (PärS § 16 (4)).

The lawmaker was planning to give surviving registered partner equal rights to inherit as to the surviving spouse when adopting Registered Partnership Act. However, the proposal was made in the draft of implementing acts, which are on the second reading in parliamentary procedure, but have not been adopted yet. The fate of the implementing acts is unknown, but they will most likely drop out of the parliamentary proceedings upon elections<sup>143</sup>. Otherwise, homosexual couples could also be intestate successors, provided they have concluded registered partnership contract.

As marriage has to be contracted between a man and a woman (PKS § 1 (1)), there cannot be cases of homosexual marriages concluded according to Estonian law. With homosexual marriages concluded abroad, private international law questions arise. In deciding, whether a surviving spouse who had concluded same-sex marriage with the bequeather abroad, is an intestate successor, the preliminary question of the validity of the marriage must be assessed. The law of the state of the residence of both of the spouses has to be cumulatively taken into account (REÖS § 55 (2)). Are same-sex marriages valid in Estonia is yet to be decided by Supreme Court, up to date there is no case-law about it, though the validity of same-sex marriages and public order have been discussed in legal literature<sup>144</sup>.

A natural person has right to inherit if he or she has succession capacity (PärS § 5). Any person with passive legal capacity has succession capacity (PärS § 5 (2)). Passive legal capacity of a natural person (human being) is the capacity to have civil rights and perform civil obligations. General rule is that all natural persons have uniform and unrestricted passive legal capacity that begins with the live birth of a human being and ends with his or her death (TsÜS § 7 (1, 2)). Therefore, a natural person who is alive at the time of death of the bequeather may be a successor (PärS § 5 (3)).

A fetus can have passive legal capacity from conception if the child is born alive, when prescribed by law (TsÜS § 7 (3)). One of the cases when a fetus can have passive legal capacity is in case of succession. A child born alive after the opening of a succession shall be deemed to have succession capacity at the time of opening of the succession if the child was conceived but not yet born before the opening of the succession (PärS § 5 (4)).

So every natural person who has passive legal capacity (or deemed to have in case of an unborn child) at the time of death of the bequeather can be a successor, even when his or her active legal capacity is restricted do to being under-aged (18 yo) or due to mental health (TsÜS § 8). The right to inherit of relatives presumes legally affirmed affiliation (see question 2.1.3).

### 3.2.2. Are legal persons capable of inheriting? If yes, on which basis?

Yes, a legal person who exists at that time at of death of the bequeather may be a successor (PärS § 5 (3)). Local governments and state can be intestate successors (PärS § 18). Only relatives and surviving spouse are other persons entitled to inherit in case of intestate succession (PärS § 11 (1)), therefore, legal persons can be testate successors if named at a testamentary disposition.

Legal persons must have passive legal capacity to inherit the estate. The passive legal capacity of a legal person in private law arises as of entry of the legal person in business register<sup>145</sup>. The passive legal capacity of a legal person in public law arises at the time provided in an act, that is basis for that legal person (TsÜS § 26 (2, 3)). Legal person in private law terminates upon deletion from business register and then the passive legal capacity also ends. A legal person in public law terminates pursuant to the procedure provided by law that regulates that legal person (TsÜS § 45 (2, 3)) and then also the passive legal capacity ends.

<sup>143</sup> Draft of law of implementation of Registered Partnership Act, see here [114 SE](#).

<sup>144</sup> Jaadla, K., Torga, M., 2013, 598–607; Vooglaid, V., 2018, 67–77.

<sup>145</sup> See e-business register, online in English [here](#).

There is special regulation concerning a foundation established by a will or succession contract, due to the possibility of the bequeather to found a foundation with disposition in the form of testamentary discretion (PärS § 76, 77). The law states that a foundation established by a will or succession contract shall be deemed to exist at the time of opening of the succession if it acquires the rights of a legal person later<sup>146</sup>.

**3.2.3. Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.**

Yes, the institute of unworthiness is regulated in Estonian law. There is a list of grounds of unworthiness that are related to moral reasons. The grounds for unworthiness prevent that a person would succeed if it seems immoral or unjust.

A person is deemed to be unworthy to succeed when the person (PärS § 6 (1))

- intentionally and unlawfully causes or tries to cause the death of the bequeather;
- intentionally and unlawfully places the bequeather in a situation where he or she is incapable of making or revoking a testamentary disposition until his or her death;
- by duress or deceit hinders the bequeather from making or altering a testamentary disposition or in the same manner induces the bequeather to make or revoke a testamentary disposition if it is no longer possible for the bequeather to express his or her actual testamentary intention;
- intentionally and unlawfully removes or destroys a will or succession contract if it is no longer possible for the bequeather to renew it;
- falsifies the will made by the bequeather or the succession contract or a part thereof.

The grounds for unworthiness apply in case of intestate and testate succession, moreover they are also applicable to legatees and other persons who have the right to receive benefit from the succession (PärS § 6 (3)).

However, added to the aforementioned, a parent of a child from who the custodial rights were fully taken away by court due to endangering the well-being of a child (PKS § 134–136) cannot be an intestate successor of the child (PärS § 6 (2)).

In case of dispute, an interested person can request that a person would be declared unworthy. The limitation period of this claim is six months after becoming aware of the reasons for unworthiness to succeed, but not longer than ten years from the date of opening of the succession (PärS § 8).

If a successor is unworthy to succeed, the person who would have succeeded if the unworthy person had died before the opening of the succession is entitled to succeed (PärS § 7).

**3.2.4. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?**

In case of intestate succession, relatives and surviving spouse are successors. When none of the named relatives and the spouse do not inherit, local government or state can be intestate successors (PärS § 11, 18).

Relatives of the deceased succeed in three orders (PärS § 11–15):

- I order, children of the bequeather and their descendants;
- II order, parents of the bequeather and their descendants;
- III order, grandparents of the bequeather and their descendants.

The list is a cascade, which means that second order successors succeed only if there are no first order successors and in turn third order successors succeed only if there are no first or second order

<sup>146</sup> See PärS § 5 (5); see also the requirements and process about founding a foundation with a testamentary disposition in Foundations Act, online in English [here](#) (§ 6, 7).

successors. Surviving spouse inherits besides the relatives the share stipulated in special regulation (PärS § 16). The right of surviving spouse to inherit presumes that the marriage was valid at the time of death and the bequeather did not pose a claim to court to divorce the marriage or to annul it (PärS § 16 (4)).

Together with the relatives, surviving spouse is entitled to receive:

- with first order successors, equal to the share of a child, but not to less than  $\frac{1}{4}$ ;
- with second order successors  $\frac{1}{2}$  of the estate;
- if third order successors would succeed, because there are no relatives from the first or second orders, then the surviving spouse is entitled to receive the entire estate.

Surviving spouse has in addition to the share of the estate special rights that are not counted as part of the share of the estate:

- he or she can demand a personal right of use in residential building to be set to an immovable, which was the matrimonial home of the spouses provided that the standard of life would otherwise be harmed (PärS § 16 (3));
- in case the relatives of second order succeed, surviving spouse is entitled to a preferential legacy that comprises the standard furnishings of the spouses' matrimonial home (PärS § 17)<sup>147</sup>.

The principles of intestate succession in Estonia are:

- principle of order of succession (*parentela*),
- principle of succession by branches (*per stirpes*),
- principle of exclusion of distant relatives when nearer is alive,
- principle of replacement (representation),
- principle of filiation.

Principle of order of succession means that relatives succeed on three orders and the relatives of the next order are entitled to succeed only in case all the persons belonging to the former do not inherit the estate, e. g. the all renounce the succession or have died before the bequeather.

Principle of succession by branches (*per stirpes*) determines the shares of the successors of the same order. Opposed to the principle *per capita* in which case all the relatives of the same order are entitled to equal share, division by branches gives equal share to every branch of the same succession order. There are different number of branches inside every succession order:

- I order: every child with his or her descendants forms a branch and gets equal share of the estate (PärS § 13);
- II order: there are two branches, mother with her descendants form one branch and father with his descendants forms the other, both branches are entitled to  $\frac{1}{2}$  of the estate. Principle of branches means that irrespective of the number of descendants, the mother side of the relatives always inherits  $\frac{1}{2}$  and father's side  $\frac{1}{2}$  of the estate (PärS § 14);
- III order: there are four branches, two on the side of the mother of the bequeather and two on the side of the father. The idea that both sides receive half of the estate remains, but each side is further divided into two branches – respectively the branch of grandfather and the branch of grandmother. Therefore, there are four branches that all get equal shares of the estate.
  - grandmother on mother's side,
  - grandfather on mother's side,
  - grandmother on father's side,
  - grandfather on father's side.

Some special rules are added. If paternal or maternal grandparent is deceased, his or her descendants replace him or her. If he or she has no descendants, the other grandparent on the same side succeeds to his or her share. If the other grandparent is also deceased, his or her descendants succeed (PärS § 15 (3)). If both paternal or maternal grandparents are

<sup>147</sup> See also Liin, U., 2001- 114–124.



deceased and they have no descendants, the grandparents on the other side or their descendants succeed (PärS § 15 (4)).

Principle of exclusion means that nearer relatives who are alive exclude from succession further relatives who are in relation to the bequeather through him or her (PärS § 13 (2)). This principle applies for all the three orders of succession.

Principle of replacement means that if a person is deceased before the bequeather his or her descendants step in his or her place and inherit the share that the dead relative would have inherited if he or she would have been alive (PärS § 13 (3)). This principle also applies in case of all the three orders. This principle can be seen as counterpart to the principle of exclusion and has big importance related to the principle of succession by branches.

For example. Bequeather has two children, both of them have two descendants (four grandchildren), one of the children has died before the bequeather. One child, who is alive inherits  $\frac{1}{2}$  of the estate and by being alive excludes his descendants (principle of exclusion). On the other hand, as the other child had died before the bequeather, his descendant (two grandchildren) step in his place and inherit instead of the child (principle of replacement).

Because of the principle of succession by branches, the grandchildren and the child do not all inherit equally  $\frac{1}{3}$ . As the grandchildren receive the amount meant for the branch of the dead child, they divide among themselves the  $\frac{1}{2}$  that the child would have inherited. So the child receives  $\frac{1}{2}$  and both of the grandchildren receive  $\frac{1}{2} / 2 = \frac{1}{4}$  of the estate.

Principle of filiation means that intestate succession as a relative presumes that a filiation has been verified in the way acknowledged by law (see PKS § 80 sqq), e.g acknowledgement of paternity, adoption etc. To succeed as a relative a person must either affiliate from the bequeather or from a person that is affiliated to the bequeather. An example of the principle is succession by representation. If children succeed instead of their parents, the children who are related to one of the parents only succeed in place of one, at the same time, the children who are related to both of the parents, succeed instead of both of them, so the shares of children are not equal due to filiation.

### 3.2.5. Are the heirs liable for deceased's debts and under which conditions?

Due to the principle of universal succession (PärS § 4, 130 (1)) all the rights and obligations go over to the successor that means that the successor is liable for the debts of the deceased even with his or her own assets (PärS § 130–145) Successor liability is limited in two cases:

- successor has applied for an inventory and the inventory was conducted, in which case the liability of the successor who applied for inventory is restricted with the value of the estate (PärS § 143 (1))<sup>148</sup> (*pro viribus hereditatis*);
- successor has filed an application for bankruptcy proceedings of the estate because the obligations of the estate exceeded the assets and the estate was declared insolvent or the proceedings were ended before the declaration of insolvency because of lack of assets to cover for procedural costs (PärS § 130 (3); § 142 (6))<sup>149</sup>.

It is debatable, whether the liability of a successor is restricted in case he or she made an application for inventory, but did not file for bankruptcy later. However, the law was amended to make clear that applying for inventory is not a prerequisite to file for bankruptcy<sup>150</sup>. In their inner relation, the

<sup>148</sup> Only the liability of the successor, who applied for inventory, is limited (PärS § 139 (7); § 143 (1)), the inventory on the application of one of the successors does not limit the liability of the other successors.

<sup>149</sup> The law does not regulate, if the liability of all the successors is limited if only the liability of the successor who filed for bankruptcy is does it limit the liability of all of the successors. Furthermore, the law does not regulate if the liability is restricted by the assets of the estate (*pro viribus hereditatis*) or by the value of the estate (*cum viribus hereditatis*). There is no special regulation about the bankruptcy of the estate, but there is a revision of insolvency law going on, where those questions are analysed. See the documents of the revision of insolvency law [here](#), see the analysis on the insolvency of the estate [here](#).

<sup>150</sup> See the draft and explanatory notes here [725 SE](#), explanatory notes, p 18.

successors are liable as joint and several debtors according to the shares they inherited (PärS § 151 (1)).

There is a unique regulation that permits creditor, who is not a creditor to the estate, to demand fulfilment of an obligation on the account of the estate, when debtor renounced a succession. The purpose of the regulation should be to protect creditors in the cases, when a debtor renounces succession in order to avoid fulfilment to the creditor. The creditor of a debtor, who renounced succession, can demand fulfilment from the persons, who succeeded due to the renunciation of the debtor on the account of the estate (PärS § 126). The essence of the claim has been analysed in Supreme Court practice, but the regulation has remained rather underdeveloped<sup>151</sup>.

### 3.2.6. What is the manner of renouncing the succession rights?

In Estonia there is the system of renunciation of succession (PärS § 116–125). However, in the former Law of Succession Act (01.01.1997–31.12.2008) there was system of acceptance of the succession<sup>152</sup>. Upon the opening of a succession, the estate transfers to a successor, if he or she does not renounce it (PärS § 4). There are principles of absoluteness and irrevocability of succession. Succession cannot be accepted conditionally and once renouncing the succession, the succession cannot be accepted afterwards. Though, when successor has right to succeed on different grounds, he or she can choose on which ground to accept the succession (PärS § 116, § 117).

Due to the system of renunciation, a successor must be active when he or she wants to renounce the succession, but can stay passive, when wanting to accept the succession. The muteness of the successor is interpreted as a will to succeed. If a successor did not renounce the succession within the term for renunciation, then he or she shall be deemed to have accepted the succession (PärS § 118 (1)).

For renunciation of a succession:

- a written application shall be submitted to a notary, that the notary authenticates; every notary can authenticate renunciation application, regardless of which notary conducts succession proceedings (PärS § 118 (3), § 165 (5));
- the term for renunciation of succession is three months, but the term can be extended by a notary; the term commences when cumulatively two conditions are fulfilled:
  - the successor is or ought to be aware of the death of the bequeather and
  - the successor is or ought to be aware of his or her right of succession (PärS § 119)<sup>153</sup>.

## 3.3. Disposition of property upon death.

### 3.3.1. Testate succession.

#### 3.3.1.1. Explain the conditions for testate succession.

As mentioned before (see question 3.1.5), there can be three possible grounds for succession:

- a succession contract (PärS § 95–103),
- a will (PärS § 19–27; § 89–94),
- intestate succession regulation (PärS § 9–18).

The succession contract prevails legally all the other grounds<sup>154</sup> and a will prevails intestate succession regulation. Those grounds can apply simultaneously, but the latter grounds only apply to

<sup>151</sup> See RKTkm 04.12.2018, [2-17-18529/24](#); see also RKTko 25.05.2010, [3-2-1-41-10](#).

<sup>152</sup> See U. Liin, 2003, 45–56.

<sup>153</sup> There is special regulation about the term of renunciation in case of: 1) succession of a right to accept or renounce (PärS §120) and 2) when application to accept of renounce is declared invalid (PärS § 123, 124).

the extent that the prevailing ground does not apply (PärS § 9, 10, 39 (2)). Determining whether testate succession applies, following questions should be analysed:

1. Did the bequeather make testamentary dispositions in case of death:

- did he conclude a succession contract (PärS § 95–103),
- did he draw up a will (PärS § 19–27; § 89–94),

2. Is the testamentary disposition valid at the time of death:

2.1 formal requirements of the testamentary disposition are followed, e.g (PärS § 20–24; § 89 (3), § 100)

2.2 in case of personal will, is it made less than six months before death (PärS § 25 (1)),

2.3 testamentary disposition was not voided before death, or there are exceptions why it is still valid (PärS § 88),

2.4 testamentary disposition is not void or has been voided after the death (PärS § 19 (1), § 27, § 32, § 88 (7); TsÜS § 10, 84–96).

### 3.3.1.2. Who has the testamentary capacity?

A will is a unilateral transaction whereby a bequeather makes a disposition of his or her estate in the event of his or her death (PärS § 19 (1)). As it is a transaction, the main requirement is active legal capacity for the will to entail valid legal consequences. The same applies in case of reciprocal will of the spouses and succession contract.

Requirements for testamentary capacity:

- person has passive legal capacity (TsÜS § 7),
- the person has full active legal capacity (TsÜS § 8)
  - is an adult (at least 18); exception is that minor who is at least 15, can draw up a will in notarially authenticated form (PärS § 27),
  - active legal capacity is not restricted due to mental illness, mental disability or other mental disorder that makes the person permanently unable to understand or direct his or her actions;
- the person has capacity to exercise will (TsÜS § 13), i.e does not have temporary mental disorder or other circumstances that put him or her in a condition which precludes his or her ability to accurately assess the impact of the transaction on his or her interests.

There is a formal requirement to make testamentary dispositions personally, which means that a testator is required to make a will himself or herself (PärS § 19 (2)) and cannot use a representative. That can raise questions in case of adults whose active legal capacity has been restricted and who have a guardian (see PKS § 171–207). Because guardians cannot represent wards (person with restricted active legal capacity who have guardians) in drawing up a will, then it could be concluded that wards cannot make testamentary dispositions. Furthermore, it is presumed that persons to whom guardians have been appointed do not understand legal consequences of transactions to the extent the guardian has been appointed (TsÜS § 8 (3)). Total limitation of testation to persons who have guardians appointed, is too restrictive. The wards should be able to testate if they understand the consequences of a will, but the law should probably be amended so the capacity to testate would be analysed in the court proceeding of appointing a guardian and written in the court decision<sup>155</sup>.

<sup>154</sup> The legal force that a reciprocal will has after the death of one of the spouses, when later a succession contract is made, can be debatable – compare PärS § 93 (2) and § 9 (2). The reciprocal will should acquire the legal force similar to succession contract after the death of one of the spouses.

<sup>155</sup> See the proceedings on petition to appoint a guardian (TsMS § 520–532); compare PKS § 203 (2): the court shall assess the person's capability to understand the legal consequences of contraction of marriage, acknowledgement of paternity and other transactions concerning family law.

### 3.3.1.3. What are the conditions and permissible contents of the will?

The freedom of testation is mainly restricted by<sup>156</sup>:

- the limitation of types testamentary dispositions (*numerus clausus*),
- good morals and public order (TsÜS § 86),
- right of close family members to receive compulsory portion (PärS § 104–109),
- the rules of interpretation of a testamentary disposition (PärS § 28–38),
- mandatory order to fulfilment of obligations of the estate (PärS § 142).

Testator can choose amongst the types of testamentary dispositions prescribed by law:

- nomination of successor (PärS § 39), including
  - alternative successor (PärS § 42–44),
  - subsequent successor (PärS § 45–55);
- nomination of legacy (PärS § 56–72);
- testamentary obligation (PärS § 73–75);
- testamentary discretion (PärS § 76–77);
- appointment of executor of will (PärS § 78–87).

The restrictions on the content of testamentary dispositions related to good morals or public order, compulsory portion and the order of fulfilment of obligations influence the content of testamentary dispositions directly. At the same time, the rules of interpretation and the limitation of types of testamentary dispositions has an indirect legal influence.

The rules of interpretation are composed with a purpose to lead to the legal consequences that are in accordance with the presumed will of the testator. The main ground for interpretation is the will of the testator at the time of drawing up a will (PärS § 28). At the same time, the perspective that the testator had may not have been legally grounded. One of the main questions discussed in practice is the legal differentiation between a successor and legatee, especially in cases, where the testator named most of the valuable assets in a will as a legacy but did not appoint a successor. In accordance with legal literature, it was found in Supreme Court practice that testamentary disposition must be qualified legally. Only grammatical interpretation of the will is not enough. Even when testator used legal terms or made it in notarially authenticated form, the interpretation of the will is still possible<sup>157</sup>.

Testator can also leave single assets to different persons without specifying if he or she made the dispositions to appoint a legacy or nominate a successor. In that case the will should be interpreted to decide if the testator wanted to leave the assets as a legacy (PärS § 56), appoint legacy to a successor (PärS § 61) or nominate successors with legally non-binding instructions (PärS § 159 (1)) how he or she envisions the assets could be divided<sup>158</sup>.

The will can include personal thoughts or wishes of the testator, dispositions without legal consequences or dispositions that the successors can overcome if they all agree. For example the testator can write down the vision, how the obligations should be filled in case of his or her death, but it is not binding on the successors.

Testator can put in a will that an apartment should be sold and from the money received, the home loan should be paid back, but this does not force the successor to sell the apartment. The successor can instead e.g continue the payments of home loan or pay the home loan in lump sum and keep the apartment.

Testator can also foresee that the estate should not be divided for up to thirty years, but as the provision is dispositive, the estate can still be divided if all the successors agree on that (PärS § 155 (3)).

<sup>156</sup> See also Liin, U., 2005, 85–94.

<sup>157</sup> RKTko 24.10.2018, [2-16-2978/58](#), p 12 sqq.

<sup>158</sup> See RKTko 24.10.2018, [2-16-2978/58](#), p 19.

**3.3.1.4. Describe the characteristics of will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a will?**

The types of wills can be differentiated by their form requirements and contents as followed:

- notarial will
  - notarially authenticated will (PärS § 21)
  - will deposited with notary (PärS § 22)
- domestic will
  - will signed in presence of witnesses (PärS § 23)
  - holographic will (PärS § 24).

Therefore, a will may be either notarial or domestic. In case the testator drew up many wills, the last one is the basis of the succession, irrespective of the form of the will. All the aforementioned wills have equal legal consequences. If testator revokes only a part of the will with the next one, then they both can be simultaneously grounds for succession, if they are valid at the time of death (PärS § 88). Main difference between notarial and domestic wills is that notarial wills do not have an expiration date, but domestic will can only be basis for succession if they were not drawn up more than six months before death (PärS § 25 (1)).

Notary will take part of drawing up a will in case of notarially authenticated will and will legally advise the testator. On the contrary, a will deposited with notary is a will that the notary has not drawn up, the notary may not even know the contents of the will.

Holographic will has to be made in testator's own handwriting from beginning to end and testator must indicate the date and year of making the will, though if the date is missing, the will is not void (PärS § 25 (2)). The testator has to sign his or her holographic will (PärS § 24 (1)). If a holographic will is submitted to a notary, then it is valid as a notarially authenticated will, at the same time the fact that witnesses have also signed a holographic will, does not turn it into a will signed in the presence of witnesses (PärS § 24 (2, 3)).

Will signed in the presence of witnesses must be, as the term says, signed in the simultaneous presence of witnesses. The will does not have to be written by hand or by the testator, it can also be typed or written by someone else. There has to be two witnesses, who have full active legal capacity and who are not closely connected to any persons to whom the will gives rights. The witnesses do not have to know the contents of the will, but they must understand that it is a signing of a will that they are witnessing. Testator must sign the will and the witnesses add their signatures after the signature of the testator (PärS § 23). According to the wording of the law, the testator must also write the date on the will by hand, but breach of this requirement does not bring about the invalidity of the will, when the date can be determined otherwise (PärS § 25 (2)), e.g. with the statements of the witnesses.

There is a special regulation about the reciprocal will of the spouses (PärS § 89–94). The law gives explicitly right to conclude this type of will only to the spouses. As the legal nature of the will can be complicated, it must be concluded in notarially authenticated form (PärS § 89 (3)).

Spouses can make dispositions with different legal nature: usual, reciprocal or correlative. Usual dispositions are in their legal nature different from ordinary dispositions the spouses make in separate will, reciprocal dispositions give benefits to the other spouse. Correlative dispositions on the other hand are unique, because their validity is mutually dependant: if one of the spouses annuls a correlative disposition, then the disposition of the other spouse corresponding to this is also void. When spouses do not make correlative dispositions or do not appoint a beneficial (successor or legatee) to the surviving spouse, then most of the special regulation does not apply and calling it a reciprocal will in this case can be misleading.

The main practical distinction from other types of wills arise when spouses make correlative dispositions, name each other reciprocally successors and name together also a person entitled to succeed after the surviving spouse (PärS § 90). This type of will according to law called a reciprocal will of spouses for benefit of third person, but sometimes also referred to as *Berlin type of will*.

Distinctive characteristic of Berlin type of will is that the freedom of testation after the death of one of the spouses is restricted. He or she can only alter the beneficiary third person when renouncing the benefits (succession of legacy) appointed to him or her. This kind of restriction of freedom of testation has been criticised in legal literature<sup>159</sup>.

Two types of reciprocal will of the spouses for benefit of third person can be distinguished: a will by principle of unification (PärS § 90 (3)) of by principle of separation (PärS § 90 (4)). If the type is not clear from the wording in the testament, then it is presumed that it is a will by the principle of unification.

By principle of unification the assets of deceased spouse and the assets of the surviving spouse blend to one lump of assets that cannot be distinguished (unification). The main legal consequence that arises is that the surviving spouse has the position of an heir of the deceased spouse and the beneficial third person succeeds the assets in the state they are at the time of death of the surviving spouse.

By principle of separation, on the other hand, the beneficial third person has right to the assets in the state they were at the time of death of the earlier deceased spouse. To guarantee it, the surviving spouse has only limited rights and is the position of a provisional successor (PärS § 45 (1)).

**3.3.1.5. Is there a (public) register of wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

In Estonia there is a succession registry that is maintained by the Chamber of Notaries (PärS § 176 (2)). The regulation concerning the registry is more specifically regulated by a [regulation](#) of Ministry of Justice.

The succession registry was created for two purposes. The first and more important goal was to create a common database for recording the existence and location of wills and succession contracts in order to facilitate their being found and the subsequent fulfilment of the last will of the testator. The secondary purpose of the register was to gather information about which notary was responsible for which succession matters.<sup>160</sup>

Digital transcripts of wills, except domestic wills, and succession contracts are stored in the archives of the succession register. A digital transcript of the original of a will or succession contract is deemed to be equal to the original unless a notation has been entered in the succession register indicating that the digital transcript was made of a transcript of the will or succession contract (PärS § 176<sup>1</sup> (3)).

A testator or a person with whom the testator has deposited his or her will may notify of making the domestic will and alteration and revocation thereof through web service or by submitting a notice to the registrar (PärS § 177<sup>1</sup> (3)).

Therefore, digital transcripts of notarial wills and succession contracts make them easier to find to solve a succession matter and they are deemed equal to the original. On the other hand, when a person notifies the registrar about a will, it also makes solving the succession matter easier, but it does not change the legal essence of the will, e.g a domestic will does not become a notarial will by the registering of the information about the will.

**3.3.2. Succession agreement (*negotia mortis causa*). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.**

There are two grounds of testate succession: a will or a succession contract. Succession contract prevails a will (PärS § 9 (2)). So in case a bequeather has drawn up a will and concluded a succession contract, the basis for succession is the contract.

<sup>159</sup> Liin, U., Nagel, U., 2001, 35–45.

<sup>160</sup> Liin, U., 2014, 197–205.

Succession contract must be made in notarially authenticated form (PärS § 100) and the parties must have full active legal capacity. Usually succession contracts are concluded at the same time as some other contract, e.g. life annuity contract (VÕS § 568). Only the part of the agreement that includes dispositions in case of death, are considered to be part of the succession contract. Succession contracts can be used in a way that the beneficial party agrees to fulfil some kind of obligation during the lifetime of the bequeather and receives a benefit for it later on the account of the estate.

Different types of dispositions are available for the parties, mainly positive (PärS § 95) and negative (PärS § 98) succession contracts can be distinguished. Positive succession contract is an agreement whereby the bequeather nominates the other party or another person as his or her successor or gives the party or person a legacy, testamentary obligation or testamentary direction. A negative succession contract is an agreement between a bequeather and his or her intestate successor whereby the latter renounces the succession. In the latter case, the other party usually receives some benefit in bequeather's lifetime on the basis of another contract and in return renounces beforehand the right to inherit.

### **3.3.3. Are conditions for validity of wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

It is inherent to succession law that the formal requirements for testamentary dispositions are strict to protect the will of the bequeather, who is unable to protect his or her own interests after the death. Therefore, succession law contains special formal requirements for wills and succession contracts. There has not been any Supreme Court cases, but in the case-law of the county courts and district courts shows, a relatively strict approach, when deciding whether the formal requirements were fulfilled. For example a question has arisen, whether a will signed in the presence of the witnesses is valid, when they were not both simultaneously in the room or if the signatures of the witnesses located before the signature of the bequeather.

The good moral and public policy, on the other hand are concepts that are regulated in the General Part of Civil Code Act (TsÜS § 86) and there is no special succession law regulation that would complement it. The grounds for voidance (cancellation) of the will by an interested party after the death of the bequeather by an interested party are also regulated by civil law including, e.g. mistake, threat or violence (PärS § 88 (7); TsÜS § 90–101)

### **3.3.4. Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

In Estonia there is a concept of compulsory portion/statutory share (PärS § 104–109) that gives entitled persons a monetary claim against the successors, if they were excluded from succession or received less than they would have in case of intestate succession.

To decide, whether a person has a right to compulsory portion, following questions should be analysed (PärS § 104 (1)):

1. Is the person a descendant, parent or a spouse of the bequeather, other relatives, e.g. brothers and sisters, ex-husbands, ex-wives or partners do not have right to compulsory portion.
2. Would the person be entitled to succeed in case of intestate succession, considering all the principles of intestate succession.
3. Has the bequeather excluded the person from succession or left him or her less than he or she would have received in case of intestate succession.
4. Did the bequeather have a valid obligation to maintenance towards the person at the time of death (PKS § 16; § 96 sqq).

Preclusive conditions:

1. The bequeather excluded person from succession validly with good ground (PärS § 108)

2. The right to claim compulsory portion is expired, because three years have passed of the moment since the person became aware of the opening of the succession and the disposition affecting his or her rights (PärS § 109)

If following conditions are met and there are no preclusive conditions fulfilled, then the person has right to claim for compulsory portion. It should be mentioned that the right to compulsory portion does not make the entitled person an heir at corresponding share, but gives monetary claim against the successors (PärS § 104 (5)).

Size of the claim and how to calculate it

A compulsory portion is one-half of the value of the share of an estate which a successor would have received in the case of intestate succession if all intestate successors would have accepted the succession (PärS § 105 (1)).

If a person entitled to claim a compulsory portion has been bequeathed a share of an estate which is smaller than a compulsory portion, he or she may claim the deficient share as a compulsory portion from the co-successors (PärS § 105 (2)).

To calculate the size of the monetary claim, following should be analysed (PärS § 105–106):

1. determine the share that the person would have inherited in case of intestate succession
2. determine the value of the estate at the time of death of the bequeather, taking into account both the rights and obligations
3. by determining the value of the estate:
  - take into account provisional successions, the spouse's preferential share and gifts made by the bequeather to other persons within the last three years before the death of the bequeather for the purpose of reducing the compulsory portion;
  - do not take into account the the burial expenses of the bequeather, expenditure for preparation of an inventory of the estate and valuation of the estate, and one month's maintenance expenditure for persons who were maintained by the bequeather.
4. Calculate the size of the monetary claim by considering the value of the estate and then calculate the value corresponding to the share that the person is entitled to.

It can be brought out that former Law of Succession Act (01.01.1997–31.12.2008) did not pose a requirement of existing maintenance obligation of the bequeather. Instead of that, the person had to prove the lacking of capacity to work, that posed many problems<sup>161</sup>. Supreme Court analysed the constitutionality of compulsory portion and deemed it constitutional, at the same time the criterion of lack of capacity to work was found problematic, especially in cases of persons who have retired<sup>162</sup>. That is the main reason the requirement was substituted with the requirement of the maintenance obligation of the bequeather.

Another question arose in Supreme Court practice related to interpreting the notion of excluding the person from succession. Supreme Court found that cases, where a person has been appointed as a successor, but where the actual value of the estate has been diminished by legacies, can also be interpreted as a situation where the person has been excluded from succession<sup>163</sup>. In that decision the former regulation was analysed and the wording of the present regulation can pose questions (PärS § 107 (1)), because it does not contain the term legacy. Nonetheless, the same argumentation could still be relevant, though there has not yet been new Supreme Court case-law to confirm it.

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<sup>161</sup> Liin, U., 2005, 85–94.

<sup>162</sup> See RKÜKo 22.02.2005, [3-2-1-73-04](#), p 20 sqq.

<sup>163</sup> RKTko 09.05.2012, [3-2-1-27-12](#), p 11.



### **3.3.5. Cross-border issues.**

#### **3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?**

Generally it can be said, the regulation is applied, without there being bigger issues to be specifically pointed out. When there is a succession matter that has an international element, then the rules of jurisdiction and applicable law have been applied without bigger problems, according to gathered information.

Furthermore, there are usually no problems accepting the certificates of succession from other countries, or in making entries to the land register.

Maybe one observation that could be pointed out, according to information gathered, is that the possibility to choose applicable law should be emphasised more by the notaries in the process of drawing up a will. According to the information received, the regulation is maybe viewed more as a regulation to solve succession matters, not as a regulation to apply already when drawing up a will. A notary should explain the possibility to choose applicable law and the explanations should also be present at the notarial deed in the part concerning the explanations by a notary.

#### **3.3.5.2. Are there any problems with the scope of application?**

According to the information gathered, biggest issue remaining is a practical one – how to gather relevant information about foreign law.

#### **3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country have experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?**

According to the information gathered, in practice there have not been many experiences with wills, where Estonian law was chosen as applicable law. The reason can be that the regulation has not yet been in force for such a period that there would be relevant cases to bring out as an example.

#### **3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?**

According to the information gathered, when determining the applicable law, there is no information about bigger problems that have arisen. Some notaries have authenticated wills, where the applicable law is chosen, usually Estonia law is chosen (art 24, 25 of the regulation).

Other types of testamentary dispositions are reciprocal wills of the spouses (that can be seen as succession contracts according to art 3 (1) b)) of the regulation. And succession contracts that are rare.

An example can be brought out from practice. A notary refused to authenticate a will, because the person wanted to be sure that adult descendants would be excluded from the succession. A notary refused, explaining that that cannot be absolutely guaranteed, because the knowledge of a notary about foreign law applicable, may not be as thorough as a notary from the country of the applicable law would have. Suggestion was made to consult a notary from the country of a law applicable.

#### **3.3.5.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?**

According to the information gathered, there have not been bigger problems accepting the certificates of succession from other countries or accepting European certificates of succession. Furthermore, the entries to the land register have been made related to those certificates of succession. A debatable question about division of labour in the land register department was brought out. The question is, whether a judge or an assistant judge should make entries related to European certificates of succession. In practice, a lot of assistant judges tend to send all those kind of matters to a judge, finding that there is need to apply foreign law.

#### **3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?**

According to the information gathered, so far in Estonia, nine European certificates of succession have been issued. There have not been negative experiences with issuing the certificates or with accepting the certificates issued in Estonia in foreign countries.

Though, it was mentioned that the European certificate of succession is very long. Before a practical problem was the expenses of translation of the certificate, there was one case where around 600 euros had to be paid just for translation. Lately, all the notaries were informed about existence of the dynamic form of European certificate of succession on the e-justice homepage that translates relevant parts automatically and should avoid further problems in the future.

Specifically European certificate of succession has been asked from Finnish and Swedish banks, also one experience was that European certificate of succession was issued, because a lawyer from Finland suggested it. Though the banks in Finland and Sweden should also accept without problems a certificate of succession made according to Estonian law.

#### **3.3.5.7. Are there any national rules on international jurisdiction and applicable law (besides the Succession Regulation) concerning the succession in your country?**

Yes (see question 2.3.6). Jurisdiction is regulated in Law of Succession Act (*PärS*<sup>164</sup> that states that succession proceedings shall be conducted by an Estonian notary if he bequeather's last residence was in Estonia (*PärS* § 165 (2)). Added to that, there is a specific exception when Estonian notary can conduct territorial succession proceedings concerning the assets in Estonia, in case the last residence of a bequeather was in a foreign state. Exception is that Estonian notary shall conduct succession proceedings if the succession proceedings cannot be conducted in the foreign state or the proceedings conducted in the foreign state do not include the property located in Estonia or the succession certificate prepared in the foreign state is not recognised in Estonia (*PärS* § 165 (3)).

Private International Law Act<sup>165</sup> (*REÕS*) regulates applicable law to succession matters. General rule is that succession is governed by the law of the last state of residence of the bequeather, but the bequeather may make a disposition in will or a succession contract and choose that the law of the state of citizenship applies to the estate (*REÕS* § 24, 25). There is a list of legal questions that form a part of a scope of law governing the succession (*REÕS* § 26).

Added to that applicable law to wills, to capacity to conclude a will and succession contracts and reciprocal wills is also regulated (*REÕS* § 27–29).

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## Links

- Ametlikud teadaanded, <https://www.ametlikudteadaanded.ee/>
- Analysis on the insolvency of the estate, [here](#)
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- Code of Civil Procedure – tsiviilkohtumenetluse seadustik ([TsMS](#)) – RT I 2005, 26, 197; RT I, 04.07.2017, 31
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Green line states the number of marriages and blue line the number of divorces (abielud – marriages, lahutused – divorces); Statistics Estonia. Eesti ei ole abielulahutuse osas enam Euroopa meister (05.11.2018), online [here](#)  
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# Finland

Tuulikki Mikkola

## 1. Social perspective.

### 1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without *affectio maritalis*).

The Finnish concept of a family is quite limited. The concept usually refers to the *nuclear family*. It includes the parents and their children. If grandparents, parents and children live together in the same dwelling, officially, only the parents and children form a family and the grandparents form a separate family of their own. Also a family without children is a family. Children of a family can also be born from previous relationships of the adults. If these children live with the couple, the family is called as a *stepfamily*. There are not always both parents in a family. It may consist of a mother or a father and his/her children. According to Statistics Finland's family statistics 2017, eighty-nine per cent of children aged under three live in families with two parents. In ten years, the share has gone down by two percentage points, while the share of children living in *one-parent families* in turn has grown by two percentage points. Of all babies aged under one, 91 per cent live with two parents and nine per cent with their mother only.<sup>1</sup> The adults forming family can be either the same or opposite sexes. The concept of a *rainbow family* refers to a family with gay, lesbian, bisexual or transsexual parents and their children. They include also families that have more than two parents.<sup>2</sup>

### 1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.

See 1.3.

### 1.3. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.

The number of marriages in 2017: 24.500. The number of divorces in 2017: 13.200.<sup>3</sup> According to Statistics Finland's data, there were 1,472,000 families in Finland at the end of 2017.<sup>4</sup>

### 1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).

The Statistics Finland provides data from which one can view key number data related to divorces between persons with Finnish background and persons with foreign background.<sup>5</sup>

<sup>1</sup> Statistics Finland, [https://www.stat.fi/til/perh/index\\_en.html](https://www.stat.fi/til/perh/index_en.html) (10.5.2019).

<sup>2</sup> What is family, <https://www.infofinland.fi/en/living-in-finland/family/what-is-a-family> (10.5.2019).

<sup>3</sup> Divorces, [http://www.stat.fi/tup/maahanmuutto/perheet/avioerot\\_en.html](http://www.stat.fi/tup/maahanmuutto/perheet/avioerot_en.html) (10.5.2019).

<sup>4</sup> For the number of families by type, see Official Statistics of Finland (OSF): Families, [http://www.stat.fi/til/perh/index\\_en.html](http://www.stat.fi/til/perh/index_en.html) (10.5.2019).

<sup>5</sup> Divorces, [http://www.stat.fi/tup/maahanmuutto/perheet/avioerot\\_en.html](http://www.stat.fi/tup/maahanmuutto/perheet/avioerot_en.html) (10.5.2019).

## 2. Family law.

### 2.1. General.

#### 2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL? There are several acts and decrees concerning FL.

Marital law can be found in the Marriage Act (the MA),<sup>6</sup> and the inheritance law in the Inheritance Code. Even though the marriage is now open also for same-sex spouses, the Act on Registered Partnerships is still relevant. The Act on the Dissolution of the Household of Cohabiting Partners is applicable to cohabiting (also to same-sex) partners who have lived in a shared household for at least five years or who have, or have had, a joint child or joint parental responsibility for a child. Child law is regulated separately and the main acts concerning child law are the following: the Child Custody and Rights of Access Act, the Act on the Enforcement of a Decision on Child Custody and the Right of Access, Child Maintenance Act, the Paternity Act, the Adoption Act.

#### 2.1.2. Provide a short description of the main historical developments in FL in your country.

The Finnish legal system originated during the period of Swedish rule. Swedish laws remained in force even when Finland was under Russian realm. Swedish legal system has had a profound influence on Finnish legislation. Finland achieved independence in 1917 and many of the acts prepared after this, were prepared in co-operation with Sweden and other Nordic countries. As a consequence, there are identifiable features in family and inheritance law statutes in Nordic countries. However, co-operation has been on decline during the recent decades and all of these countries – also in Finland – family and inheritance laws have been amended many times.

#### 2.1.3. What are the general principles of FL in your country?

Previously, the Marriage Act of 1929 was preceded by the Law on Property and Debts of Married Spouses of 1889 and the Code of Marriage of 1734. The law of 1889 was based on community of property and the guardianship of a husband over the wife. The husband administered all of the property and acted as a representative of a wife. As long as the marriage lasted, no transactions between spouses were allowed. Currently, the Marriage Act is based on the equality of the spouses and the principle of separation of property and debts. Transactions – including gifts - between spouses are also allowed. Spouses have a wide freedom of contract inter and *ultra partes*. The Marriage Act does not apply to cohabitation, though.

#### 2.1.4. Define “family” and “family member” in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?

Generally speaking, there is a single definition for a family. The term ‘family’ refers to married spouses and partners in a registered partnership. In addition, the term family member usually refers to individuals who are living together permanently but there might be some variations in respect to cohabitees. For instance, for tax purposes cohabitees are considered spouses only if they have or have had a child together, or if they have been married to one another previously.

Also children under the age of 18 years (children of one’s own, adopted children or children of one’s spouse or partner if living in the same household) belong to the family.

<sup>6</sup> <https://www.finlex.fi/fi/laki/kaannokset/1929/19290234> (10.5.2019).

### 2.1.5. Family formations.

#### 2.1.5.1. Define the “spouse” in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?

There can be different definitions for different purposes. One example is the legal status of cohabitantes. Provisions of the Marriage Act are not applicable to cohabitation and accordingly, cohabiting partners have no mutual liability of maintenance, they have no rights to each other's property etc. However, cohabitation has several statutory implications. For instance, in regulations concerning social insurance and income taxation, cohabitation and marriage are usually seen as equivalent.

#### 2.1.5.2. What types of relationships/unions between persons are recognised in FL of your country? In particular, formal (registered) and informal (*de facto*) unions, heterosexual and same-sex unions, unions with and without *affectio maritalis*. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?

See 2.1.1.

#### 2.1.6. What legal effects are attached to different family formations referred to in question 2.5.?

In terms of the relationship between parents and their children, different forms of families have only limited legal effects. The Paternity Act was passed in 1976 and since then the maintenance rights of children have been equal and not linked to the type of union of the parents. In addition, since 1983 the custody of the child has not been dependent of the type of union of the parents. Before this, only couples who were married could have a joint custody of a child. Thus, the type of the union between parents has relevance when a child is born, because it affects the establishment of paternity, in other words a relationship between the father and the child. If the parents are married at the time the child is born, a presumption of paternity is applied. If the parents are cohabiting or do not live in the same dwelling, paternity must be acknowledged or established by a decision of the court.

#### 2.1.7. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/*de facto* family formations? Explain briefly.

No.

### 2.2. Property relations.

#### 2.2.1. List different family property regimes in your country.

Pursuant to the Marriage Act, both spouse owns the property which he/she has acquired before the conclusion of marriage and which he/she acquires during it (the Marriage Act, section 34). Both spouses are independent in respect to debts; each is responsible for a debt that he/she has incurred regardless of whether it was incurred before or during the marriage. However, both spouses are jointly and severally liable for a so-called maintenance debt – a debt that either of spouses has



incurred for the maintenance of the family. Thus, joint liability does not cover a monetary loan even if it was incurred for purposes of maintenance. In addition, joint liability does not cover any other debt taken in order to maintain the family, if the creditor was aware that the spouses did not live together because of a breakdown of their relationship (the MA, section 52). Naturally the spouses are jointly and severally liable for debts that they have taken together regardless of the purpose of the debt. These provisions of the Marriage Act apply to registered partnerships, as a main rule. The MA is not, thus, applicable to cohabittees. The property of each cohabitee remains separate during and after the cohabitation. The maintenance debt is not known as there is no obligation to maintain the cohabiting partner.

**2.2.2. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?**

The main, default rule of the MA is that the spouses have a marital right to each other's property irrespective of whether the property is movable or immovable property (or whether it is situated in Finland or abroad). The property that is covered by the marital right (so-called marital property) is divided in case of dissolution of the marriage. Thus, a donor of a gift, a testator, or a policyholder is able to stipulate that the spouse of a donee, of an inheritor, or of an insurance beneficiary has no marital right to such property which his/her spouse has received as a gift, due to a will, or based on a beneficiary clause of an insurance (the MA, section 35). See also 2.2.3.

**2.2.3. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a "new regime just for them"?**

In a marital agreement concluded before or during the marriage, spouses or future spouses are able to exclude from the scope of the marital right any property which either of them already owns or later acquires (the MA, section 41). If the spouses have concluded a marital agreement according to which marital right is mutually excluded, only a separation of property takes place in the dissolution of the marriage (see 5.1.).

**2.2.4. Explain briefly the rules on the administration of family property and compare if there are difference for different property regimes.**

See 2.2.1 above.

**2.2.5. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

The agreement can be concluded before marriage, but it will only take effect after it has been registered with the register for matrimonial matters (in the Local Register Office).<sup>7</sup> Registration has to be done before an application for a divorce (the MA, sections 43-44). Everybody is entitled to receive information on whether the spouses have registered a marital agreement and on its contents.

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<sup>7</sup> See <https://www.maistraatti.fi/> (10.5.2019).

**2.2.6. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

See 2.2.1 above. The existence of a marital right/marital agreement does not affect the separation of debts in marriage.

**2.2.7. Describe allocation and division of property in case of divorce, separation or dissolution of the union.**

Pursuant to default matrimonial system of the Marriage Act, both spouses are entitled to receive half of the spouses' net marital property (the MA, section 35). The date of the institution of divorce proceedings determines property that is taken into account in the calculations. Any property that either spouse earns, inherits or receives as a gift after this date is not included in the calculation. The value of the property is determined on the date of the division. Each spouse's own debts incurred before to the institution of divorce proceedings and his/her share of the common debts have to be deducted and if a spouse is indebted, his/her net assets is marked as zero. Following this, the net marital assets (property covered by a marital right) of each spouse are calculated together and divided by two in order to determine a portion what a spouse has a right to. If one spouse's property covered by the marital right exceeds that of the other spouse, the difference is evened out. This end-result can be adjusted if the end-result would otherwise lead to an unreasonable detriment for one spouse, and the other spouse would receive an unjustifiable benefit due to the division (the MA, section 103b).

In case the spouses have mutually excluded the marital right, only a separation of property takes place. The separation means that both spouses receive their own property. However, also the separation of assets may be adjusted and it can be decided that part of the spouse's property or all of it is marital property.

If a cohabiting partnerships ends, a separation of the partners' property is carried out and each partner keeps his/her own property. In addition, a cohabiting partner is entitled to compensation if, through contributions to the shared household, he or she has assisted the other partner in accumulating or retaining his/her property, such that dissolution of the household solely on the basis of ownership would result in the unjust enrichment of one partner at the expense of the other. Furthermore, the law gives limited protection in case the cohabitation ends because of the death of a partner. A surviving cohabitee may have a right to a support paid from the estate of the deceased cohabitee (the Inheritance Code, chapter 8, section 2).<sup>8</sup>

**2.2.1. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?**

No.

**2.3. Cross-border issues.**

**2.3.1. Is your country participating in the enhance cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?**

Finland is participating.

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<sup>8</sup> Inheritance Code, [https://www.finlex.fi/fi/laki/kaannokset/1965/en19650040\\_20011228.pdf](https://www.finlex.fi/fi/laki/kaannokset/1965/en19650040_20011228.pdf) (10.5.2019).

**2.3.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as “marriage”, “matrimonial property agreement”, “partnership property agreement” etc.?**

I am expecting problems in defining the key concept “habitual residence”. See also 3.3.5.4.

**2.3.3. Are you expecting any problems with the application of the rules on jurisdiction?**

See 2.3.2.

**2.3.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

See 2.3.2. Problems in considering the possible pre-selection of law and whether there exists a tacit or implied choice-of-law.

**2.3.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

**2.3.6. Are there any national rules on international jurisdiction and applicable (besides the Regulations) concerning the succession in your country?**

There are Nordic Conventions that include regulations concerning jurisdiction, applicable law and recognition and enforcement<sup>9</sup>. In addition, there are two bilateral conventions, which contain orders concerning succession. These conventions are concluded between Finland and the Soviet Union (in 1979, applicable also between Finland and Russia) and between Poland and Finland (in 1980).

### *3. Succession law*

#### **3.1. General.**

**3.1.1. What are the main legal sources of Succession Law (SL) in your country? What are the additional legal sources of SL?**

The main legal source is the Inheritance Code. Also the Inheritance and Gift Tax Act is important at a practical level.

**3.1.2. Provide a short description of the main historical developments in SL in your country.**

See 2.1.2.

**3.1.3. What are the general principles of succession in your country?**

The Inheritance Code is based on the parentelic principle (groups of heirs), a widow is protected by special rules, forced portions restricts the testamentary freedom of the deceased. Universal

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<sup>9</sup> Nordic Convention on Succession 19.11.1934, Nordic Convention on Marriage 6.2.1931, Nordic Convention on the Recognition and Enforcement of Judgments Concerning Judgments in Civil Cases 11.10.1977.

succession is not applicable. Instead, inheritance is a process during which the estate property is administered before it can be distributed.

**3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.**

In general, authorities are not active in any proceedings concerning the estate. However, drawing up an estate inventory is obligatory. The estate inventory contains a list of the deceased person's assets and liabilities and it has to be completed within three months after the date of death. It must be sent to the Tax Administration of the deceased person's domicile within one month of being drawn up.<sup>10</sup>

**3.1.5. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?**

A person has a right to self-determination mortis causa, in other words, to dispose of his/her property by a will. The statutory order of inheritance may therefore be overridden by a will. Cumulative application of titles is possible. Forced shares and the minimum protection of a widow may, however, prevent the fulfilment of testamentary bequests in full or partly.

**3.1.6. What happens with the estate of inheritance if the decedent has no heirs?**

Inheritance devolves on the State. The estate is administered by the unit of Legal Affairs of the State Treasury Office.

**3.1.7. Are there special rules or limitations concerning succession with reference to the deceased's (or heir's) culture, tradition, religion or other characteristics?**

No.

**3.2. Intestate succession.**

**3.2.1. Are men and women equal in succession? Are domestic and foreign nationals equal in succession? Are decedent's children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?**

A person is able to inherit the deceased if he/she was alive at the moment of the deceased's death. Furthermore, also a child that was conceived prior to the deceased's death is able to inherit (the Inheritance Code, chapter 1, section 1). It depends whether a child is later born alive or not (Inheritance Code, chapter 2, section 2). Paternity may be confirmed after the deceased has died. Domestic and foreign nationals are equal in succession (the Inheritance Code, chapter 1, section 3). Neither it is relevant whether a person lives in Finland or not (thus, the taxation depends on the residence of the deceased and the beneficiary. If the deceased or a beneficiary lived in Finland at the time of death, Finnish inheritance tax is payable.<sup>11</sup>

<sup>10</sup> Estate inventory meeting and estate inventory deed, [https://www.vero.fi/en/individuals/property/inheritance/estate\\_inventory\\_meeting\\_and\\_estate\\_inv/](https://www.vero.fi/en/individuals/property/inheritance/estate_inventory_meeting_and_estate_inv/) (10.5.2019).

<sup>11</sup> Inheritance, <https://www.vero.fi/en/individuals/property/inheritance/> (10.5.2019).

Partners (also same-sex partners) of a registered partnership have the same title to inheritance as married partners. The partner of an unregistered partnership can become an heir only where a will provides it. Legislation does not give the unregistered partner right to inherit.

**3.2.2. Are legal persons capable of inheriting? If yes, on which basis?**

Yes. A legal person may be a beneficiary under a will.

**3.2.3. Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.**

Disinheritance is possible if the heir has, by a deliberate act, seriously offended the deceased of his/her close relatives. The disinheritance is possible also if the heir has continuously acted immorally (The Inheritance Code, chapter 15, section 4) The disinheritance has to be done in a form of a will. In addition, if a person has destroyed or concealed the will of a testator, a court is able to decide that the person has forfeited his/her inheritance rights or rights as a beneficiary of a will (the Code of Inheritance, chapter 15, section 4).

**3.2.4. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined? Are the heirs liable for deceased's debts and under which conditions?**

Chapter 2 of the Inheritance Code includes provisions of the right of the relatives to inherit and it is based on the parentelic principle. Heirs are sorted into groups and in each group (parentela) there is a right of substitution. The right is unlimited in the first two groups but in the third group the substitution is restricted. According to section 1, direct descendants have a primary right to inherit. Their shares are equal. If a child has died, his or her descendants shall take his or her place and each branch shall receive an equal share. In case someone can be found to belong to this first group of relatives, all the relatives that are more distant receive no share in the inheritance. Heirs of the second group include the parents of the deceased along with their children and children's children. Children of the parents inherit only if the parents of the deceased are not alive. They inherit the share of their deceased father or deceased mother. The third group of heirs includes the grandparents and if they are not living, their share devolves on their children. The right of substitution is restricted, as cousins of the deceased have no statutory right of inheritance.

As a rule, beneficiaries are not individually liable for the deceased person's debts. A beneficiary responsible for drawing up the estate inventory will only be individually liable for the deceased person's debts if he/she fails to submit the inventory by the deadline. The debts of the deceased person and the estate will be settled from the estate's assets. The beneficiaries will, however, be individually liable for any debts contracted by them on behalf of the estate.

A widow does not belong to any parentela which include only relatives of the deceased. A widow is an exception to the relative-based right to inheritance and in case the deceased was not survived by any heirs from the first group but was married at the time of the death, the widow has a right of inheritance (widow's legal position is regulated in chapter 3 of the Inheritance Code).

**3.2.5. What is the manner of renouncing the succession rights?**

An heir may renounce his/her right to the estate even before the death of a deceased. The renunciation has to be made in writing. However, if a heir has not received consideration at the time of the renunciation, or the consideration does not correspond the value of his/her forced portion, he/she is still entitled to the forced portions. A renunciation can also happen after the death of the

descendant. The requirement is that an heir has not taken part in the administration of the estate (the Inheritance Code, chapter 17, sections 1-2). An inheritance right can also be lost under the statute of limitation (the Inheritance Code, chapter 16).

### **3.3. Disposition of property upon death.**

#### **3.3.1. Testate succession.**

##### **3.3.1.1. Explain the conditions for testate succession.**

The statutory order of inheritance may be overridden by a will. If the will infringes the right to a forced share, it is possible though that the fulfilment of the will may be prevented in full or partly (the Inheritance Code, chapter 7). It should be noted that the infringement does not make the will invalid. In addition, the minimum protection of a widow may affect the fulfilment of the will (the inheritance Code, chapter 3, section 1a).

##### **3.3.1.2. Who has the testamentary capacity?**

A person who has reached the age of 18 years has a capacity to dispose of his/her property by a will. In addition, if a person has concluded a marriage prior to gaining majority, he/she obtains a testamentary capacity. A minor who has turned 15 is able to draw a will with regard to his/her own earnings from work (the Inheritance Code, chapter 9, section 1).

##### **3.3.1.3. What are the conditions and permissible contents of the will?**

See 3.3.1.4.

##### **3.3.1.4. Describe the characteristics of will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a will?**

The testator has a right to choose the content of his/her will but the form of a will is regulated in detail and interpreted in a rigorous way in practice. A will has to be made in writing, signed by the testator and witnessed by two witnesses (the Inheritance Code, chapter 10, section 1). The witnesses must be simultaneously present when the testator signs the will or acknowledges the earlier signature.

The extent of the rights under a will may vary in various ways and also joint wills are permitted.<sup>12</sup> (for different types of wills, see Tuulikki Mikkola: Family and Succession Law in Finland. Wolters Kluwer 2018, p. 97-98).

##### **3.3.1.5. Is there a (public) register of wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

There is no register of wills.

#### **3.3.2. Succession agreement (*negotia mortis causa*). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.**

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<sup>12</sup> Mikkola, T., 2018, 97-98.

The only acceptable way to make a disposition mortis causa is to make a will. An agreement pertaining to the estate of a living person is invalid (the Inheritance Code, chapter 17, section 1). The donation mortis causa is not accepted.

**3.3.3. Are conditions for validity of wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

By specific succession rules, see 3.3.1.4.

**3.3.4. Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

Direct descendants and adopted children, as well as their own descendants, are entitled to a forced share of the estate. The legal share amounts to half the value of the share of the estate devolving to that heir pursuant to the statutory order of inheritance (the Inheritance Code, chapter 7, section 1). It is notable though that a forced share is not a compulsory share and accordingly, it is always up to the protected heir whether he/she wants to claim for the share against a will. Also a widow is protected against a will made by the deceased spouse. However, the protection is not given in the form of a forced share. Instead, the widow has a right to keep the spouses' common home in his/her undivided possession for a lifetime (the Inheritance Code, chapter 3, section 1a). The right covers also the usual household effects. The surviving spouse has a right of possession unless the/she owns similar dwelling compared to spouses' common home. The dwelling has to be similar in terms of size and quality in order to hinder the protection (the Code of Inheritance, chapter 3, section 1a).

**3.3.5. Cross-border issues.**

**3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?**

There is only scant practice regarding cross-border successions in Finland. But in those few cases we have had so far the main problem has been the determination and interpretation of the "habitual residence".

**3.3.5.2. Are there any problems with the scope of application?**

The universality of the Regulation has caused some interpretational problems in respect to third countries (when there are connections to for instance USA or Asian countries).

**3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country have experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?**

I am not aware of cases where articles 6-7 have been applied. See also 3.3.5.1.

**3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?**

See 3.3.5.1. for problems in determining the habitual residence of the deceased. In Finland it is common to use multiple wills if a person has assets in different countries. Multiple wills can thus create challenges; it may be difficult to reconcile the provisions of the wills with each other. There also looms the risk of revocating the former will accidentally by the latter will. Further problems are caused by the fact that testators are not aware of the choice-of-law issues concerning the wills. The various elements included in a certain will, may point in the direction of a given national law. Whether this is sufficient to conclude that the person truly intended that his will be governed by that national law, is a matter for interpretation. There have also arisen many questions concerning implied choice-of-law. There have been problematic cases concerning the question when a will has been drafted in such a way that it can be deemed to point in the direction to certain legal system. In addition, if the applicable law has been foreign law, in practice there have been problems concerning the information concerning it: what is the true content of foreign legal rules and how one is able to find it.

**3.3.5.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?**

No.

**3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?**

In my opinion this system is now operating quite smoothly.

**3.3.5.7. Are there any national rules on international jurisdiction and applicable (besides the Succession Regulation) concerning the succession in your country?**

See 2.3.6.

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## France

Maria Virginia Maccari

### 1. Social perspective.

#### 1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without *affectio maritalis*).

The traditional family with a father and mother is no longer the only family structure found in France today. With the evolution of modern society, new models have appeared *la famille conjugale*: the family formed by a couple, whether heterosexual or homosexual, married or in a civil partnership.

- *La famille unilinéaire*: in which the child is descended from only one of the partners.
- *la famille monoparentale*: in which the child lives with one parent only, the result either of the parents' separation or the death of one of the parents
- *la famille recompose*: the result of marriage or of a civil partnership between two people who have children from a previous partnership.
- *la « famille » de fait*: where there are no legal ties and the couple living together are bound neither by marriage nor by civil partnership.

Separate mention should also be made of polygamous families. In the early 2000s immigration from former African and Asian colonies resulted in an influx of numerous polygamous family units.

It is important to remember that in France, Article 433-20 of the Civil Code regulates the offence of polygamy: "*Le fait, pour une personne engagée dans les liens du mariage, d'en contracter un autre avant la dissolution du premier, est puni d'un an d'emprisonnement et de 45 000 euros d'amende*".

Furthermore, Article 21-4 of the Civil Code and Article 222-9 CP deny to polygamous foreigners the right of citizenship "*because of unworthiness [and] a refusal to integrate*". Act no 93-1027 of 24<sup>th</sup> August 1993 on immigration (known as the Pasqua) establishes, in Article 15 bis, that a residence permit cannot be granted to a foreign immigrant who is living in a state of polygamy. A residence permit granted in ignorance of a state of polygamy must be withdrawn.

Article 30 of the same law establishes that "*when a polygamous foreigner resides in France with his first wife, the right to family reunification will not be extended to another wife. If the other wife is not deceased or her kinship rights have not lapsed, her children cannot enjoy the right to family reunification. A residence permit, which has been applied for or granted to another wife will be refused or withdrawn. The residence permit of a foreign immigrant who has brought more than one wife to live with him, or the child/children of a wife other than his first or of another wife now deceased or divorced, will be withdrawn*".

The above was confirmed in the modified law of 1998.

Moreover, in French law polygamy is a serious breach of Article 14 ECHR regarding equal rights for men and women (see also Decree no. 2012-127 of 30<sup>th</sup> January 2012 on the rights and responsibilities of naturalized immigrants). Decree no. 2006-911 of 24<sup>th</sup> June 2006 states that the polygamous immigrant, even when French citizenship has been conferred, cannot transmit such citizenship to his wife/wives *per juris communicationem* by a previous marriage.

The French criminal courts interpret Article 433-20 CP very strictly. The Appeals Court in Rouen in a sentence of 29/11/2007 declared that "*any marriage celebrated in France, even when between foreigners, is null and void whenever at least one of the spouses is, at the moment of marriage, still part of another undissolved marriage*". The Appeals Court in Paris on 12/02/2009 denied any kind of retroactive amnesty, because the offence of bigamy and/or polygamy cannot be discharged even

when the previous marriage is dissolved by divorce. As far as the recognition of polygamous marriages contracted abroad is concerned, the French courts (Paris Appeals Court, 22<sup>nd</sup> February 1978) do not impede the contracting of polygamous marriage abroad, as long as it does not impinge, explicitly or otherwise, on the French juridical system. The French courts recognize polygamy if the marriage between adults was celebrated abroad according to the law in force in that particular place. In other words, the second marriage is valid, but this union must not affect France's Non-Contentious Jurisdiction either in formal legal terms or in socio-factual terms.

### **1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.**

228 000 marriages were recorded in France in 2017, 221 000 between people of different sexes and 7000 between people of the same sex. The number of marriages between people of different sexes continues to fall (- 5 000). In 2017, marriages between people of the same sex were equally divided between marriages between two women and those between two men. The number of marriages between two women has been rising continuously since 2013, the year when the law allowing same-sex marriage was passed<sup>1</sup>.

In the case of heterosexual marriages, the average age at which people are getting married is progressively rising: in 2017 it stood at 38.1 for men and 35.6 for women. In 1997 the average age at which men married was 32.9, while for women the age was 30.3 (over 5 years less than 2017).

The statistics for homosexual couples tell a different story. When same-sex marriage was legalized in 2013 many people who had been together for a long time decided to get married: in 2013 men's average age was 49.8 and for women 43.0. That average age has been falling since then and in 2017 stood at 44.0 for men and 39.1 for women.

In 2016 192 000 civil partnerships were performed, which amounted to 3000 more than the previous year. Of these 7000 involved people of the same sex. The number of civil partnerships has been on the increase since 2002, with the exception of the year 2011 when changes were made to tax laws. Since 2011 couples who get married or who enter into a civil partnership can file three separate tax returns for the year in which they were joined in union.<sup>2</sup>

In 2016 there were four civil partnerships to every five marriages between people of different sexes. For same-sex couples there were as many civil partnerships as there were marriages.

According to data from the *Commission Nationale Consultative des Droits de l'Homme de l'Assemblée Nationale*, which was asked in 2005 to look into the question of polygamy, there are between 16 000 and 20 000 polygamous families. Estimates suggest that there are up to 180 000 people affected by polygamous relationships<sup>3</sup>. More recently polygamy has been growing rapidly in France, and now involves a total of about 40 000 families, mostly Muslim.

### **1.3. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.**

In 2016 there were 128 000 divorces, 4 400 more than in 2015. More than half of these were by mutual consent. The year 2015 saw a reverse in the almost continuous decline in the number of divorces since the peak in 2005 (the year after the passing of law simplifying the divorce process)<sup>4</sup>. With the law reform relating to divorce by mutual consent before a notary entered into force on 1 January 2017, the number of divorces by mutual consent pronounced by the judge fell by 53% in 2017<sup>5</sup>.

<sup>1</sup> <https://www.insee.fr/fr/statistiques/3305173> (12.5.2019).

<sup>2</sup> <http://www.justice.gouv.fr/statistiques-10054/donnees-statistiques-10302/pactes-civils-de-solidarite-pacs-25129.html> (12.5.2019).

<sup>3</sup> [www.cncdh.fr](http://www.cncdh.fr) (12.5.2019).

<sup>4</sup> [https://www.ined.fr/fichier/rte/41/2017-4EN\\_Conjoncture\\_BretonEtAL.pdf](https://www.ined.fr/fichier/rte/41/2017-4EN_Conjoncture_BretonEtAL.pdf) (12.5.2019).

In 2015, there were 79 386 dissolutions of PACS. In 2011, 52 002 formal unions were dissolved. In 55% of the cases, this dissolution resulted from a common agreement or a unilateral will of one of the couple's members. In 40% of the cases, this dissolution was due to a marriage.

**1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).**

In 2015 33800 marriages were performed between people of French nationality and foreigners. The proportion of transnational marriages is growing: it has gone from 6% in 1950 to 14% in 2015. In 2015 half these transnational marriages involved a foreign woman and a French man, and the other half a French woman and a foreign man. Marriages in which both parties were foreign amounted to 4% of the total in 2015<sup>6</sup>.

## 2. Family law.

### 2.1. General.

**2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?**

The main source of family law is the *Code Civil*, which brought together all the main modifications to family law introduced over the years.

The *Code Civil* remains the primary reference for matters relating to family law: book I, on “persons” includes marriage, divorce, filiation and parental authority (and, since 1999, civil partnerships) while patrimonial issues – matrimonial regimes, gifts and succession are dealt with in book III.

Among additional legal sources we should mention the *Code de l'action sociale et des familles*: this governs areas such as social care and the kinds of care available to children, the elderly, the disabled and the poor. The code also regulates the social services, social and socio.-medical institutions and sets them within the relevant legal framework.

**2.1.2. Provide a short description of the main historical developments in FL in your country.**

Family law in the 1804 *code civil* covered marriage, divorce, filiation, paternal power and tutelage/guardianship. Analysis of the legal dispositions relating to these themes allows us to identify the features of family law at that time.

- Types of family

In 1804, the civil code only recognized the family, which was founded on marriage, i.e. the legitimate family. Marriage was firmly encouraged while divorce was severely restricted.

- The role of the wife

In 1804 wives were subject to the authority of their husbands, to whom they owed obedience (article 213, c.c.). The wife was legally incompetent and to fulfil certain tasks, required the permission of the husband or a judge.

- The role of the husband

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<sup>5</sup> <http://www.justice.gouv.fr/statistiques-10054/donnees-statistiques-10302/les-divorces-et-ruptures-dunion-25130.html> (12.5.2019).

<sup>6</sup> <https://www.insee.fr/fr/statistiques/3303338?sommaire=3353488> (12.5.2019).

The husband was the sole legitimate head of the family in the Napoleonic code. The management of the legitimate family was the exclusive responsibility of the husband, who exercised his paternal power alone over his offspring, and was able to use powerful forms of discipline, including the possibility of imprisonment.

- Rejection of the natural family in the Napoleonic code

In 1804, people living together were not recognised in law. Children born out of wedlock, who were then called “natural children” possessed fewer rights than legitimate children.

In the 19th century, family law enjoyed a period of stability, except where divorce was concerned. In fact, divorce was first abolished by the Bonald Act of 8th May 1816, only to be brought back by the Naquet Act of 27 July 1884, but only where negligence could be proved.

The 20th century, by contrast, was a period of great change in family law.

The Act of 13th July 1907 allowed women to earn money and to dispose of their salaries and earnings as they saw fit.

The Act of 18 February 1938 abolished women’s legal incompetence.

The Act of 22nd September 1942 to some degree increased the rights of married women, involving them in the management of the family.

The Carbonnier era. From 1964 to 1985 Carbonnier drove through significant changes to family law in a number of different areas (disability, the spouses’ property rights, divorce, filiation and parental authority):

- The Act of 14th December 1964 on guardianship and emancipation
  - the Act of 13th July 1965 on the reform of patrimonial regimes
  - the Act of 3rd January 1968 on the reform of the rights of incompetent adults
  - the Act of 4th June 1970 on parental authority
  - the Act of 3rd January 1972 on filiation
  - the Act of 11th July 1975 on divorce reform
  - the Act of 23rd December 1985 on equal rights for spouses in patrimonial matters and of parents in the management of children’s property
- After Carbonnier came a new wave of reforms to family law. However, while the laws adopted during the Carbonnier period formed a coherent set of reforms, it has often been pointed out that the reforms brought in, one after another, after 1999 have lacked any kind of coherence:
- the Act of 15th November 1999 on the introduction of civil partnerships
  - the Act of 3rd December 2001 on the abolition of the category of “illegitimate children” and the unification of the rules applying to children
  - the Act of 4th March 2002 on the surname and parental authority
  - the Act of 26th May 2004 on divorce reform
  - the Act of 17th May 2013 on the recognition of same-sex marriage and on the rights of homosexual couples to adopt
  - the Act of 18th November 2016 which allowed divorce by mutual consent without the need for a legal judgment

### **2.1.3. What are the general principles of FL in your country?**

As a result of the significant reforms of French family law during the last two centuries, we can say that the key principles of modern family law are as follows:

- The freedom to marry and equality between spouses including in property rights and in their rapport with children;
- The freedom to divorce, without any limitation;
- The equality of children born in or out of wedlock;
- The equality between opposite-sex and same-sex marriages.

**2.1.4. Define “family” and “family member” in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

The difficulty in replying to this question lies in the fact that French law does not define “family” and does not legislate for it as an entity, but rather regulates the relationships between its component parts. According to J. Carbonnier, “family” indicates the group of people united by marriage, consanguinity and kinship through marriage, which are also the consequence of marriage and filiation. Therefore, outside marriage it is kinship which makes the family. As a result, cohabitation and civil partnership create a family unit recognised in social and fiscal law, but do not create a family, according to civil law, if there are no children. This is why it is said that, apart from marriage, it is a child which makes a family. Another author, on the other hand, declared that the only certainty in this matter is that the “family” means a “group of people”.

**2.1.5. Family formations.**

**2.1.5.1. Define the “spouse” in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

Spouses are defined as two married people of the same or different sexes.

The spouse is the person who has contracted marriage with another person of the same or a different sex. The law on marriage determines the marital relationship.

The conditions which shape a marriage:

1. biological conditions:
  - the ages of the spouses (18 for both sexes)
  - the spouses’ sex (same-sex marriage made legal by the May 2013 law)
2. Psychological conditions
  - the spouses’ consent
  - the effectiveness of the consent
  - the integrity of the consent
3. Sociological conditions
  - monogamy
  - the ban on incest
4. Formal requisites
  - celebration before a public authority
  - the preparation and celebration before a public official

The definition of spouse can be regarded as valid in all areas of the legal system.

**2.1.5.2 What types of relationships/unions between persons are recognised in FL of your country? In particular, formal (registered) and informal (*de facto*) unions, heterosexual and same-sex unions, unions with and without *affectio maritalis*. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

There are three types of union recognised in French law: marriage, civil partnership and cohabitation (free union). Prior to the Act of 15 November 1999, only marriage had legal recognition in French law. Marriage is defined as the union between two people of the same or different sexes, legitimised by a solemn declaration before a civil registrar. This union is made in order to establish a life together and to produce a family.

The PACS, or Civil Solidarity Pact (civil partnership), is provided for by article 515-1 of the Civil Code and is defined as “*a contract between two people over the age of 18, of the same or different sex, to organise their life together*”. As with marriage, this contract can be dissolved only if certain conditions, laid down by the law, are met. Unlike marriage, which has existed since antiquity, the PACS came about as the result of considerable pressure, particularly from the gay community who, at that time (prior to the law of 17<sup>th</sup> May, 2013), could not be joined in marriage. However, demand for this type of civil union was also driven by heterosexual couples who wanted to organise their lives together in a more flexible way than that offered by the institution of marriage, which imposes fairly strict conditions on terminating the contract, which may put some couples off.

Unregistered free unions (cohabitation) are recognised by article 515-8CC, but are not regulated by it.

Marriage and PACS civil partnerships.

The two types of union differ mainly because of their nature. The civil partnership is basically regarded as a kind of contract while marriage is seen as a real institution, and by some as a religious sacrament. Various articles of the civil code underline the conventional nature of the PACS (articles 515-1, 515.3). Furthermore, the Constitutional Council stated that “*the civil code articles 1109 and those following, which concerned the contract, are applicable to the civil partnership*”. Accordingly, even if the dispositions regarding the PACS are contained in the first book of the civil code (on people’s rights), it is subject also to the rules of the contract which are found in the third book of the civil code. Disputes arising from this type of civil partnership are handled by the *Tribunal de Grande Instance* rather than the *Juge aux Affaires Familiales*.

What really distinguishes these two forms of union is their purpose. Indeed, as article 203 of the civil code reminds us: “*les époux contractent ensemble, par le seul biais du mariage, l’obligation de nourrir, entretenir et élever leurs enfants*”. The aim of marriage is, therefore, to start a family, while the aim of the PACS is to organise the life of the couple. There is no mention of the idea of having children or starting a family.

Furthermore, the contractual nature of the civil partnership makes the conditions of its application more flexible than those of marriage. In fact, the latter is subject to the rules of public order.

Before the Act of 17<sup>th</sup> May 2013, only people of the opposite sex could marry, while the civil partnership has always been open to gay couples as well. What’s more, cousins can enter into this type of civil union, but cannot get married.

#### **2.1.6. What legal effects are attached to different family formations referred to in question 2.5.?**

There are also differences in the effects produced by these unions. The civil partnership basically produces property consequences. In addition, it is much easier to dissolve a PACS than dissolve a marriage. In order to end a marriage, the parties must obtain a divorce or seek an annulment, while a PACS may be terminated either by means of a mutual or unilateral declaration by the partner(s) or by their decision to marry or in the event of the death of one of the partners. The dissolution of a PACS takes effect from the date of registration. The procedure is therefore somewhat faster than that involved in a divorce. Lastly, the duties and obligations of a married couple differ from those in this kind of civil partnership. Unlike in a marriage (Article 212 of the Civil Code), a civil partnership does not impose the duty of fidelity or respect. However, the 2006 reform (Article 515-4 of the civil code) introduced personal obligations on partners in a PACS (such as living together and moral/material assistance)

**2.1.7. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/*de facto* family formations? Explain briefly.**

These unions, *PACS* in particular, have been the subject of frequent legislative interventions over the last twenty years. There are currently no proposals for further reform.

**2.2. Property relations.**

**2.2.1. List different family property regimes in your country.**

In France, if spouses have not made a contract, the community of property is the default regime (*communauté légale* also called *communauté réduite aux acquêts*) (Art. 1400 French Civil Code) The French Civil code regulates three types of matrimonial property regimes besides the default of community of property:

- 1. The conventional community (Art. 1497-1528 French Civil Code).
- 2. The separation of property (Art. 1536-1543 French Civil Code).
- 3. The participation in acquisitions (Art. 1569-1581 French Civil Code).

**2.2.2. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?**

Where there is no matrimonial property agreement the spouses are subject to the community of property regime: the community of acquisitions (articles 1400-1491 of the Civil Code). Assets acquired for valuable consideration after the marriage are joint. However, assets already owned by one of the spouses on the day the marriage is celebrated, or acquired through gift, legacy or inheritance and assets of a "personal nature" are owned separately (article 1404 of the Civil Code). For civil partnerships (*PACS*), the legal regime is that of property separation. Article 515-5 of the Civil Code stipulates, in fact, that unless partnership property agreement provides otherwise, each partner keeps administration, has use and free disposition of his or her personal assets and has the personal obligation to pay his or her personal debts which occurred before or during the *PACS*. If no partner can prove that one asset is his or her personal property, the asset is deemed to belong jointly to both partners (article 515-5 para. 2 of the Civil Code).

**2.2.3. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a "new regime just for them"?**

Article 1387 of the Civil Code enshrines the principle of the spouses' freedom to manage their property relations. They can opt for conventional community (articles 1497 et seqq of the Civil Code), universal community, in which assets and debts are shared jointly (article 1536 of the Civil Code), separation of property where there is no sharing of property (articles 1536 et seqq. of the Civil Code) and the participation in acquisitions, regime in which there is no community of assets but each spouse, in the event of divorce or death, is entitled to receive monetary compensation where he/she has accumulated less wealth than the other spouse during the marriage (articles 1569 et seqq of the Civil Code).



The spouses may never derogate from the application of the “primary” regime, which applies as a automatic effect of the marriage (article 212 et seq. of the Civil Code)<sup>7</sup>

Since 1 May 2013, Franco-German couples have been able to opt for the new optional Franco-German matrimonial property regime. The optional matrimonial property regime is open not only to marriages between French and German nationals, but also to French or German couples living abroad, or foreign couples living in France or Germany. The optional matrimonial property regime of the community of accrued gains was created to address legal difficulties that may arise from marriages between persons of different nationalities or persons not living in their country of origin. This regime is largely based on a participation in acquisitions regime (a regime of separation throughout the duration of the marriage and, upon its dissolution, each spouse is entitled to half of the assets acquired during the marriage)<sup>8</sup>.

The matrimonial property agreement must be drawn up by a notary (article 1394 of the Civil Code). The marriage certificate must indicate whether an agreement has been drawn up and the name and address of the witnessing notary (article 76 of the Civil Code). Failing this, the spouses are deemed with regard to third parties to be married under the regime of universal community. The matrimonial property agreement must be concluded prior to the celebration of the marriage and shall take effect on the day of the marriage (article 1395 of the Civil Code). After the matrimonial property regime has been in force for two years, the spouses may decide to change said regime by way of notarial deed (article 1397 of the Civil Code). The creditors and adult children of each spouse may oppose such an amendment. In such a case or if one of the spouses has children who are minors, the act must be ratified by the courts.

In this regard, the recent *Réponse ministérielle française* (Rép. min. n. 91647 of 27th September 2016) seems interesting: in an attempt to stimulate the recovery of the domestic market and to simplify matters for companies, it observed that the two and a half year deadline as per Article 1397 of the civil code constituted an obstacle which needed to be removed and announced that in the first half of 2017 «*le délai sera supprimé et les époux pourront modifier leur régime matrimonial aisément avant tout nouveau projet entrepreneurial*». The legislator in France has removed the above time limit with the Article 8 of Act n°2019-222 of 23 March 2019.

Registered partnerships (civil partnerships/PACS) are regulated by articles 515-1 et seq. of the Civil Code.

Pursuant to article 515-5-1 of the Civil Code, the partners may, by agreement, choose to submit to the regime of joint ownership the assets which they acquire, together or separately, from the registration of these agreements. However, in accordance with article 515-5-2 of the Civil Code remain the exclusive property of each partner the assets listed in this article. For the administration of joint ownership, partners may enter into an agreement for the exercise of their undivided rights under the conditions set out in articles 1873-1 to 1873-15.

#### **2.2.4. Explain briefly the rules on the administration of family property and compare if there are difference for different property regimes.**

Each spouse may administer and dispose of his or her separate property (article 1428 of the Civil Code which echoes article art. 225 of the Civil Code)<sup>9</sup>. The principle applies very broadly to all goods, movable and immovable property. It concerns conservative acts, acts of administration or acts of disposition. Each spouse is free to alienate, by gratuitous or onerous title, his own property. Each spouse is free to perceive and to consume the fruits and incomes.

<sup>7</sup> <http://www.coupleseurope.eu/en/france/topics/3-how-can-the-spouses-arrange-their-property-regime> (12.5.2019).

<sup>8</sup> [http://www.presse.justice.gouv.fr/art\\_pix/LActuJUSTICE\\_Numero\\_6.pdf](http://www.presse.justice.gouv.fr/art_pix/LActuJUSTICE_Numero_6.pdf) (12.5.2019).

<sup>9</sup> <http://www.coupleseurope.eu/en/france/topics/2-is-there-a-statutory-matrimonial-property-regime-and-if-so-what-does-it-provide> (12.5.2019).

Each spouse has the power to administer and dispose alone of joint property (article 1421 para. 1 of the Civil Code ) subject to being accountable for faults committed in his or her management. Transactions entered into without fraud by a spouse are enforceable against the other.

However, because of their importance, some transactions relating to joint property must be co-managed. This means that the transaction must be made by both spouses or by one of them but with the consent of the other. One spouse may not, without the other<sup>10</sup>:

- dispose *inter vivos*, gratuitously, of the community assets (article 1422 para. 1 of Civil Code);
- assign a common property to guarantee a third person's debt (article 1422 para. 2 of Civil Code);
- transfer or encumber with rights in rem immovables, business assets and enterprises depending on the community, or non-negotiable rights in a firm and tangible movables whose alienation requires public notice. One spouse may not, without the other, collect the capital coming from those operations (article 1424 of Civil Code);
- give or lease rural land or immovables for commercial, industrial or artistic use, belonging to the community (article 1425 of Civil Code);
- dispose of the rights whereby the family house is ensured (article 215 para. 3 of the Civil Code).

If one spouse exceeds his or her powers over community assets, the other, unless having ratified the act, may call for annulment of it. The action for annulment may be brought by the spouse during two years after the day when he had knowledge of the transaction, without ever being admissible more than two years after the dissolution of the community (article 1427 of Civil Code).

In the event of the improper exercise of powers or unfitness on the part of one spouse, the other spouse may apply to the court to be substituted for him or her in the exercise of those powers (article 1426 of the Civil Code).

A spouse may administer his or her spouse's separate property where so authorised expressly (article 1431 of the Civil Code), tacitly (article 1432 of the Civil Code) or in a court ruling (article 1429 of the Civil Code)<sup>11</sup>.

Civil partners are jointly and severally liable for debts contracted by one of the partners for "everyday needs" (article 515-4 of the Civil Code).

Each partner remains free to administer his or her property and remains liable for his or her personal debts. Property for which ownership is not established is presumed to be jointly owned (article 515-5 of the Civil Code). Partners may also stipulate that property acquired during the partnership is jointly owned (article 515-5-1 of the Civil Code).

**2.2.5. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

There is no register of matrimonial property or register of matrimonial property agreements in France<sup>12</sup>.

Article 1397 of the Civil Code ruled that adult offspring and those who were part of a matrimonial property agreement should be informed personally of the intention to modify the property regime. The couple's creditors are notified by means of an announcement published in a newspaper authorized to print legal notices. If the change in matrimonial property regime involves the couple's property, article 1303 Code of Civil Procedure establishes that the deed must be registered in the property register at the Mortgage Registry (Bureau de la conservation des hypothèques).

With regard to the PACS, since 1 November 2017, the registration of the PACS takes place in the town hall (and no longer in the court of first instance). The Act n°2016-1547 of 18 November 2016

<sup>10</sup> Ferrand, F., Braat, B., 2008, 34.

<sup>11</sup> <http://www.coupleseurope.eu/en/france/topics/2-is-there-a-statutory-matrimonial-property-regime-and-if-so-what-does-it-provide> (12.5.2019).

<sup>12</sup> <http://www.coupleseurope.eu/en/france/topics/4-can-or-must-the-matrimonial-property-regime-be-registered> (12.5.2019).

has provided for the transfer to the registrar powers vested in the Registrar for PACS drawn up by private deed.

The partners who conclude a civil union submit the agreement between them to the Civil Registrar who registers the declaration and carries out the publicity formalities.

When the PACS is concluded by notarial deed, the notary collects the partners' declaration, carries out the registration of the PACS and makes the publicity formalities. The agreement whereby the partners amend the PACS is addressed to the Civil Registrar or to the notary who received the initial deed in order to be registered there. The fact of a PACS being established, or cancelled, is noted in the margin of each partner's birth certificate together with the name of the other partner (article 515-3 of the Civil Code).

If the partners conclude, pursuant article 515-5-3 para 2 of Civil Code, an agreement for the administration of joint ownership, this agreement, on pain of non-enforceability against third parties, on the occasion of each deed of acquisition of a property subject to land advertising, is published in the land Registry.

**2.2.6. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

Debts which the spouses owed on the day of the celebration of the marriage, or with which the successions and gratuitous transfers falling to them during the marriage are burdened, remain personal to them, both as to capital and to arrears or interest (article 1410 of the Civil Code). Indeed, as stated by article 1411 para. 1 French Civil Code, in those cases creditors of either spouse may only enforce payment on the separate property "and the income" of their debtor. However, these creditors may also seize community assets where the movables which belonged to their debtor on the day of the marriage or which fell to him by succession or gratuitous transfer have been merged into the community assets and can no longer be identified under the rules of Article 1402.

Payment of debts which either spouse owes, for whatever reason, during the community, may always be enforced on community property, unless there was fraud of the debtor spouse and bad faith of the creditor, and subject to reimbursement due to the community, if there is occasion (article 1413 of the Civil Code ).

Each spouse may obligate only his or her personal assets and his or her income, by surety or loan, unless they have been contracted with the express consent of the other spouse, who, in that case, does not obligate his or her personal assets (article 1415 of the Civil Code).

Finally, where the debt is contracted jointly and severally by the spouses, it may be enforced against all family assets (article 1418 of the Civil Code). This is the case in particular with all debts incurred for maintaining the household or educating the children (article 1414 of the Civil Code)<sup>13</sup>.

People living together who are registered are entirely responsibly for any debts incurred relating to "daily needs" (Article 515-4 of the Civil Code)<sup>14</sup>.

**2.2.7. Describe allocation and division of property in case of divorce, separation or dissolution of the union.**

When the marriage terminates, the matrimonial regime of the couple is wound up and each spouse, according to the regime chosen, is allocated a portion of the assets accrued during the marriage.

Divorce is a cause of dissolution of matrimonial community of property. If the spouses are married under the legal regime, each spouse shall retake that of his or her property. Then shall take place the

<sup>13</sup> <http://www.coupleseurope.eu/en/france/topics/2-is-there-a-statutory-matrimonial-property-regime-and-if-so-what-does-it-provide> (12.5.2019).

<sup>14</sup> <http://www.coupleseurope.eu/en/france/topics/8-what-does-the-law-provide-for-the-property-of-registered-and-non-registered-partners> (12.5.2019).

liquidation of the common stock, as to assets and liabilities (Article 1467 of the Code Civil). After all appropriations have been carried out on the stock, the excess shall be divided by halves between the spouses (article 1475 of the Code Civil).

Prior to such division, shall be established in the name of each spouse an account of the reimbursement (article 1468 of the Code Civil) which the community owes to him or her (article 1433 of the Code Civil) and of the reimbursement which he or she owes to the community (article 1437 of the Code Civil).

Where the spouse is a debtor, his or her share in the distribution of common property is reduced. Where he/she is a creditor, he/she may exercise his or her right by appropriating common property<sup>15</sup>.

In the event of divorce, each spouse remains liable for debts that were his or her separate debts during the marriage<sup>16</sup>. Each spouse may be sued for the whole of the debts existing on the day of dissolution, which had entered into the community in his or her own right (article 1482 of the Code Civil). Each spouse may be sued only for half of the debts which had entered into the community in the other spouse's right (article 1483 of the Code Civil).

In the event of death, the matrimonial community is dissolved and then divided in two. The surviving spouse receives one half and the other half devolves to the heirs of the deceased spouse. But in practice, it often happens that if the spouses have children, the community is maintained and the division only takes place after the death of the surviving spouse, enabling the latter to benefit from all the revenues of all the assets (separate assets of the first deceased spouse and community assets)<sup>17</sup>.

The surviving spouse is also an heir and his or her rights vary according to the other heirs (articles 756 et seq. of the Code Civil).

Where a predeceased spouse leaves children or descendants, the surviving spouse shall take, at his or her option, either the usufruct of the whole of the existing property or the ownership of the quarter where all the children are born from both spouses and the ownership of the quarter in the presence of one or several children who are not born from both spouses (article 757 of the Code Civil).

Where, in the absence of children or descendants, a deceased leaves his father and mother, the surviving spouse shall take one half of the property. Where the father or the mother is predeceased, the share which he would have taken devolves to the surviving spouse (article 757-1 of the Code Civil). In the absence of children or descendants of the deceased or of his father and mother, the surviving spouse shall take the whole succession. (article 757-2 of the Code Civil).

In the participation in acquisitions regime, there is no community or common property. When the regime is dissolved, the spouse who has accumulated less wealth has a simple personal claim against the other. A claim for participation gives rise to payment in money. Where a debtor spouse meets serious difficulties in making it entirely as soon as the liquidation is closed, the judges may grant him or her a time, which may not exceed five years, subject to the condition of giving security and paying interest.

A claim for participation may however give rise to a settlement in kind, either by consent of both spouses, or under an order of the judge where the debtor spouse proves serious difficulties, which prevent him or her from discharging it in money (article 1576 of the Code Civil).

This claim for participation is equal to half of the difference between the wealth of each spouse accumulated during the regime (article 1575 of the Code Civil), taking into account their original assets and final assets (article 1570-1574 of the Code Civil). The application for participation is time-

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<sup>15</sup> <http://www.coupleseurope.eu/en/france/topics/5-what-are-the-consequences-of-divorce-separation> (12.5.2019).

<sup>16</sup> <http://www.coupleseurope.eu/en/france/topics/5-what-are-the-consequences-of-divorce-separation> (12.5.2019).

<sup>17</sup> Ferrand, F., Braat, B., 2008, 45.

barred after three years from the dissolution of the matrimonial regime (article 1578 para. 4 of the Code Civil)<sup>18</sup>.

**2.2.8. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?**

No, there are no special rules or limitations concerning property relationships between spouses or partners with reference to their culture, tradition, religion or other characteristics. Dowry is not regulated under French legislation.

**2.3. Cross-border issues.**

**2.3.1 Is your country participating in the enhanced cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?**

Yes, France participates in enhanced cooperation (Council Decision EU 2016/954 of 9 June 2016) with regard to the two Regulations: 1103/2016 and 1104/2016.

**2.3.2 Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as “marriage”, “matrimonial property agreement”, “partnership property agreement” etc.?**

Yes. Problems could arise regarding the definition of property relationships: the concept of property relationships is defined differently in the Regulations and in the Civil Code in France. In particular, the European idea of property relationships is broader and includes some rules, which form part of the “primary regime”.

The “primary regime” is a French concept, which brings together public order laws, which are applicable to all couples independently of their chosen property relationship. For example, the duty of fidelity and respect (a “non-patrimonial” regulation) or the necessity for an agreement between the two spouses when selling the matrimonial home (a “patrimonial” regulation) are covered by the “primary system”. In France this “primary system” differs from “property relationships” because the former is imperative, while the latter can be freely modified by the spouses.

The European idea of “property relationships” also encompasses the “primary regime” rules<sup>19</sup>.

The question also arises as to whether the spouse’s temporary right to freely use the family dwelling (article 763 of the Code Civil) is covered by this regulation. This temporary right is not a matter of succession, neither of a matrimonial regime nor of property. It is linked to the status of spouse and the effects of marriage.

We need, therefore, to understand whether the protection of the family home (Art. 27), which is provided for in the regulation, also includes the temporary right to dwell.

**2.3.3 Are you expecting any problems with the application of the rules on jurisdiction?**

As far as can be seen, for the moment no problems are anticipated.

<sup>18</sup> <http://www.coupleseurope.eu/en/france/topics/5-what-are-the-consequences-of-divorce-separation> (12.5.2019).

<sup>19</sup> Goré, M., De Gourcy, R. (Grimaldi, M.), 2017, 1131.

**2.3.4 Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

Questions have been raised as to whether couples can choose the regime which best suits them in the event of a change in the law which affects their matrimonial property regime. The Hague Convention of 14 March 1978 on the law applicable to property regimes (which came into force on 1.9.92) covers this point. Article 1397-3, para 3, of the civil code introduced by Act no 97-987 of 22.10.1997 (which would modify the *Code Civil* so as to adapt it to the Hague Convention) and Article 6 of the Convention allow couples to switch to the law which applies to their property regime and, at the same time, to choose the regime, universal or conventional, which is regulated by the law they have chosen. In other words the above laws offer couples the opportunity not only to choose the law applicable to their property regime, but also at the same time to identify which of the regimes on offer they prefer. However, Regulation 2016/1103 does not provide for this and doubts remain as to the possibility of applying Article 1397-3 of the Code Civil in this regard.

- It has also been revealed that Regulation 2016/1103 did not provide for the possibility of an automatic change in the applicable law, regulated by Article 7 of the Hague Convention, in cases where the spouses have not chosen the applicable law. The implication of this is that only couples married after 1 September 1992 and before 29<sup>th</sup> January 2019 (and who are therefore subject to the dispositions of the Hague Convention) will continue to be subject to this automatic change. This means that notaries will have to take great care to advise couples who married before 29.01.2019 to take the necessary steps to avoid this automatic change. This situation will not help the work of legal professionals who, in the framework of private international law governing matrimonial property regimes, will have to be familiar with three different juridical systems: the principles of common law which apply to couples who married before 1 September 1992, the regulations of the Hague Convention on laws which apply to property rights of couples who married after 1 September 1992 and the regulations on property rights which have applied to couples since 29 January 2019.

**2.3.5 What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

The French system has drawn our attention to the procedures which have to be followed when dealing with the recognition or execution not of a decision but of an authentic deed. There is debate as to whether it is necessary to impose upon the notary drawing up the deed the obligation to guarantee not only the deed's conformity with their own public policy, but also its conformity with the policies in other member states where this deed, in all probability, will be recognised and executed.

**2.3.6 Are there any national rules on international jurisdiction and applicable (besides the Regulations) concerning the succession in your country?**

In France there are other rules of international private law that are of importance in this field. For couples who were married before 1 September 1992, common law applies (principles with a legal origin: the law which applies to property relationships between spouses is established, in principle, on the basis of the first matrimonial home. This law regulates all property relationships irrespective of where the property is located. This relationship criteria is permanent: the law of the first matrimonial home applies for the entire duration of the marriage, even when the spouses move abroad).

For couples married between 1 September 1992 and 29 January 2019 the Hague Convention of 14<sup>th</sup> March 1978 applies to the law governing property regimes (in force since 1 September 1992).

For couples married after 29<sup>th</sup> January 2019 (or for marriages contracted before that date, when the couple has chosen a law applicable to their matrimonial regime starting from 29<sup>th</sup> January 2019) the EU 2016/1103 regulation holds.

### 3. Succession law

#### 3.1. General.

##### 3.1.1. What are the main legal sources of Succession Law (SL) in your country? What are the additional legal sources of SL?

The main legal source for the French succession law is the Civil Code. There are also additional legal sources: General Taxation (Code général des impôts), Article 758 et seq., Article 292 A et seq. of annex II and Article 280 et seq. of annex III., Consultation rules of the Civil Registry (Règles de consultation de l'état civil).

##### 3.1.2. Provide a short description of the main historical developments in SL in your country.

*Le droit intermédiaire* (intermediate or revolutionary law) brought about the unification of laws, which applied right across French territory and established a new and egalitarian social order. During that period the principle of unity of succession was established, with inheritance passing to relatives (children, siblings and their descendants, fathers and mothers and other ascendants, with a limitation to testamentary freedom amounting to 1/10 of the estate when there were parents in direct line and 1/6 when there were collateral descendants.

With the enactment of the *Code Civil* in 1804, the principles of unity of succession and equality were upheld. The rules of inheritance were based on the closeness of kinship, in the following order:

- Descendants
- Parents and siblings
- Ascendants
- Collateral descendants

The number of kin was unlimited and the right to succession ended at the 12<sup>th</sup> degree of kinship.

The spouse's inheritance rights were conditional on whether there were other heirs: the surviving spouse did not have the right to inherit, unless there were no heirs down to the 12<sup>th</sup> degree. The key principle, which is at the basis of the inheritance system, is that the deceased's estate should stay in the family, so only in the truly exceptional circumstances of there being no heirs, would the deceased's entire estate be transferred to the spouse, who was extraneous and belonged to another family.

The rights of natural children were severely curtailed (by half) when there were rightful heirs.

Contemporary succession law has seen a large number of fragmentary reforms, with an overall reform only coming right at the start of the new millennium (the Act of 3<sup>rd</sup> December 2001 and that of 23<sup>rd</sup> June 2006).

The gradual and piecemeal adjustments to succession law reflect the evolution of the contemporary family.

- The Act of 9th March 1891 extended usufruct rights to the spouse, which varied according to the degree of kinship of the heir with whom he/she was sharing the estate (the following Act of 29<sup>th</sup> April 1925 increased the proportion in favour of the spouse);
- In the Act of 25.3.1986 natural children were also recognised as heirs;
- In the Act of 31.12.1917 the list of relatives with succession rights was shortened, with the right to inherit stopping at the 6<sup>th</sup> degree;

- In a ruling of 23<sup>rd</sup> December 1958 the spouse was recognised as an heir and his/her ranking in the order of inheritance was improved. The spouse's rights varied according to the rank of the other heirs, and in some cases he/she could claim a share in the estate.
- In the Act of 3<sup>rd</sup> January 1972 the inheritance rights of legitimate children were extended to natural children, even though some differentiation remained until the Act of 3.12.2001. In fact, it was not to be until the ECHR found against France in the MAZUREK ruling that a law was introduced that did not discriminate against adulterine children;
- The first major reform came with the Act of 3<sup>rd</sup> December 2001. It significantly enhanced the inheritance rights of the surviving spouse and ended discrimination against illegitimate children;
- Five years later the reform of 23<sup>rd</sup> June 2006 profoundly changed the law on inheritance and gifts. This law had three aims. Above all, greater freedom was given to the deceased in preparing for his/her succession. Secondly, the reform aimed to facilitate the handling of the estate by protecting the heirs from the risk that their administration of the estate could be interpreted as acceptance pure and simple.
- The reform also made it easier to resort to a posthumous mandate for the management of the estate in the interests of the heirs, ensuring that the authorised representative can be nominated by the heirs or by a judge in the event of a dispute or by the deceased himself/herself. Finally, the law was designed to streamline distribution and avoid recourse to a distribution enforced by the courts.

### **3.1.2. What are the general principles of succession in your country?**

There are two types of succession in French: legitimate succession and testamentary succession. The rules on the legitimate succession only apply if no will was drawn up. French law also guarantees a reserved portion for certain heirs, the so-called 'legitimate' heirs (since 2006 ascendants no longer form part of this category). In French law it is possible for heirs to waive in advance their right to bring an action in abatement (Article 929 of the Civil Code) and to obtain an amount of money for the gift that interferes with their reserved portion

### **3.1.3. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.**

Proof of heirship can be made by any means (article 730 of the Civil Code).

The French legal system does not have anything like a certificate of succession, which proves heirship.

The usual way of proving heirship is by means of *acte de notoriété* (statutory declaration). Article 730-1 of the Civil Code establishes that proof of heirship may be by means of such a declaration requested by one or more of those entitled and drawn up by a notary. It gives the names of the heirs of the deceased and established for each their share in the estate.

Since the 2001 reform (Act of 3<sup>rd</sup> December 2001) heirship, identified by the *acte de notoriété* statutory declaration, is no longer confirmed by witnesses but by the prospective heirs themselves. Proof of heirship is based on documents supplied by the interested parties (such as a declaration of marital status or a death certificate) accompanied by their own sworn affidavit. The involvement of witnesses has become optional. The 2001 law has the merit of giving greater weight to the statutory declaration: in the new system, the notary receives the declarations of those entitled, solemnly sworn before a public official who, however, is not responsible for them nor guarantees their accuracy or veracity. They are declarations, which are held to be true unless proved otherwise (article 730-3 of the Civil Code).

Furthermore – after the rule of purchase from the apparent heir has long been argued by case-law and legal writings – it has finally codified the principle of the salvation of the purchase of the third whose good faith is founded precisely on the findings of this declaration: Article 730-4 of the Civil



Code establishes that third party detainers of assets have free disposition of such assets in the proportion stated in the statutory declaration.

In the event of disputes concerning heirship, whoever claims to be an heir has to file a petition of heirship in order to demonstrate his rights against those who contest him/her. The claimant has to demonstrate his/her degree of kinship or relationship by marriage, and must produce a certificate, which proves heirship.

The suit carries a 30-year time limit from the start of the succession process.

**3.1.4. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?**

If the deceased has not left a will, the estate is distributed according to the order of succession laid down by the law (intestate succession).

Intestate succession only happens in the absence of a will or when the dispositions are only partial. In the latter scenario intestate succession will only apply to the portion not covered in the will.

This law identifies the legal heirs, i.e. the deceased's family members ranked in a specific order, depending on their degree of kinship to the deceased.

**3.1.5. What happens with the estate of inheritance if the decedent has no heirs?**

If there are no heirs or only collateral heirs beyond the 6<sup>th</sup> degree, and if there are no donees or legatees, succession is declared vacant or abandoned, and the estate devolves to the State (article 539 of the Civil Code).

**3.1.6. Are there special rules or limitations concerning succession with reference to the deceased's (or heir's) culture, tradition, religion or other characteristics?**

In the French legal system there are no special rules or limitations regarding the deceased's or heirs' culture, tradition, religion or sex.

**3.2. Intestate succession.**

**3.2.1. Are men and women equal in succession? Are domestic and foreign nationals equal in succession? Are decedent's children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?**

There is no distinction made between male and female heirs or between French citizens and foreigners.

Children born in wedlock (legitimate) or out of wedlock (natural) have since 1972 had the same inheritance rights (even though some differentiation remained until the Act of 3.12.2001) and in 2005 (ruling 759/2005) the distinction was eliminated from the *code civil*.

The reform of 2001 extended to adulterine children (natural children whose father or mother was, at the moment of conception, married to somebody else) the same rights as those of legitimate children.

Where adopted children are concerned, we need to distinguish between two kinds of adoption:

- Simple adoption (*adoption simple*) in which there are ties between the biological family and the adopted child;

- Plenary adoption (*adoption plénière*) where all ties with the biological family have been broken.

A child adopted by simple adoption has dual succession rights: in his/her family of birth and in his/her adoptive family. He/she is a forced heir of both the biological and adoptive parents. However, the child adopted in an *adoption simple* does not have the same rights as the other children in terms of hereditary “representation”, in other words the right to inherit instead of one of his/her dead parents. A child adopted in a simple adoption cannot inherit in a case of intestacy from the ascendants of his/her deceased adoptive parents.

Children adopted in a “plenary adoption” have the same legal rights as the other children of their adoptive parents. In fact, in this type of adoption all ties with the biological family are severed. These ties are substituted by ties with the adoptive family. Therefore, the adopted child will only inherit from his/her adoptive parents (and not from his/her biological parents) and enjoys the same rights as a non-adopted child.

Article 725 of the Civil Code established that babies conceived before the death of the deceased person would inherit in the same way as children already born, so long as the pregnancy is successfully carried to term. The law (article 311 of the Civil Code) presumes that the child was conceived between 300 and 180 days before the date of birth.

There is no distinction between the inheritance rights of heterosexual and homosexual couples, whether married or in a civil partnership.

However, a partner’s rights differ from those of a spouse in that a partner in a civil partnership is not automatically an heir. To enjoy inheritance rights, the partner must be designated in a will.

The partners in a registered partnership only have the usufruct rights over the family house after their partner’s death in accordance with article 763 of the Civil Code.

### **3.2.2. Are legal persons capable of inheriting? If yes, on which basis?**

Legal entities can be designated by the deceased in a will as legatees. A legal entity can receive a legacy only if it obtains administrative authorization. This restriction allows the public administration to:

- Check the increase in the estate of the legal entity;
- Protect the testator’s family against excessive dispositions which reduce the estate
- Ensure that acceptance of a legacy in exchange for an obligation imposed upon the beneficiary does not cause the legal entity to deviate from the purpose for which it was constituted.

Some legal entities can receive a legacy without obtaining authorization: these include trades unions, civil law companies and commercial companies, local and regional authorities.

Public bodies can accept bequests only if they are unconditional and without any financial burden on the body in question.

### **3.2.3. Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.**

Only those who are not unworthy may become heirs. Unworthiness to inherit is a case of civil forfeiture, a civil sanction against those who had inheritance rights but is guilty serious offences against the deceased or his/her memory.

The 2001 reform established that, alongside cases where unworthiness was unequivocal (automatic and compulsory), there are also cases where the courts have to apply the sanction following application by an interested party or by the Public Prosecutor.

1) Cases of “obligatory” unworthiness (Article 726 of the Civil Code):

- Anyone who has been found guilty of having intentionally caused or attempted to cause the death of the deceased

- Anyone who has been found guilty of having caused physical harm which unintentionally led to the death of the deceased.

2) Cases of discretionary unworthiness (Article 727 of the Civil Code). The following may be declared unworthy to succeed:

- In those cases covered by Article 726 of the Civil Code, which only carried a summary conviction;
- Anyone found guilty of giving false testimony against the deceased in a criminal proceeding;
- Anyone who is found guilty of intentionally failing to prevent criminal action against the physical integrity of the deceased, from which death resulted, although he could have done so without risk to himself or to third parties;
- Anyone found guilty of slander against the deceased.

In cases of obligatory unworthiness (Article 726 of the Civil Code), the unworthiness is still recognised even when no sentence had been pronounced prior to the death of the deceased.

3) The effects of unworthiness to inherit

The unworthy heir is excluded from all succession rights relating to the deceased and retroactively loses the status of heir. The person declared unworthy has to return all assets and revenues accruing from them.

Article 729 allows for a form of pardon: the unworthy heir can have his/her rights restored when the deceased, after the events and with knowledge of them, made an express declaration to that effect (in a will or gift).

After the 2001 reform, the children of the unworthy heir are no longer automatically excluded from the succession, and can in fact inherit, even by effect of representation (Article 729). The unworthy heir may not, however, claim, on the assets in this succession, the usufruct that law grants to parents on the assets of their children.

**3.2.4. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?**

When a person dies without leaving a will, the law designates the heirs, called “devolution by law”. Only members of the family can inherit. The French civil code ranks the heirs in a very specific order depending on their degree of kinship to the deceased. It is up to the notary to designate the heirs of the 1st degree before moving on to the 2nd degree, 3rd degree and so on. If an heir ranks higher in the order of succession, she/he inherits before any of the lower ranking heirs.

1st degree: the children, the grandchildren and then the great grandchildren.

2nd degree: the father and mother of the deceased, the brothers and sisters, then the descendants of the latter.

3rd degree: the grandparents, then the great grandparents.

4th degree: uncles and aunts, the great-uncles and great-aunts, then the first cousins, then the first cousins once removed, then the first cousins twice removed.

The surviving spouse inherits in any case, but his/her rights will vary depending on the rights of the other heirs<sup>20</sup>.

If the deceased leaves a spouse, the matrimonial property rights must be settled before settlement of the estate proper. After settlement of rights arising out of the matrimonial property regime, the following rules apply:

- Where a predeceased spouse leaves children or descendants, the surviving spouse shall take, at his or her option, either the usufruct of the whole of the existing property or the ownership of the quarter where all the children are born from both spouses and the ownership of the quarter in the presence of one or several children who are not born from both spouses (article 757 of the Civil

<sup>20</sup> <http://www.successions-europe.eu/Answers.aspx?c=fr&l=en&q=17> (12.5.2019).

Code). The spouse will be deemed to have opted for usufruct if he/she dies without having made a choice.

- Where, in the absence of children or descendants, a deceased leaves his father and mother, the surviving spouse shall take one half of the property. Where the father or the mother is predeceased, the share which he would have taken (one quarter) devolves to the surviving spouse (article 757-1 of the Civil Code).

- In the absence of children or descendants of the deceased or of his father and mother, the surviving spouse shall take the whole succession (article 757-2 of the Civil Code).

Notwithstanding article 757-2, in case of predecease of the father and mother and in absence of descendants, the property that the deceased received from them by succession or gift and that is found in kind in the succession devolves for one half to the brothers and sisters of the deceased or to their descendants, themselves descending from the predeceased parent or parents from whom the devolution originates. This is the right of reversion (Article 757-3 of the Civil Code). All other assets pass to the surviving spouse<sup>21</sup>.

### **3.2.5. Are the heirs liable for deceased's debts and under which conditions?**

Universal heirs or heirs by general title who accept the succession unconditionally are liable indefinitely for the debts and charges on the estate. They are liable for legacies of sums of money only up to the value of the estate assets net of debts (Article 785 of the Civil Code).

Coheirs contribute between themselves to the payment of the debts and liabilities of the succession, each one in proportion to what he takes from it (article 870 of the Civil Code). Heirs are held to the debts and liabilities of the succession personally for their equal share and portion, and by mortgage for the whole; subject to their remedy either against their coheirs, or against the universal legatees, for the part to which the latter must contribute (article 873 of the Civil Code).

Heirs who have opted for unconditional acceptance have unlimited liability for all the deceased's debts and charges. However, they can apply to be released from all or part of their obligation for a debt on the estate if, at the time of succession, they may have been unaware of the existence of that liability and payment of these debts could seriously prejudice their own assets<sup>22</sup>.

Heir who have opted for acceptance with benefit of inventory is obliged to pay the debts of the succession only to the extent of the value of the property which he receives (article 791 of the Civil Code).

### **3.2.6. What is the manner of renouncing the succession rights?**

Heirs can renounce their succession rights by filing a declaration at the court of first instance within the jurisdiction where the estate was opened. Waiver of the succession must be expressly declared (article 804 of the Civil Code). Heirs who waive a succession are deemed never to have been heirs. The court of first instance within the said jurisdiction also receives waivers of universal legacies and legacies by general title. Under French law, no declaration is required for waivers of individual legacies.

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<sup>21</sup> [https://e-justice.europa.eu/content\\_succession-166-fr-en.do](https://e-justice.europa.eu/content_succession-166-fr-en.do) (12.5.2019).

<sup>22</sup> [https://e-justice.europa.eu/content\\_general\\_information-166-fr-maximizeMS\\_EJN-en.do?member=1](https://e-justice.europa.eu/content_general_information-166-fr-maximizeMS_EJN-en.do?member=1) (12.5.2019).

### 3.3. Disposition of property upon death.

#### 3.3.1. Testate succession.

##### 3.3.1.1. Explain the conditions for testate succession.

Article 895 establishes that the will is a personal and unilateral deed by which a testator disposes, for the time when he is no longer alive, of the whole or part of his property, and which he may revoke. In French law, the will must adhere to very strict formal rules, under penalty of being declared null and void. The solemn, formal nature of the deed is to ensure the free expression of the last will of the deceased and its conservation until his/her death. It follows that joint wills are not admissible (Article 968), and nor are spoken wills.

##### 3.3.1.2. Who has the testamentary capacity?

The person making the will (testator) must be of sound mind (article 901 of the Civil Code) The testator must have legal capacity (article 902 of the Civil Code). A minor under 16 years of age cannot make a will (article 903 of the Civil Code) and adults under guardianship must be authorised by the court or family council (article 476 of the Civil Code). Persons under protective supervision (*curatelle*) may make a will (article 470 of the Civil Code) subject to the provisions of article 901 of the Civil Code<sup>23</sup>.

##### 3.3.1.3. What are the conditions and permissible contents of the will?

The will is a framework deed, which can contain different types of content: this may be of a patrimonial or extra-patrimonial nature.

With patrimonial dispositions the testator designates the people who will receive goods or deprives others of goods that the law allocates to them. In the first case a legacy is established and in the second the testator provides for disinheritance. Furthermore, the will can contain dispositions which pertain to the testator's property but do not alter the distribution (e.g. assigning to a third party the administration of goods allocated to a minor, the exclusion of parents from legal usufruct rights over goods allocated to a minor, and the exclusion or the assignation of inheritable goods from the community property of the heir, etc.

The will can also contain dispositions which do not involve goods: examples of this are: recognising a child (article 316 of the Civil Code), nominating a guardian for a minor (Article 403), declaring authorship of an anonymous work, nomination of an executor who must verify the fulfilment of extra-patrimonial dispositions, instructions regarding the funeral, burial or cremation, the use of organs and end of life care.

##### 3.3.1.4. Describe the characteristics of will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a will?

In France, four types of will are recognised:

- Holographic wills: an holographic will is not valid unless it is entirely written, dated and signed by the hand of the testator: it is not subject to any other (Article 970 of the Civil Code).
- Notarised wills: will by public instrument shall be received by two notaries or by one notary attended by two witnesses (Article 971 of the Civil Code). Where a will is received by two notaries, it shall be dictated to them by the testator; one of those notaries shall write it himself or shall have it

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<sup>23</sup> [https://e-justice.europa.eu/content\\_general\\_information-166-fr-maximizeMS\\_EJN-en.do?member=1](https://e-justice.europa.eu/content_general_information-166-fr-maximizeMS_EJN-en.do?member=1) (12.5.2019).

written by hand or mechanically. Where there is only one notary, it must also be dictated by the testator; the notary shall write it himself or shall have it written by hand or mechanically. In either case, it must be read over to the testator. All of which shall be expressly mentioned. (Article 972 of the Civil Code). That will must be signed by the testator in the presence of the witnesses and of the notary; where the testator declares that he does not know how to sign or is unable to do so, his declaration shall be expressly mentioned in the instrument, as well as the cause which prevents him from signing (Article 973 of the Civil Code). The will must also be signed by the witnesses and by the notary (Article 974 of the Civil Code).

- Sealed wills: these are typed or handwritten by the testator or another person, signed by the testator and then presented closed and sealed before a notary in the presence of two witnesses (Article 976 of the Civil Code).

- International wills: these are presented by the testator to a notary and two witnesses, signed by them and then attached to a certificate drawn up by the notary by whom they will be kept (Washington Convention of 26 October 1973)<sup>24</sup>.

### 3.3.1.5. Is there a (public) register of wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.

Since 1971 all wills, particularly holographic wills, must be registered by the notary in the Central Register of Wills (Fichier central des dispositions de dernières volontés – FCDDV). The establishment of the Register and its operations are regulated by the European Convention on State Immunity (Basel, 1972).

It is not the contents of the will that are registered, but only the civil status of the person concerned and details of the notary holding the will.

Anyone can consult the FCDDV, subject to presenting a death certificate or any other document proving the death of the person whose will is being sought. The application is made online: <https://www.adsn.notaires.fr/fcddvPublic/profileChoice.htm>.

The notary can inform only heirs and legatees of the contents of the will, unless otherwise ordered by the presiding judge of the regional court (*tribunal de grande instance*)<sup>25</sup>.

A public will is always registered with the FCDDV.

### 3.3.2. Succession agreement (*negotia mortis causa*). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.

Succession agreements are in principle prohibited. Pursuant article 722 of the Civil Code, agreements having the purpose of creating or disclaiming rights upon all or part of a succession not yet opened or of a property being part of it are effective only where authorized by legislation.

However, it has been accepted since January 2007 that prospective heirs (children) can waive in advance their right to bring an action regarding interference with their inheritance for the benefit of one or more persons who may or may not be heirs (brothers or sisters or their descendants). This involves the advance waiver of an action in abatement (article 929 of the Civil Code). To be valid, this waiver must be recorded in an authentic deed executed before two notaries (article 930 of the Civil Code). The beneficiaries of the inheritance must also be named in the agreement.

Furthermore, under the rules on *inter vivos* division including grandchildren (*donation-partage trans-générationnelle*), the testator's children can agree to their own descendants receiving all or part of their share instead of them (article 1078-4 of the Civil Code)<sup>26</sup>.

<sup>24</sup> [https://e-justice.europa.eu/content\\_general\\_information-166-fr-maximizeMS\\_EJN-en.do?member=1](https://e-justice.europa.eu/content_general_information-166-fr-maximizeMS_EJN-en.do?member=1) (12.5.2019).

<sup>25</sup> [https://e-justice.europa.eu/content\\_general\\_information-166-fr-maximizeMS\\_EJN-en.do?member=1#toc\\_5\\_2](https://e-justice.europa.eu/content_general_information-166-fr-maximizeMS_EJN-en.do?member=1#toc_5_2) (12.5.2019).

**3.3.3. Are conditions for validity of wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

All dispositions regarding wills and succession agreements are contained in the French *code civil* with the exception of the terms of validity of international wills, which can be found in the Convention of Washington of 26.10.1973 and in Act no 94-337 of 29<sup>th</sup> April 1994 (Article. 1).

**3.3.4. Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

Under French law, only descendants of the deceased and the surviving spouse, failing descendants, are entitled to a reserved portion (forced heirship). The other heirs have no right to a reserved portion.

Until 2007, when is entered into force the Act n° 2006-728 of 23 June 2006, the ascendants had entitled to a reserved portion. Such rights to a reserved portion may not exceed three-quarters of the estate. Forced heirs cannot waive their reserved portion (unless they waive succession). However, they can waive in advance the right to bring an action in abatement against excessive testamentary gifts (the advance waiver of an action in abatement referred to in question 1 in relation to agreements on succession). Those heirs can therefore assert their right to a reserved portion (Articles 721 and 912 of the Civil Code).

- Reserved portion for children: this is half if the deceased leaves only one child on death, two-thirds if the deceased leaves two children and three-quarters if the deceased leaves three or more children (Article 913 of the Civil Code).

- Reserved portion for a surviving spouse: this is one-quarter of the assets in the estate (Article 914 1 of the Civil Code). It applies only if there are no descendants.

Forced heirs cannot renounce the reserved portion (unless they renounce the succession). On the other hand, an action in abatement allows heirs to assert their right to the reserved portion. Therefore, if a direct or indirect gift interferes with the reserved portion of one or more heirs, the gift may be deducted from the disposable (non-reserved) part of the estate (Article 920 of the Civil Code).

This action can be brought only by forced heirs within five years of the opening of the estate or two years from the date of discovery of the interference (Article 921 of the Civil Code).

Any forced heir apparent can waive in advance their right to bring an action in abatement (article 929 of the Civil Code). This waiver must be recorded in an authentic deed executed before two notaries (article 930 of the Civil Code). It must be signed separately by each of the parties waiving their rights, in the presence of the notaries alone. It must detail its future legal consequences for each of those parties<sup>27</sup>.

**3.3.5. Cross-border issues.**

**3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?**

As things stand, there do not appear to have been any rulings which apply Regulation 650/2012. On 15 January 2016, the Ministry of Justice sent out a circular which introduced the European Regulation. It was aimed mainly at magistrates and outlined the main changes contained in the

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<sup>26</sup> [https://e-justice.europa.eu/content\\_general\\_information-166-fr-maximizeMS\\_EJN-en.do?member=1](https://e-justice.europa.eu/content_general_information-166-fr-maximizeMS_EJN-en.do?member=1) (12.5.2019).

<sup>27</sup> [https://e-justice.europa.eu/content\\_succession-166-fr-en.do](https://e-justice.europa.eu/content_succession-166-fr-en.do) (12.5.2019).

Regulation.<sup>28</sup> The National Council of Notaries has published a practical guide to the European Certificate of Succession.<sup>29</sup> The Council of Notaries also stated on 2 August 2016, almost a year after the Regulation came into force, that 52 European succession certificates had already been registered.

### **3.3.5.2. Are there any problems with the scope of application?**

In the past the problem of exclusion of issues relating to matrimonial property regimes from the scope of application of the regulation. It was shown how in all member states the liquidation of a succession necessarily depended on the couple's matrimonial property regime and that, in the absence of any kind of harmonisation, each state would continue to have its own conflict-of-law rules and connecting factors. This problem, however, seems to have been resolved by the entry into force and full applicability of the 1103/2016 and 1104/2016 regulations.

### **3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country had experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?**

There are no known court decisions concerning the application of the rules on jurisdiction.

### **3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?**

Doubts are raised over the succession agreements drawn up abroad which impact upon the member state whose law is applied to the succession. The interpretational difficulty comes from the fact that the regulation does not regulate the effects which must be attributed in a member state to a succession agreement drawn up according to a different, foreign law which is acquainted with it, endorses it and regulates the binding effects.

The regulation expresses the hope that once the agreement has been declared admissible and valid according to the law of the country where it was drawn up, its effects will be recognised in all the participating states and in particular in the country which is called upon to handle the succession. However, the regulation does not oblige that country to consider the agreement in its handling of the succession.

### **3.3.5.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?**

There has been debate as to whether it is possible to invoke public policy in cases where the applicable law does not recognise the legitimate heirs' rights to the reserved portion. In the above-mentioned ministerial circular (v.3.3.5.1) it was observed that the reserved portion provided for in French law in favour of certain heirs is not considered by the French Supreme Court to fall within the remit of international public order. The corrective mechanism to apply could be, if there are the conditions, the evasion of the law (*fraude à la loi*).

### **3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?**

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<sup>28</sup> [http://www.textes.justice.gouv.fr/art\\_pix/JUSC1601018C.pdf](http://www.textes.justice.gouv.fr/art_pix/JUSC1601018C.pdf) (12.5.2019).

<sup>29</sup> [https://www.inafon.fr/uploads/doc/20160114122400\\_gp\\_cse\\_28\\_aout\\_2015\\_2015-08-28\\_17-52-32\\_134.pdf](https://www.inafon.fr/uploads/doc/20160114122400_gp_cse_28_aout_2015_2015-08-28_17-52-32_134.pdf) (12.5.2019).



Decree no. 2015-1395 of 2.11.2015 has modified the French civil code by introducing, in Article 1381-1/1381-4 the framework of the European Certificate of Succession. In particular Article 1381-1 establishes that this certificate should be issued by notaries and the following Articles identify the judges who are qualified to handle disputes concerning the certificate of succession.

**3.3.5.7. Are there any national rules on international jurisdiction and applicable (besides the Succession Regulation) concerning the succession in your country?**

Yes, as far as the applicable law is concerned, see Article 3 of the civil code.

For the recognition of foreign enforceable instruments, see Articles 509 – 509-7 of the civil code.

The following conventions are still applicable:

- The Hague Convention of 5<sup>th</sup> October 1961 on conflict of law in relation to testamentary dispositions;
- The Washington Convention of 26<sup>th</sup> October 1980 on a uniform law in relation to the form of international wills;
- The Rome Convention of 19<sup>th</sup> June 1980 on the law applicable to contractual obligations.

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## Germany

Tereza Pertot

### 1. Social perspective.

**1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without *affectio maritalis*).**

There are different family formations in Germany:

- the nucleus family;
- the family consisting in the relation between one parent and his or her child (or children);
- the patchwork family (consisting of two partners and their children from a former relation);
- the adoptive family;
- the foster family;
- the so-called rainbow-family (*Regenbogenfamilie*), where children live with their homosexual parents.<sup>1</sup>

**1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.**

In 2014 the number of marriages in Germany was 386.000.<sup>2</sup> In 2016 the number increased to 410.426.<sup>3</sup> There were 407.493 marriages in 2017.<sup>4</sup> In 2017 there were ca. 11,58 million families in Germany (as family is intended: a married couple; non-married hetero- and homosexual couple; single fathers and mothers with their cohabitant children; children born out of wedlock, adoptive, foster and stepchildren are included).<sup>5</sup> In 2017 there were ca. 30.000 registered partnerships between men<sup>6</sup> and 23.000 registered partnerships between women.<sup>7</sup> In 2016 7.733 partnerships were registered (3.727 between men and 4.006 between women).<sup>8</sup> Till now more than 10.000

<sup>1</sup> <https://www.familie-und-tipps.de/Familienleben/Familienformen/> (13.5.2019).

<sup>2</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 21.

<sup>3</sup> [https://www.destatis.de/DE/Themen/Querschnitt/Jahrbuch/jb-bevoelkerung.pdf;jsessionid=6EB3CBADAED54D3AFE72A9E55470123C.internet731?\\_blob=publicationFile&v=6](https://www.destatis.de/DE/Themen/Querschnitt/Jahrbuch/jb-bevoelkerung.pdf;jsessionid=6EB3CBADAED54D3AFE72A9E55470123C.internet731?_blob=publicationFile&v=6), 61 (13.5.2019).

<sup>4</sup> <https://de.statista.com/themen/96/hochzeit/> (13.5.2019).

<sup>5</sup> <https://de.statista.com/statistik/daten/studie/2281/umfrage/anzahl-der-familien-in-deutschland/> (13.5.2019).

<sup>6</sup> <https://de.statista.com/statistik/daten/studie/437154/umfrage/eingetragene-lebenspartnerschaften-von-maennern-in-deutschland/> (13.5.2019).

<sup>7</sup> <https://de.statista.com/statistik/daten/studie/437160/umfrage/eingetragene-lebenspartnerschaften-von-frauen-in-deutschland/> (13.5.2019).

<sup>8</sup> [https://www.destatis.de/DE/Themen/Querschnitt/Jahrbuch/jb-bevoelkerung.pdf;jsessionid=6EB3CBADAED54D3AFE72A9E55470123C.internet731?\\_blob=publicationFile&v=6](https://www.destatis.de/DE/Themen/Querschnitt/Jahrbuch/jb-bevoelkerung.pdf;jsessionid=6EB3CBADAED54D3AFE72A9E55470123C.internet731?_blob=publicationFile&v=6), 61, (13.5.2019).

homosexual (sometimes already registered) couples have got into a marriage.<sup>9</sup> The number of *de facto* relationships (*nichteheliche Lebensgemeinschaften*) was 2.800.000 in 2015.<sup>10</sup>

**1.3. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.**

In 2017 there were 153.500 divorces in Germany<sup>11</sup> (the divorce rate was 37,67%, this means 0,4 divorces for every marriage entered).<sup>12</sup> In the same year 1.243 registered partnerships (728 between women and 515 between men) were dissolved in Germany.<sup>13</sup>

**1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).**

In 2015 every third family living in Germany had a migration background.<sup>14</sup> In 2017 there were 19.258.000 people with migration background in Germany. 8.364.000 of them was married (1.537.000 with Germans, 2.692.000 with people with migration background and 3.614.000 with foreigners – *Ausländer*). In the same year there were 1.094.000 divorced people with migration background.<sup>15</sup> In 2016 ca. 35,7 % families without a migration background and ca. 38,1 % of families with migration background had two children.<sup>16</sup>

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<sup>9</sup> <https://www.faz.net/aktuell/politik/inland/ehe-fuer-alle-tausende-schwule-und-lesben-heiraten-15811273.html> (13.5.2019).

<sup>10</sup> [https://www.destatis.de/DE/Presse/Pressemitteilungen/Zahl-der-Woche/2017/PD17\\_24\\_p002.html](https://www.destatis.de/DE/Presse/Pressemitteilungen/Zahl-der-Woche/2017/PD17_24_p002.html) (13.5.2019).

<sup>11</sup> [https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Bevoelkerung/Eheschliessungen-Ehescheidungen-Lebenspartnerschaften/\\_inhalt.html](https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Bevoelkerung/Eheschliessungen-Ehescheidungen-Lebenspartnerschaften/_inhalt.html) (13.5.2019).  
<https://de.statista.com/statistik/daten/studie/1325/umfrage/ehescheidungen-in-deutschland/> (13.5.2019).

<sup>12</sup> <https://de.statista.com/statistik/daten/studie/76211/umfrage/scheidungsquote-von-1960-bis-2008> (13.5.2019).

<sup>13</sup> [https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Bevoelkerung/Eheschliessungen-Ehescheidungen-Lebenspartnerschaften/\\_inhalt.html](https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Bevoelkerung/Eheschliessungen-Ehescheidungen-Lebenspartnerschaften/_inhalt.html) (13.5.2019);  
<https://de.statista.com/statistik/daten/studie/588585/umfrage/aufgehobene-gleichgeschlechtliche-eingetragene-lebenspartnerschaften-nach-geschlecht/> (13.5.2019).

<sup>14</sup> <https://www.welt.de/politik/deutschland/article137061110/Fast-jede-dritte-Familie-hat-Migrationshintergrund.html> (13.5.2019).

<sup>15</sup> [https://www.destatis.de/DE/Themen/Querschnitt/Jahrbuch/jb-bevoelkerung.pdf;jsessionid=6EB3CBADAED54D3AFE72A9E55470123C.internet731?\\_blob=publicationFile&v=6\\_61](https://www.destatis.de/DE/Themen/Querschnitt/Jahrbuch/jb-bevoelkerung.pdf;jsessionid=6EB3CBADAED54D3AFE72A9E55470123C.internet731?_blob=publicationFile&v=6_61), (13.5.2019).

<sup>16</sup> <https://de.statista.com/statistik/daten/studie/486370/umfrage/familien-in-deutschland-nach-migrationshintergrund-und-kinderzahl/>, (13.5.2019).

## 2. Family law.

### 2.1. General.

#### 2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?

The main legal source of the German family law is the Civil Code (*Bürgerliches Gesetzbuch*, hereafter BGB) of 18 August 1896 (in force since 1 Januar 1900). Family law is regulated in the fourth book at the §§ 1297 et seq. of the BGB.<sup>17</sup>

Family and marriage have a constitutional foundation. They're guaranteed by Article 6 of the German constitution (*Grundgesetz*, hereafter GG) of 23 May 1949. Pursuant to Article 6, paragraph 1 of the GG, "marriage and the family shall enjoy the special protection of the state".<sup>18</sup>

Other legal sources are:

- the *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* (hereafter FamFG), containing provisions on the procedure in family matters;
- the *Zivilprozessordnung* (hereafter ZPO), dealing with civil procedure law;
- the *Gerichtsverfassungsgesetz* (Courts Constitution or Judicature Act, hereafter GVG) (see, in particular, § 23b, paragraph 1, § 23a, paragraph 1, No. 1 of the GVG (together with § 111 of the FamFG) concerning Divisions for family matters, *i.e.* family courts or *Familiengerichte*, which are divisions of the local court (*Amtsgericht*);
- the *Versorgungsausgleichsgesetz* (hereafter VersAusglG), *i.e.* the Law on the Balance of Pension Entitlements;
- the *Personenstandsgesetz* hereafter PStG), containing the law of personal state;
- the *Kinder- und Jugendhilfegesetz* (contained in the 8th book of the *Sozialgesetzbuch*, hereafter SGB VIII) concerning the children and young person's assistance);
- the *Lebenspartnerschaftsgesetz* (hereafter LPartG), concerning the Registered Life Partnerships, which now only applies to foreign partnerships and partnerships entered into in Germany before 1 October 2017 (see point 2.1.2).

The private international law rules are contained in the *Einführungsgesetz zum BGB* (*i.e.* the Introductory Act to the Civil Code, hereafter EGBGB).

Germany also ratified many international conventions and treaties (as *e.g.* the European Convention on Human Rights, hereafter *ECHR*). The Charter of Fundamental Rights of the European Union (CFR) also applies as well as the European Regulations.<sup>19</sup>

Court decisions have an important role as well.

#### 2.1.2. Provide a short description of the main historical developments in FL in your country.

In the past, the German family law was strongly influenced by the church. During the 18<sup>th</sup> century the importance of the state grew. This led to the secularization of the family law. In the 19<sup>th</sup> century the

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<sup>17</sup> For the English translation of the German Civil Code, see: [https://www.gesetze-im-internet.de/englisch\\_bgb/](https://www.gesetze-im-internet.de/englisch_bgb/) (13.5.2019). An analysis of the German family and succession law system in English is also provided by Schwab, D., Gottwald, P., Lettmaier, S., 2017. Both texts were of fundamental importance by the answering of this questionnaire. For first information see also: Robbers, G., 2016, 199, 210 and <http://www.coupleseurope.eu/en/germany/topics> (13.5.2019).

<sup>18</sup> A translation can be found at the following link: [https://www.gesetze-im-internet.de/englisch\\_gg/](https://www.gesetze-im-internet.de/englisch_gg/) (13.5.2019).

<sup>19</sup> For a complete list of legal sources, see: Schwab, D., Gottwald, P., Lettmaier, S., 2017, 22 et seq. See also Coester-Waltjen, D., Coester, M., 2003, 2.

civil marriage was introduced. However, there were still different legal rules in the different German States. The uniformity was reached through the PStG of 1875 and finally through the BGB. The Regulation of family law has been modified a lot of times since the Civil Code entered into force in 1900.

The most important changes occurred with:

- the *Gesetz über die religiöse Kindererziehung* (Law on the Religious Education of Children) of 15 July 1921;
- the *Ehegesetz* (Marriage Act) of 7 July 1938, which modified the regulation of the marriage ceremony and divorce;
- the *Kontrollratsgesetz* (Control Council Act no 16) of 20 February 1946, a re-implementation of the *Ehegesetz* of 1938;
- the *Gleichberechtigungsgesetz* (Sex Discrimination Act) of 18 June 1957, which was aimed to reform the family law in accordance with the principle of the gender equality;
- the *Familienänderungsgesetz* of 11 August 1961;
- the *Familiengesetzbuch* (Family Code) of 20 February 1965, which was adopted in the GDR;
- the *Nichtehelichengesetz* of 19 August 1969, dealing with the rights of children born out of wedlock;
- the *Erstes Gesetz zur Reform des Ehe- und Familienrechts* (First Reform Act on Marriage and the Family Law) of 14 June 1976, which established the family court as a special branch of the local court (*Amtsgericht*);
- the *Adoptionsgesetz* from 2 July 1976, the Adoption Act, dealing with the adoption law;
- the *Gesetz zur Neuregelung des Rechts der ehelichen Sorge* (Parental Responsibility Reform Act) of 18 July 1979, which strengthened children's rights (however, the discrimination between the ones born in and out of wedlock were not definitely abolished);
- the *Transsexuellengesetz* (*i.e.* the Act on Transsexuals) of 10 September 1980;
- the *Einigungsvertrag zwischen der DDR und der BRD* (Treaty of German Reunification) of 31 August 1990 which led to the adoption of the law of the Federal Republic in the former GDR;
- the *Kinder- und Jugendhilfegesetz* (*i.e.* the Children and Young Persons Assistance Act) of 26 June 1990;
- the *Betreuungsgesetz* (*i.e.* the Caretaking or Care and Control Act) of 12 September 1990, which replaced the former guardianship over adults through the so-called *Betreuung*;
- the *Familiennamensrechtsgesetz* of 16 December 1993, which amended the Law on Family Names;
- the *Kindschaftsrechtsreformgesetz* (Child Law Reform) of 16 February 1997, which reformed the child law, abolishing the differences between children born in or out of wedlock and modifying the rules on the parental responsibility;
- the *Kindesunterhaltsgesetz* (Child Support Act) of 4 June 1998, dealing with the child's support claim;
- the *Eheschliessungsgesetz* (Formation of Marriage Act) of 4 May 1998, concerning the formation of marriage and repealing the *Ehegesetz* 1938;
- the *Lebenspartnerschaftsgesetz* of 16 February 2001, which introduced and regulated the registered same-sex partnerships (then reformed in 2005);
- the *Gewaltschutzgesetz* (Act for Protection against Violence) of 11 December 2001;
- the *Adoptionsvermittlungsgesetz* (Adoption Placement Act) of 12 December 2001;
- the *Gesetz zur Änderung der Vorschriften über die Anfechtung der Vaterschaft und das Umgangsrecht von Bezugspersonen des Kindes* (Law Reform Act on Contested Paternity and Rights to Contact) of 23 April 2004, which recognized to the biological father the right to contest a legally established paternity;
- the *Personenstandsrechtsreformgesetz* (Civil Status Act) of 29 February 2007, providing the possibility of keeping the civil status registers in electronic form;

- the *Gesetz zur Änderung des Unterhaltsrechts* (Maintenance Reform) of 27 December 2007, which reformed the maintenance law;
- the *Gesetz zur Klärung der Vaterschaft unabhängig vom Anfechtungsverfahren* (Law Reform Act on Ascertaining Paternity outside Paternity Contests) of 26 March 2008;
- the *Gesetz zur Erleichterung familiengerichtlicher Maßnahmen bei Gefährdung des Kindeswohls* (Law on Facilitating Family Court Child Protection Measures) of 4 July 2008;
- the FamFG of 17 December 2008 (see point 2.1.1);
- the *Gesetz zur Strukturreform des Versorgungsausgleichs* (Pension Splitting Reform Act) of 3 April 2009, concerning the pension splitting on divorce;
- the *Gesetz zur Änderung des Zugewinnausgleichs- und Vormundschaftsrechts* (Law Reform Act on Property Division on Divorce and Guardianship) of 6 July 2009, which amended the rules applicable to the property regime of the community of accrued gains;
- the *Gesetz zur Reform der elterlichen Sorge nicht miteinander verheirateter Eltern* of 16 April 2013, which reformed the system of parental custody applicable to non-married parents;
- the *Gesetz zur Stärkung der Rechte des leiblichen, nicht rechtlichen Vaters* (Act to Improve the Rights of Biological, Non-Legal Fathers) of 4 July 2013;<sup>20</sup>
- the *Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts* of 27 July 2017, which introduced the marriage between same-sex couples. The consequence is that the registered partnership can't be entered anymore. The LPartG only applies to foreign partnerships and to registered partnerships registered in Germany before the introduction of the marriage between homosexuals.<sup>21</sup>

### 2.1.3. What are the general principles of FL in your country?

The general principles of the German family law can be summarized as follows.

The marriage is considered as a union between equals (principle of equality of spouses).<sup>22</sup>

Spouses can be of same- or of different-sex (see point 2.1.2.).

Only the marriage celebrated before a registrar has legal effects, § 1310 of the BGB (principle of civil marriage).<sup>23</sup>

A marriage can only be monogamous (principle of monogamy). Therefore, it “may not be entered into if a marriage or a civil partnership exists between one of the persons who intend to be married to each other and a third party” (§ 1306 of the BGB).

Adults are free to enter into a marriage (principle of freedom of marriage). A forced marriage represents a criminal offence (§ 237 of the StGB) and may be repealed according to § 1314 of the BGB.

Pursuant to § 1307 of the BGB “a marriage may not be entered into between relatives in direct line and between brothers and sisters of the whole blood and of the half-blood” (principle of the prohibition of the marriage among consanguineous) and “this continues to apply if the relationship is extinguished as the result of adoption”. § 1308 of the BGB provides then that “a marriage should not be entered into between persons whose relationship in the meaning of section 1307 was created by adoption”. The criminal consequences of an incest are regulated by § 173 of the StGB.

The household's management is based on the spouses' mutual agreement (see § 1356 of the BGB).

According to Article 6, paragraph 2 of the GG “the care and upbringing of children” represents “the natural right of parents” and “duty primarily incumbent upon them”.

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<sup>20</sup> For the historical background, see: Schwab, D., Gottwald, P., Lettmaier, S., 2017, 22. See also pages 41 et seq. for the development of the legislation and a list of the main changes in the field of family law. See Coester-Waltjen, D., Coester, M., 2003, 2.

<sup>21</sup> <http://www.coupleseurope.eu/en/germany/topics/8-what-does-the-law-provide-for-the-property-of-registered-and-non-registered-partners> (13.5.2019).

<sup>22</sup> BVerfG 3, 225.

<sup>23</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 51.

Children born in and out of wedlock are considered equal (confront article 6, paragraph 5 of the GG). According to the German law, the marriage can be repealed (§ 1314 of the BGB) or dissolved by divorce (based on a breakdown, §§ 1564 et seq. of the BGB).

**2.1.4. Define “family” and “family member” in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

There is no legal definition of “family” or “family member” under the German law. The German Federal Constitutional Court (*Bundesverfassungsgericht*, hereafter *BVerfG*) defined the family as a “community between parents (or one parent) and his or her child or children, including illegitimate children, adopted children, and stepchildren”.<sup>24</sup> Also “the relationship between the biological, non-legal father and his child constitutes a family” according to the BVerfG. The condition is the existence of a “de facto social-familial relationship (*sozial-familiäre Beziehung*) (...) between them”.<sup>25</sup> Furthermore, according to the BVerfG, a family can also exist “between other relatives”, e.g. “between grandparents and grandchildren (...) if close familial ties exist”.<sup>26</sup>

**2.1.5. Family formations.**

**2.1.5.1. Define the “spouse” in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

The notion of marriage is not defined by the law. According to the BVerfG it is a life community of equal partners based on joint responsibility.<sup>27</sup>

The spouse or *Ehegatte* can only be the one, who is already 18. Between 16 and 18 a person can only get married with the dispensation of the family court. The other spouse must be already 18 years old. The one who is not capable of contracting cannot marry (confront §§ 1303 and 1304 of the BGB).<sup>28</sup>

In the past, spouses could only be of different sex. In 2017 the „marriage for all“ (*Ehe für alle*) was introduced with the *Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts* (see point 2.1.2). Hence, now also same-sex couples can enter into a marriage with and be married to each other (see now explicitly § 1353, paragraph 1, sentence 1 of the BGB). The entering in a registered partnership is no more possible (see § 20a LPartG).

As stated above (see point 2.1.3.), a marriage lasts in principle for life (it can only be dissolved by divorce or repealed) and is only possible between two persons. Furthermore, only a marriage celebrated before a registrar has legal effects (§ 1310 of the BGB).

The term *Ehegatte* is also used in other law acts (confront § 15, paragraph 1 of the ErbStG, § 11, paragraph 1, No. 1, letter *a* of the StGB, including the spouse in the category of relatives for the purposes of the Criminal Law Act).

<sup>24</sup> BVerfG FamRZ 2003, 816, 822 as reported and translated by Schwab, D., Gottwald, P., Lettmaier, S., 2017, 45.

<sup>25</sup> BVerfG FamRZ 2003, 816, 822 as reported and translated by Schwab, D., Gottwald, P., Lettmaier, S., 2017, 45.

<sup>26</sup> BVerfG FamRZ 2014, 1435 No. 22 seq. as reported and translated by Schwab, D., Gottwald, P., Lettmaier, S., 2017, 45.

<sup>27</sup> BVerfG of 5 February 2002 – 1 BvR 105/95, in [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de) (13.5.2019). See also Sanders, A., 2012, 912; Schwab, D., Gottwald, P., Lettmaier, S., 2017, 45.

<sup>28</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 47.

**2.1.5.2. What types of relationships/unions between persons are recognised in FL of your country? In particular, formal (registered) and informal (*de facto*) unions, heterosexual and same-sex unions, unions with and without *affectio maritalis*. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

In Germany the marriage can be entered into from people of different sex. Furthermore, it was recently opened up to same-sex couples as well (see § 1353, paragraph 1, sentence 1 of the BGB). After the introduction of the same-sex marriage (see point 2.1.2), the registration of a partnership between homosexual partners is no more possible. The rules contained in the LPartG (and largely aligned with the rules applicable to the marriage) still apply to the foreign partnerships and to the partnerships entered into in Germany before 1 October 2017. The partners may declare (before a civil registrar) that they want to enter into a marriage (§ 20a LPartG). The engagement, consisting in and originated from a promise of marriage, is also regulated by the law (§§ 1298 et seq. of the BGB). There's no right of specific performance in case of a breach of it.<sup>29</sup> De facto family formations are regulated in their vertical relationship(s), *i.e.* between parents or each parent and their/his or her children. On the contrary, there're no general statutory rules applying to the unmarried (and non-registered) partners in their horizontal relationship. The non-marital cohabitation is only partially recognised by law in some specific fields. *E.g.* § 563 of the BGB foresees that not only the spouse, but also the partner, "who maintains a joint household with the lessee" (*rectius*: tenant) "succeeds to the lease" (*i.e.* tenancy) "upon the death of the lessee" (*i.e.* tenant). There're also some provisions expressly referred not only to the marriage, but also to the cohabitation (§ 20 of the *Sozialgesetzbuch XII*). Furthermore, some provisions related to the marriage are considered to be applicable to unmarried couples as well (see *e.g.* §§ 1969 and 553 of the BGB). These can then regulate their relationship through an agreement. General rules on civil law apply. *E.g.* compensation claims based on §§ 705 et seq. of the BGB (concerning the commercial partnership) or on § 812, paragraph 1, sentence 2 of the BGB (dealing with the unjust enrichment) can be made.<sup>30</sup>

**2.1.6. What legal effects are attached to different family formations referred to in q 2.5.?**

The law expressly regulates the effects of the marriage (which basically apply also to the registered partnerships entered into before the introduction of the marriage for same-sex couples).<sup>31</sup> These are regulated in §§ 1353 et seq. of the BGB.

Firstly, "the spouses have a mutual duty of conjugal community" (intended as a *consortium omnis vitae*)<sup>32</sup> "and are responsible for each other" (§ 1353, paragraph 1 of the BGB).

According to § 1355 of the BGB they "should determine a common family name". If they don't do so, "they keep the names they use when the marriage is entered into". Details are regulated by the law.

§ 1356 of the BGB concerns then the household management, for which the spouses have to provide "in mutual agreement". There's also the possibility, that "the household management is left to" only "one of the spouses". If this is the case, "that spouse manages the household on" his or her "own responsibility". Pursuant to § 1356, paragraph 2 of the BGB "both spouses are entitled to be gainfully employed. In the choice and exercise of a gainful employment, they must take the necessary account of the concerns of the other spouse and the family".

§ 1357 of the BGB concerns then the transactions, that must be done in order to provide the necessities of life (*Schlüsselgewalt*). In accordance with the abovementioned rule, "each spouse is

<sup>29</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 46 et seq.

<sup>30</sup> Coester-Waltjen, D., Coester, M., 2003, 42 et seq.; Schwab, D., Gottwald, P., Lettmaier, S., 2017, 70 et seq.

<sup>31</sup> Coester-Waltjen, D., Coester, M., 2003, 72 et seq.; Schwab, D., Gottwald, P., Lettmaier, S., 2017, 42 et seq.

<sup>32</sup> For the interpretation by courts, see Schwab, D., Gottwald, P., Lettmaier, S., 2017, 53.



entitled to enter into transactions to appropriately provide the necessities of life of the family, also binding the other spouse. Such transactions entitle and oblige both spouses, unless it appears otherwise from the circumstances”. An exception is foreseen in the case that “the spouses live apart” (paragraph 2). As provided by paragraph 2 “one spouse may restrict or exclude the entitlement of the other spouse to enter into transactions binding” him or her.

§ 1359 of the BGB provides that “in the performance of the duties arising from the marriage relationship, the spouses are answerable to each other only for the care they customarily exercise in their own affairs”.

§ 1360 of the BGB establishes a reciprocal duty of support. In accordance with this disposition “the spouses have a duty to each other to appropriately maintain the family through their work and with their assets. If the household management is entrusted to one spouse”, he or she “normally performs” his or her “duty of contributing to family maintenance through work by carrying out the household management”.

§ 1360a of the BGB contains some statements about the scope of the obligation to maintain, providing that “the reasonable maintenance of the family includes everything that is necessary, depending on the circumstances of the spouses, to pay the costs of the household and to satisfy the personal needs of the spouses and the necessities of life of the children of the family entitled to maintenance”. “Maintenance must be provided in the manner that is required by conjugal community. The spouses have a duty to each other to provide for a reasonable period of time the means necessary for the collective maintenance of the family” (paragraph 2).

§ 1360b of the BGB applies in case of an overpayment: “If a spouse makes a larger contribution to the maintenance of the family than” he or she “is obliged to, then in case of doubt it is to be assumed that” he or she “does not intend to demand reimbursement from the other spouse”.

If the spouses are living apart, special rules, contained in § 1361 et seq. of the BGB, apply.

§ 1362 of the BGB foresees a presumption of ownership. According to this disposition, “it is presumed in favour of the creditors of the husband and the creditors of the wife that the movable things that are in the possession of one spouse or of both spouses belong to the debtor”. However, “this presumption does not apply if the spouses are living apart and the things are in the possession of the spouse who is not the debtor. Bearer instruments and instruments made out to order which have a blank endorsement are treated in the same way as movable things”. Nevertheless, paragraph 2 of the same disposition adds, that “it is presumed of the things intended exclusively for the personal use of a spouse, as between the spouses to each other and between the spouses and the creditors, that they belong to the spouse for whose use they are intended”.<sup>33</sup>

**2.1.7. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/*de facto* family formations? Explain briefly.**

Germany foresees now a marriage, which is open to different or same-sex couples. An equalisation between marriage and informal cohabitation is discussed in the literature.

**2.2. Property relations.**

**2.2.1. List different family property regimes in your country.**

In Germany there are the following property regimes:

- community of accrued gains (*Zugewinnngemeinschaft*), regulated in §§ 1363 et seq. of the BGB;

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<sup>33</sup> See Coester-Waltjen, D., Coester, M., 2003, 3, 5 et seq.; Schwab, D., Gottwald, P., Lettmaier, S., 2017, 52 et seq.

- separation of property (*Gütertrennung*), regulated in §§ 1414 and 1388 et seq. of the BGB;
- community of property (*Gütergemeinschaft*), regulated in §§ 1415 et seq. of the BGB.<sup>34</sup>

Additionally, according to § 1519 of the BGB the spouses may agree on the optional matrimonial property regime of the community of accrued gains (*Wahl-Zugewinnngemeinschaft*, §§ 1519 et seq. of the BGB).<sup>35</sup> In this case, “the provisions contained in the Agreement of 4 February 2010 between the Federal Republic of Germany and the French Republic on the Optional Matrimonial Property Regime of the Community of Accrued Gains apply”.

**2.2.2. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?**

The default or statutory family property regime under the German law is the community of accrued gains (*Zugewinnngemeinschaft*) (§§ 1363-1390 of the BGB).<sup>36</sup> The spouses live under this property regime, if they don't choose another one (see § 1363 of the BGB).

If the spouses live under the statutory regime, their property (brought to and acquired over the course of the marriage) doesn't become common property. However, the accrued gains acquired during the marriage are equalized, when the property regime ends (§ 1363, paragraph 2 of the BGB). There're different rules applying whether the statutory property regime ends by death of a spouse or for other reasons (repeal, divorce, opting-out, death, if the other spouse doesn't become heir or legatee) (confront § 1371 et seq. of the BGB).<sup>37</sup> The possibility to claim an early or advance equalization is possible, if certain circumstances exist (§ 1385 of the BGB).

If the spouses live under the default property regime, they are free to manage their property independently during the marriage (confront § 1364 of the BGB, see point 2.2.4). However, there're also some restrictions on disposal of their assets (see §§ 1365 et seq. BGB). *E.g.* “a spouse may only with the consent of the other spouse agree to dispose of his or her property as a whole” (§ 1365 of the BGB). Furthermore, “a spouse may dispose of objects of the household of the spouses belonging to” him or her “and agree to such a disposition only if the other spouse consents” (§ 1369 of the BGB). According to § 1366 of the BGB “a contract which a spouse enters into without the necessary consent of the other spouse is effective if the spouse ratifies it”.

Some special conditions of liability are foreseen. Spouses are normally liable only for their own debts. However, one spouse is also liable for the debts entered into by the other one according to § 1357 of the BGB (point 2.1.6). There's a presumption of ownership, foreseen in § 1362 of the BGB. Pursuant to this disposition “it is presumed in favor of the creditors of the husband and the creditors of the wife that the movable things that are in the possession of one spouse or of both spouses belong to the debtor” (confront § 739 of the ZPO).

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<sup>34</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 115 et seq.

<sup>35</sup> See Cubeddu, M. G., 2014.

<sup>36</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 119 et seq.; Coester-Waltjen, D., Coester, M., 2003, 4, 7; <http://www.coupleseurope.eu/en/germany/topics/2-is-there-a-statutory-matrimonial-property-regime-and-if-so-what-does-it-provide/> (13.5.2019).

<sup>37</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 121 et seq.

**2.2.3. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a “new regime just for them”?**

Spouses (and registered partners) can regulate their property relationships otherwise, *e.g.* choosing a different regime. According to § 1408, paragraph 1 of the BGB “the spouses may provide for their matrimonial property arrangements by contract (marriage contract)” They can “terminate or alter the patrimonial property regime” “even after entering into marriage”. Spouses may opt for the application of a different matrimonial property regime provided by law. Furthermore, they can modify some provisions foreseen by the law.

The contract formalities are provided by § 1410 of the BGB. The latter states that a “marriage contract must be recorded by a notary, and both parties must be present”.

As stated in paragraph 2, spouses may also “conclude agreements on the equalization of pension rights in a marriage contract”.

§ 1411 of the BGB applies to persons with restricted capacity to contract or incapable of contracting.

**2.2.4. Explain briefly the rules on the administration of family property and compare if there are difference for different property regimes.**

If the spouses live under the default matrimonial property regime (the community of accrued gains, see point 2.2.2) § 1364 of the BGB (management of property) applies. According to this disposition, “each spouse manages his” or her “property independently” during the marriage. However, there’re also some restrictions on disposal of their assets (see §§ 1365 et seq. BGB). *E.g.* “a spouse may only with the consent of the other spouse agree to dispose of his” or her “property as a whole”, *i.e.* in its entirety (§ 1365 of the BGB). Furthermore, “a spouse may dispose of objects of the household of the spouses belonging to” him or her “and agree to such a disposition only if the other spouse consents” (§ 1369 of the BGB). According to § 1366 of the BGB “a contract which a spouse enters into without the necessary consent of the other spouse is effective if the spouse ratifies it” (for the unilateral transactions, see: § 1367 of the BGB, according to which such legal transactions are ineffective if they’re “entered into without the necessary consent”). § 1357 of the BGB concerning transactions to provide the necessities of life finds application (see 2.1.6).

Also under the optional matrimonial property regime of the community of accrued gains (*Wahl-Zugewinnngemeinschaft*, regulated in §§ 1519 et seq. of the BGB, see point 2.2.1) each spouse uses and manages his or her own property. The accrued gains acquired during the marriage are equalized at the end of it.

If the spouses live under the property regime of the separation of property<sup>38</sup> (*i.e.*, when the spouses agree on it or when they exclude the statutory regime without a different agreement, § 1414 of the BGB), the spouses’ assets remain separated and each spouse manages his or her own property. However, no equalization of accrued gains takes place. §§ 1360 et seq. (concerning the duty of family maintenance), 1353, paragraph 1, sentence 2 (mutual duty of conjugal community) and 1357 (regarding transactions to provide the necessities of life) of the BGB apply (see point 2.1.6).

If then the spouses opt for a community of property<sup>39</sup> (see § 1415 et seq. BGB), their assets become part of their joint property (marital or common property). The latter “also includes the property that the husband or the wife acquires during the period of community of property” (§ 1416, paragraph 1 of the BGB). According to § 1416, paragraph 2 of the BGB, “the individual objects become joint property” as well. As stated in “1419, paragraph 1 of the BGB “a spouse may not dispose of his share of the marital property and of the individual objects that are part of the marital property”.

<sup>38</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 116 et seq.

<sup>39</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 116.

Furthermore, “he is not entitled to demand partition”. According to § 1421 of the BGB (management of the marital property) “in the marriage contract in which” the spouses “agree on community of property, the spouses should specify whether the marital property is managed by the husband or by the wife or by both of them jointly”. If they agree on a joint management, §§ 1450 et seq. of the BGB apply. In case of a management by only one spouse §§ 1422 et seq. of the BGB find application. If there’re no different agreements, “the spouses manage the marital property jointly”. Special rules on the management are then contained in §§ 1922 et seq. BGB.

If the property regime of the community of property applies, the distribution takes place according to §§ 1471 et seq. of the BGB.<sup>40</sup>

From the marital or common property is excluded the special property (*Sondergut*) (§ 1417, paragraph 1 of the BGB), *i.e.* “the objects that may not be transferred by legal transaction” (as *e.g.* the usufruct) (§ 1417, paragraph 2 of the BGB). The special property is managed independently by each spouse. The latter “manages it for the account of the marital property” (paragraph 3).<sup>41</sup>

Also the reserved or separate property (*Vorbehaltsgut*) is excluded from the marital or common one (§ 1418, paragraph 1 of the BGB). According to § 1418, paragraph 2 of the BGB, reserved or separate property comprises the items:

- “1. that by marriage contract are declared the reserved property of a spouse,
2. that a spouse acquires as a result of death or that are given to him or her by a third party free of charge, if the testator specified by testamentary disposition or the third party specified when making the disposition that the acquisition is to be reserved property,
3. that a spouse acquires on the basis of a right that is part of his or her reserved property or as compensation for the destruction, damage or removal of an item that is part of the reserved property or by a legal transaction that relates to the reserved property”.

Also the management of the reserved property is attributed to each spouse independently from the other. (paragraph 3).

#### **2.2.5. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

Provisions that depart from the statutory property regime (and that affect third parties) has to be recorded in the marriage property register.<sup>42</sup> The registration isn’t required for the validity of the agreement. On the contrary, it only represents an example of negative publicity or *negative Publizität*. Therefore, if the agreement isn’t registered, the spouses cannot rely it towards third parties (unless these have known the agreement). The effects of the registration are described in § 1412 of the BGB, which establishes, that “where the spouses have excluded or altered the statutory matrimonial property regime, they may derive from this, in relation to a third party, objections to a legal transaction that was entered into between one of them and the third party only if the marriage contract has been entered in the marriage property register of the competent local court [*Amtsgericht*] or was known to the third party when the legal transaction was entered into”.

The marriage property register is regulated in §§ 1558 et seq. of the BGB. According § 1558 of the BGB “the entries in the marriage property register are to be made at the local court [*Amtsgericht*] in whose district at least one of the spouses has” his or her “habitual residence (subsection 1). “The Land governments are authorized to transfer the competence to keep the register, by statutory order, to one local court [*Amtsgericht*] for the districts of more than one local court [*Amtsgericht*]. The Land governments may, by statutory order, transfer the authorization to the Land justice administration authorities” (paragraph 2).

<sup>40</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 136.

<sup>41</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 116.

<sup>42</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 118; <http://www.coupleseurope.eu/en/germany/topics/4-can-or-must-the-matrimonial-property-regime-be-registered> (13.5.2019).

Pursuant to § 1560 of the BGB “an entry in the register should be made only on application and only to the extent that it is applied for. The application must be in notarially certified form”. The requirements are provided by § 1561 of the BGB. According to this provision “the application of both spouses is necessary for entry; each spouse is obliged to the other to cooperate” (paragraph 1). However, paragraph 2 foresees “the application of one spouse is sufficient:

1. to enter a marriage contract or a change in the marital property regime arrangements of the spouses based on a judicial decision if, together with the application, the marriage contract or the decision, bearing a certificate of finality and non-appealability, is submitted;
2. to repeat an entry in the register of another district if, together with the application, a notarially certified copy of the earlier entry issued after the termination of the previous residence is submitted;
3. to enter the objection to the independent operation of a trade or business by the other spouse and to enter the revocation of the consent, if the spouses live in community of property and the spouse who makes the application manages the marital property alone or jointly with the other spouse;
4. to enter the restriction or exclusion of the entitlement of the other spouse to perform transactions with effect for the applicant (paragraph 1357 (2))”.

As stated in § 1562 of the BGB “the local court [*Amtsgericht*] must publish the entry in the newspaper intended for its public notices” (paragraph 1). “If a change of the matrimonial property regime is entered, the notice must be restricted to the designation of the matrimonial property regime and, where this is defined differently from the statutory provisions, to a general designation of the difference” (paragraph 2).

Concerning the inspection of the register, § 1563 of the BGB provides that “every person is permitted to inspect the register” (therefore, it is a public register). “A copy of the entries may be requested” and, “on request, the copy must be certified”.

**2.2.6. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

As stated above (see point 2.2.5), provisions departing from the statutory property regime may be invoked against third parties in case of a registration or if third parties knew the spouses’ agreement. Under the property regime of the separation of property, each spouse is only liable for his or her own debts. This is also the case, if the spouses live under the statutory regime of accrued gains.<sup>43</sup> One spouse can also be liable for the debts the other spouse entered into according to § 1357 of the BGB (see point 2.1.6). Note, that there’s a (rebuttable) presumption of ownership, foreseen in § 1262 of the BGB, aiming to facilitate the compulsory enforcement. In particular, according to this disposition “it is presumed in favor of the creditors of the husband and the creditors of the wife that the movable things that are in the possession of one spouse or of both spouses belong to the debtor” (confront § 739 of the ZPO).

If the spouses live under the property regime of the community of property, § 1450 et seq. of the BGB applies. In particular, § 1459 of the BGB (which applies in case of a jointly management of the property) foresees, that “the creditors of the husband and the creditors of the wife, may, to the extent that sections 1460 to 1462 do not provide otherwise, require satisfaction from the marital” or common “property (marital property obligations)” (paragraph 1). “For the marital property obligations, the spouses are also personally liable as joint and several debtors. If the obligations, as between the spouses, fall on one of the spouses, the obligation of the other spouse expires on the termination of the community of property” (paragraph 2).

In case of management by only one spouse, § 1437 of the BGB applies. According to this provision, “the creditors of the spouse who manages the marital property and, to the extent that sections 1438 to 1440 do not provide otherwise, the creditors of the other spouse in addition may require

<sup>43</sup> See Coester-Waltjen, D., Coester, M., 2003, 6.

satisfaction from the marital” or common “property (marital property obligations)” (paragraph 1). Additionally, “the spouse who manages the marital property is also personally liable as a joint and several debtor for the obligations of the other spouse which are marital property obligations. The liability lapses on the termination of the community of property if the obligations, as between the spouses, fall on the other spouse” (paragraph 2).<sup>44</sup>

### 2.2.7. Describe allocation and division of property in case of divorce, separation or dissolution of the union.

After the dissolution of the marriage by divorce spouses are entitled to maintenance, if one of the grounds provided by law exists (see §§ 1570, 1571, 1572, 1576, 1573, paragraph 1, 1573, paragraph 2, 1575 of the BGB).<sup>45</sup> The law also provides some criteria in order to establish the amount of the maintenance and some restrictions as well (§§ 1577 et seq. of the BGB). The modalities of payment are regulated in §§ 1585 et seq. of the BGB.<sup>46</sup>

The equalization of pension rights arises according to the principle of equal sharing (see § 1587 of the BGB and the VersAusglG).<sup>47</sup>

Some rules concerning the treatment of the marital home and the allocation of the household objects in case of divorce are provided by §§ 1568a and 1568b of the BGB.<sup>48</sup>

If the spouses lived under the default property regime of community of accrued gains, “the accrued gains that the spouses acquire in the marriage (...) are equalized if the community of accrued gains ends” (§ 1363, paragraph 2 of the BGB: see 2.2.2). This means, that the spouse whose gains accrued over the course of the marriage has to pay half of the excess to the other one (§ 1378 of the BGB). Spouse’s debts are also taken into account in calculating the acquired property (§ 1375, paragraph 1 of the BGB).<sup>49</sup>

To be mentioned is also § 1383 of the BGB, according to which “on the application of the creditor, the family court may order that the debtor is to transfer particular objects of his assets to the creditor, to be set off against the equalization claim if this is necessary to avoid gross inequity for the creditor and if this can be expected of the debtor; the decision must stipulate the amount that is set off against the equalization claim” (paragraph 1).

No equalization is foreseen in case that the spouses lived under the property regime of the separation of their assets.

In case that the spouses lived under the property regime of the community of property, a division of the joint property takes place according to the statutory rules (unless the spouses decide to do otherwise). Debts incurred in respect of the joint property must be deducted before the property is divided (§ 1476, paragraph 1 of the BGB).

In case of a separation, “one spouse may demand from the other the maintenance appropriate with regard to the standard of living and the earnings and property situation of the spouses” (see § 1361 of the BGB, dealing with the support claim).

§§ 1361a and seq. of the BGB apply to the allocation of the household and the treatment of the family home.

§§ 1671 and 1687 of the BGB regulate the custody and its exercise in case that the parents live apart. Registered partnerships (which can’t be entered anymore: see points 2.1.2 and 2.1.5.2) terminates through the *Aufhebung* (repeal or termination) (§ 15 I LPartG). The consequences are similar to them of a divorce.

<sup>44</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 117.

<sup>45</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 59 et seq.

<sup>46</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 60 et seq.

<sup>47</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 66.

<sup>48</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 67; <http://www.coupleseurope.eu/en/germany/topics/5-what-are-the-consequences-of-divorce-separation> (13.5.2019).

<sup>49</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 121.

**2.2.8. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?**

No, similar rules do not exist in Germany.

**2.3. Cross-border issues.**

**2.3.1. Is your country participating in the enhanced cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?**

Yes, Germany is participating in the enhance cooperation with regard to the two abovementioned Regulations.

**2.3.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as “marriage”, “matrimonial property agreement”, “partnership property agreement” etc.?**

The problems connected with the two Regulations are discussed in literature.<sup>50</sup>

Firstly, the term “marriage” isn’t defined under the European law. In Germany, the marriage between same-sex couples may be considered as a “marriage” (see Article 17 b, paragraph 4, 2 of the EGBG). Therefore, the Regulation (UE) no. 1103/2016 shall apply. Problems could arise, when the applicable law doesn’t know the homosexual marriage.

As the other abovementioned terms of “matrimonial and partnership property agreement” have to be interpreted autonomously, problems with their interpretations are expected. In fact, they are wider intended as the correspondent national ones. Property regime under the Regulation extends also to aspects concerning the effects of the marriage.

It is then unclear, which is the delimitation between the matrimonial property regimes and the rights *in rem* (which are excluded from the scope of the Regulation). A similar problem exists under the Succession Regulation too and was decided in the CJEU’s decision of 12 October 2017, Kubicka (C218/16), EU:C:2017:755 (see point 3.3.5.2).

Also the delimitation between the matrimonial property regime and the succession law is sometimes difficult, as emerges from the CJEU’s decision of 1st March 2018, Mahnkopf (C-558/16), ECLI:EU:C:2018:138, which should be considered in this field too (see point 3.3.5.2).

Moreover, it’s not sure, if some aspects concerning (nuptial) gifts are included in the scope of the application of the European Regulation(s).

Problems concerning the determination of the notion of habitual residence are expected as well. Some additional difficulties can arise by the determination of the moment to be considered by establishing the habitual residence under Article 26, paragraph 1, lit. a (see also recital no 49, sentence 2) of the Regulation in matters of matrimonial property regime.

**2.3.3. Are you expecting any problems with the application of the rules on jurisdiction?**

As the two abovementioned European Regulations only contains rules on the international jurisdiction, problems could arise in order to establish the competence of local courts (which is regulated by national rules: see now § 3 of the *Gesetz zum Internationalen Güterrecht und zur*

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<sup>50</sup> See e.g. Henrich, D., 2016, 171 et seq.; Dutta, A., Weber, J., 2017; Döbereiner, C., 2018, 405 et seq.; Ziereis, M.-T., 2018, 1040 et seq.; Mansel, H.-P., Thorn, K., Wagner, R., 2019, 95 (see the literature cited in the Footnote No. 156).

Änderung von Vorschriften des Internationalen Privatrechts<sup>51</sup> of 17 December 2018, which implemented the two Regulations and adapted the national law to them).

**2.3.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

As stated above, it is unclear, which is the delimitation between the matrimonial property regimes and the rights *in rem* (which are excluded from the scope of the Regulation). The same problem arises under the Succession Regulation too and was decided in the CJEU's decision of 12 October 2017, Kubicka (C218/16), EU:C:2017:755 (see point 3.3.5.2).

Also the delimitation between the matrimonial property regime and the succession law is sometimes difficult, as emerges from the CJEU's decision of 1st March 2018, Mahnkopf (C-558/16), ECLI:EU:C:2018:138, which should be considered in this field too (see point 3.3.5.2).

Moreover, it's not sure, if some aspects concerning (nuptial) gifts are included in the scope of the application of the European Regulation.

Furthermore, it is difficult to fix the delimitation between a change of the law applicable to the matrimonial property regime and a change of the matrimonial property regime (which in some countries is not possible after the marriage or requires additional formalities).

Concerning the choice of the applicable law (see Article 22), it is not clear then, if it can be suspensively conditionate.

Some problems could arise also with regard to the formal validity of the agreement on a choice of applicable law (Article 23) and of the matrimonial property agreement (Article 25). Coordination with the requirements foreseen by the national law is needed (see Article 23, paragraph 2 and Article 25, paragraph 2).

Article 25 was criticised as it doesn't foresee enough formal requirements in his paragraph 1. Additionally, the interpretation and application of paragraphs 2 and 3 could be difficult. The same is for the exception foreseen in Article 24, paragraph 2.

**2.3.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

§§ 108 et seq. FamFG still apply to the recognition and enforcement of decisions from third States (that are not participating in the enhance cooperation with regard to the two abovementioned Regulations).

An infringement of the *ordre public* could exist, if the applicable law leads to a discrimination based on sex (e.g. if according to the applicable law the wife has a worse treatment than the husband).

**2.3.6. Are there any national rules on international jurisdiction and applicable law (besides the Regulations) concerning the succession in your country?**

The German legislator implemented the two Regulations and adapted the national law to them with the *Gesetz zum Internationalen Güterrecht und zur Änderung von Vorschriften des Internationalen Privatrechts* (see point 2.3.3). Through the abovementioned Act he repealed or simply modified some private international law rules contained in the EGBGB. The provisions contained therein continue to apply in case that the marriage was concluded (or the partnership was registered) before 29 January 2019.

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<sup>51</sup> BGBl 2018 I, S. 2573.



### 3. Succession law.

#### 3.1. General.

##### 3.1.1. What are the main legal sources of Succession Law (SL) in your country? What are the additional legal sources of SL?

The main legal source of the German succession law is the Civil Code. Succession is regulated in the fifth book at §§ 1922 et seq. of the BGB (see additionally §§ 563 et seq. and 857 of the BGB, which also deal with the inheritance law) and is guaranteed by the Constitution at article 14, paragraph 1. According to this provision, “the right of inheritance shall be guaranteed” and its “content and limits shall be defined by the laws”.

There’re some additional legal sources too.<sup>52</sup>

Relevant provisions are e.g. contained in the Commercial Code (§§ 25 and 27 of the HGB).

Some special rules concerning the succession of farmers are then provided by the *Höferordnung* (Law of Hereditary Farms, which only applies in certain parts of Germany).

Other relevant legal sources are:

- the FamFG and the ZPO (see point 2.1.1), containing provision on voluntary jurisdiction and on civil procedure;
- the LPartG (see point 2.1.1), dealing with the rights of the registered same-sex civil partner;
- the *Grundbuchordnung* (hereafter GBO), which regulates the registration in the land register;
- the *Beurkundungsgesetz*, concerning the documentation of wills, which applies when a notarial will and/or a deed of inheritance is made;
- the *Insolvenzordnung* (hereafter InsO), containing rules on proceedings of insolvent estates;
- the *Erbschaftsteuer- und Schenkungsteuergesetz* (hereafter ErbStG) of 1997 (reformed in 2008), dealing with succession’s and gift’s taxes (as the amendment of 2008 was then considered to be unconstitutional, the Law to Adapt the Law of Inheritance Tax and Donation Tax to the Rulings of the Federal Constitutional Court was then enacted in 2016).<sup>53</sup>

Private international law rules are now provided by the Regulation (EU) No 650 of July 2, 2012. The *Internationales Erbrechtsverfahrensgesetz* of 29 June 2015 (hereafter *IntErbRVG*), which was adopted in order to implement the European Regulation 650/2012, has to be taken into account as well. The same is for the §§ 25 et seq. of the EGBGB, which are now complementary rules (see point 3.3.5.7).

There are some other Conventions and/or Treaties (e.g. the German-Turkish Estate Settlement Agreement; the German-Persian Settlement Agreement; the German-Soviet Consular Treaty; the Hague Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions of 5 October 1961).

Note, that in the former German Democratic Republic successions before 3 October 1990 are regulated by the Civil Code that was applicable in the east Germany before the reunification (see Art. 235 § 1 EGBGB).<sup>54</sup>

##### 3.1.2. Provide a short description of the main historical developments in SL in your country.

The law of succession contained in the Civil Code is based on the Roman law tradition.

It hadn’t been changed much till the Reform 2009-2010, which amended some provisions dealing with compulsory heirs and shares and amended the rules on the prescription in the field of succession law.

Other modifications to be mentioned are:<sup>55</sup>

<sup>52</sup> For a list of legal sources, see: Schwab, D., Gottwald, P., Lettmaier, S., 2017, 128.

<sup>53</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 129.

<sup>54</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 128 et seq.

- the amendment of the Law of Hereditary Farms on 26 July 1976;
- the *Erbrechtsgleichstellungsgesetz* of 19 December 1997 and the *Kindschaftsrechtsreformgesetz* (hereafter *KindRG*) of the 16 December 1997, which repealed all the discriminatory provisions dealing with children born out of wedlock in the field of inheritance law (for some changes see already the *Nichtehelichengesetz*, see point 2.1.2);
- a minor change in 2002 concerning wills made by persons who are not able to speak and write (§§ 2232 et seq. of the BGB; see also §§ 22 et seq. of the BeurkG);
- the new FamFG of 17 December 2008 (then amended in 2015);
- the LPartG which recognized to the same-sex registered partner the succession rights of the spouse (see point 2.1.1);
- the Second Act on the Equalization of Illegitimate Children in Succession Law of 12 April 2011, following the decision of the European Court of Human Rights of 28 May 2009, which established that the exclusion of the illegitimate children born before 1 July 1949 from the father's inheritance violates Articles 14 and 8 of the European Convention on Human Rights.<sup>56</sup>
- the Law to Adapt the Law of Inheritance Tax and Donation Tax to the Rulings of the Federal Constitutional Court, enacted in 2016 (after the amendment of the ErbStG in 2008 was considered to be unconstitutional) (see point 3.1.1).<sup>57</sup>

In order to implement the European Regulation, in 2015 the IntErbRVG was adopted.

In 2017 the marriage for same-sex persons was introduced (see point 2.1.2).

### 3.1.3. What are the general principles of succession in your country?

There are some general principles governing the succession law in Germany.<sup>58</sup>

The first to be mentioned is the principle of universal succession (*Gesamtrechtsnachfolge* or *Universalsukzession*), stated in § 1922 of the BGB. According to this provision the deceased's property usually "passes as a whole" to his or her heirs. Additionally, there's also the possibility for the deceased to appoint a legatee. The legacy only has obligatory effects under the German law (so called *Damnationslegat*).

There's no need to accept the estate as it passes to the heirs immediately upon the death of the deceased (*Vonselbsterwerb*). However, the heirs have the possibility to disclaim the inheritance (see point 3.2.6).

German law distinguishes between intestate<sup>59</sup> and testamentary<sup>60</sup> succession. Intestate succession is modelled on the so-called parentelic system and only takes place, if the deceased didn't provide otherwise. The testamentary freedom (§§ 1937 et seq. and § 2302 of the BGB) is guaranteed by the Constitution in Article 14, paragraph 1, of the GG (see also Article 2, paragraph 1).

Under the German law there's no prohibition of succession agreements. The possibility of a renunciation of the inheritance in advance is provided. The compulsory share may also be renounced in advance. Reciprocal and joint wills are admitted. In his will the testator may also appoint a subsequent heir or *Nacherbe*.

Compulsory heirs are protected by the law. However, they're only entitled to demand a certain sum of money.

German law knows a national certificate of succession (*Erbschein*).

<sup>55</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 22. For the development of the testamentary succession, see: Zimmermann, 2011, 176 et seq. For the development of the intestate succession, see: Zimmermann, R., 2015, 181 et seq.

<sup>56</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 133 et seq.

<sup>57</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 129.

<sup>58</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 129 et seq.; Zimmermann, R., 2011, 176 et seq.; Zimmermann, R., 2015, 181 et seq.

<sup>59</sup> Zimmermann, R., 2015, 181 et seq.

<sup>60</sup> Zimmermann, R., 2011, 176 et seq.

### 3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.

Upon the deceased's death, his or her estate passes immediately as a whole to his or her heirs (§ 1922, paragraph 1, § 1942, paragraph 1 of the BGB; according to § 875 of the BGB, the heir also gets the possession by law). However, according to § 1942, paragraph 1 of the BGB, he or she has the right to disclaim the inheritance "by a declaration to the probate court" (which "must be made in presence of and recorded by the probate court" – *Nachlassgericht*; "or in notarially certified form": § 1945, paragraph 1 of the BGB) within 6 weeks of having knowledge of the opening of the inheritance and of the "reason for" his or her "entitlement" as a heir or having been notified "of the disposition *mortis causa* by the probate court". "The period is six months if the deceased had his last residence only abroad or if the heir is resident abroad" (§ 1944 of the BGB).

There's no possibility for the heir to disclaim the inheritance, if: a) "he has already accepted it"; b) "the time of six weeks laid down for disclaimer" (§ 1944 of the BGB) "had passed" and "the inheritance is" therefore "deemed to have been accepted" (§ 1943 of the BGB) (see point 3.2.6).

The "local jurisdiction shall be determined based upon the deceased's domicile at the time of the succession". "If the domicile was not in Germany, that court shall have jurisdiction in the district in which the testator had his place of residence at the time of the succession". "If the testator is a German citizen and at the time of the succession had neither a domicile nor a place of residence in Germany, the Schöneberg Local Court in Berlin shall have jurisdiction". On the contrary, "if he's a foreign citizen without a domicile or place of residence in Germany at the time of the succession, each court in which any estate assets are located shall have jurisdiction over all estate assets" (§ 343 of the FamFG).

To prove the quality of heir and to obtain *e.g.* the registration in the Land Register an inheritance certificate (*Erbschein*; see §§ 2353 et seq. of the BGB) must be issued by the competent authority.<sup>61</sup> If a notarial will exists, there is no need of a certificate for the registration (see § 35, paragraph 1 of the GBO). In case of a national certificate, the jurisdiction lies with the probate court of the deceased's last domicile within the German territory. The local court of Schöneberg in Berlin is competent, when a German deceased didn't have residence in Germany (§ 343, paragraph 2 of the FamFG). By a foreign deceased any local court where the estate assets are located should have the jurisdiction according to § 343, paragraph 3 of the FamFG.<sup>62</sup>

The court clerk issues the certificate, unless there's a will or foreign law applies. In these cases, the certificate is issued by the judge (§§ 3 no 2c, 16, paragraph 1 no 6 RPfIG).

The probate court is also competent to issue a European Certificate (see § 34, paragraph 2 of the IntErbRVG). For the local competence, see Article 64 of the European Regulation and §§ 2, 34, paragraph 1, sentence 1 of the IntErbRVG. In particular, according to § 2 no 1 of the IntErbRVG the court of the district of the last habitual residence has the jurisdiction.<sup>63</sup>

The national certificate is aimed to protect third parties (see §§ 2366 et seq. of the BGB). There's a rebuttable presumption (see § 292 of the ZPO) of accuracy regarding the elements listed in § 2365 of the BGB. A difference between the effects of the national and the European Certificate exists: In fact,

<sup>61</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 70 et seq.

<sup>62</sup> However, in its decision of 21 June 2018 (Oberle (C-218/16), ECLI:EU:C:2018:485, see point 3.3.5.2) the CJEU stated that "article 4 of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which provides that, although the deceased did not, at the time of death, have his habitual residence in that Member State, the courts of that Member State are to retain jurisdiction to issue national certificates of succession, in the context of a succession with cross-border implications, where the assets of the estate are located in that Member State or the deceased was a national of that Member State".

<sup>63</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 171.

the national one “has a bona fide effect unless one knows positively that the certificate is wrong” (see Article 2366 of the BGB). Otherwise, “with regard to the European Certificate this protection is already lacking when one is ‘unaware of such inaccuracy due to gross negligence’”<sup>64</sup> (see Article 69, paragraph 3 of the Regulation; for the effects of the European Certificate, see also Articles 63, paragraph 2 and 69, paragraph 2 of the BGB).<sup>65</sup>

**3.1.5. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?**

In Germany the succession may be intestate (§§ 1924 et seq. of the BGB)<sup>66</sup> or determined by a disposition upon death.<sup>67</sup> Typically, the latter is his will, § 2064 et seq. of the BGB. However, a succession agreement is also allowed under the German law (§§ 2274 et seq. of the BGB).

Intestate succession is of subsidiary nature, as it only takes place if there’s no disposition upon death (*i.e.* neither a will nor a succession agreement). A cumulative application of different legal titles is possible. In fact, as provided by § 2088 of the BGB, “if the testator appointed only one heir and restricted the appointment to a fraction of his inheritance, the reminder” transfers “under the rules of the intestate succession” (§ 2088 of the BGB).

**3.1.6. What happens with the estate of inheritance if the decedent has no heirs?**

The consequences of the lack of the deceased’s heirs are regulated by § 1936 of the BGB. According to this disposition, “if at the time of the devolution of the inheritance neither a relative, nor a spouse, nor a civil partner of the deceased is living, the Land in which the deceased had his last place of residence or, if none such is ascertainable, his customary place of residence at the time of the devolution of the inheritance is the heir. In other cases, the Federal Government” inherits (§ 1936 BGB). However, the State’s liability is limited to the dimension of the estate.

**3.1.7. Are there special rules or limitations concerning succession with reference to the deceased’s (or heir’s) culture, tradition, religion or other characteristics?**

No, there are no discriminatory rules based on the abovementioned characteristics.

**3.2. Intestate succession.**

**3.2.1. Are men and women equal in succession? Are domestic and foreign nationals equal in succession? Are decedent’s children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?**

Men and women are equal in succession. The same is for domestic and foreign citizens. Children (born in or out of wedlock) are equal in succession too. However, there is a discriminatory rule concerning “illegitimate” children born before the 1 July 1949. Also after the modification adopted with the Second Act on the Equalization of Illegitimate Children in Succession Law of 12 April

<sup>64</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 174.

<sup>65</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 173 et seq.; [https://e-justice.europa.eu/content\\_succession-166-de-en.do#toc\\_1](https://e-justice.europa.eu/content_succession-166-de-en.do#toc_1) (13.5.2019).

<sup>66</sup> Zimmermann, R., 2015, 181 et seq.

<sup>67</sup> Zimmermann, R., 2011, 176 et seq.

2011, only if the father died after 29 May 2009 (the day after the European decision mentioned above, point 2.1.2), the illegitimate child born before 1 July 1949 becomes legal heir. This is not the case, if the father has died before the 29 May 2009.<sup>68</sup>

The adopted children are equal in succession. However, there're some differences between the adoption of a child according to §§ 1754 et seq. of the BGB (*Volladoption*) and the adoption of an adult (§§ 1770 et seq. of the BGB). In fact, only the adoption of a minor establishes a full relationship between him or her and the adoptive parent(s) as well as the latter's relatives.<sup>69</sup>

According to § 1923, paragraph 2 of the BGB and § 2101 of the BGB a person conceived at the time of entry of succession may be a heir as she or he is "deemed to have been born before the devolution of an inheritance".

Spouses and extra-marital registered partners are equal in succession. Note, that a registered partnership is only allowed between same-sex couples. However, it cannot be entered anymore (see point 2.1.2). Since 2017 a marriage between homosexuals is possible. In this case the succession rights foreseen for the survived spouse apply.

No legal succession rights are foreseen with regard to other forms of (*de facto*) partnership or cohabitation.

### **3.2.2. Are legal persons capable of inheriting? If yes, on which basis?**

Yes, legal persons can inherit under the German law. The possibility to appoint a legal person as an heir arises from § 2044, paragraph 2, Sentence 3; § 2101, paragraph 2 and § 2109 paragraph 2 of the BGB.

### **3.2.3. Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.**

Yes, the institute of unworthiness is present in the German legal system. It's regulated in §§ 2339 et seq. of the BGB. One is unworthy to inherit: a) "if he has intentionally and unlawfully killed or attempted to kill the deceased, or has put him in a state as a result of which the deceased was incapable until his death of making or revoking a disposition *mortis causa*"; b) "if he has intentionally and unlawfully prevented the deceased from making or revoking a disposition *mortis causa*"; c) "if he has, by deceit or unlawfully induced the deceased to make or revoke a disposition *mortis causa*"; d) "if he is, in respect of a disposition *mortis causa* made by the deceased, guilty of a criminal offence under the provisions of sections 267, 271-274 of the Criminal Code". In the last two cases the unworthiness "does not occur if, before the [...] devolution, the disposition that the testator was induced to make or in respect of which the criminal offence was committed has become ineffective, or the disposition which he was induced to revoke would have become ineffective".

According to § 2340 of the BGB "unworthiness to inherit is enforced by avoidance of the acquisition of the inheritance", which is "admissible only after the devolution of the inheritance" and "may be effected only within the period" of one year from the knowledge of the grounds of avoidance (§ 2340, 2082 of the BGB). Pursuant to § 2341 of the BGB "any person is entitled to avoid if he benefits from cessation of entitlement of a person unworthy to inherit, even if it is only on the cessation of another person". The "avoidance is effected by bringing an action [...], which must be directed to having the heir declared unworthy to inherit. The avoidance does not enter into effect until the judgement is final and absolute" (§ 2342 of the BGB). Note, that the "avoidance is excluded if the testator has forgiven the person unworthy to inherit" (§ 2343 of the BGB).

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<sup>68</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 133 et seq.

<sup>69</sup> For the status of adopted people, see Schwab, D., Gottwald, P., Lettmaier, S., 2017, 134.

The effects of the declaration of the unworthiness are regulated in § 2344 of the BGB. The unworthiness also extends to the capacity to receive a legacy or a compulsory share (§ 2345 of the BGB).<sup>70</sup>

**3.2.4. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?**

The German regulation of the intestate succession<sup>71</sup> (see §§ 1924 et seq. of the BGB) follows the parentelic system. Intestate heirs are the deceased's relatives and his or her spouse (or registered partner). However, the latter has no succession rights in case of a divorce or, under certain conditions, in case of a separate life.<sup>72</sup>

Relatives are divided up into 4 classes. Heirs of 1<sup>st</sup> class are the deceased's descendants (§ 1924 of the BGB); heirs of the 2<sup>nd</sup> class are the deceased's parents and their descendants (§ 1925 of the BGB); heirs of the 3<sup>rd</sup> class are the deceased's grandparents and their descendants (§ 1926 of the BGB); heirs of the 4<sup>th</sup> class are the great-grandparents and their descendants (§ 1928 of the BGB).

A heir belonging to the previous class excludes from the inheritance the descendants of subsequent, more distant classes (see § 1930 of the BGB). Furthermore, an ascendant excludes from the succession his or her descendants. If the grandparent's descendants have already died, the closest relative is the sole heir.

The spouse gets  $\frac{1}{4}$  of the estate together with the deceased's descendants (*i.e.* relatives of the 1<sup>st</sup> degree) and  $\frac{1}{2}$  together with any deceased's relatives of the 2<sup>nd</sup> degree or his or her grandparents (§ 1931 of the BGB). The same rule applies to the survived registered partner (see §§ 6 and 10 of the LPartG). Succession rights of the survived spouse shall be coordinated by the matrimonial property regime. Thus, if the couple lived under the default regime of the community of accrued gains, the share belonging to the survived partner increases by  $\frac{1}{4}$  (§§ 1931 and 1371 of the BGB) In absence of relatives of 1<sup>st</sup> or 2<sup>nd</sup> class or grandparents he or she receives the entire inheritance (§ 1931 of the BGB).

In addition, an advance legacy (so called *Großer Voraus*), covering the "objects belonging to the marital household" and "the wedding presents" (§ 1932 of the BGB), goes to the spouse together with relatives of the 2<sup>nd</sup> class or grandparents. If there're heirs of the 1<sup>st</sup> class, the spouse only has this right "to the extent that he needs them to maintain a reasonable household".

In absence of other heirs, the State becomes the legal heir (§ 1936 of the BGB, see point 3.1.6).

A special succession right is then foreseen in § 1969 of the BGB. According to this provision, "the heir has a duty in the first thirty days after the occurrence of the devolution of the inheritance to grant maintenance to family members of the deceased, if they belong to the household of the deceased and had been receiving maintenance from" him or her "at the time of" his or her "death, to the same extent as the deceased had done and to permit them to use the home and the household objects" (maintenance for thirty days). However, "the deceased may by testamentary disposition make different arrangements".

<sup>70</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 158 et seq., 169.

<sup>71</sup> Zimmermann, R., 2015, 181 et seq.; Schwab, D., Gottwald, P., Lettmaier, S., 2017, 132 et seq.; [https://e-justice.europa.eu/content\\_succession-166-de-en.do#toc\\_1](https://e-justice.europa.eu/content_succession-166-de-en.do#toc_1) (13.5.2019).

<sup>72</sup> For the spouse's inheritance rights, see: Schwab, D., Gottwald, P., Lettmaier, S., 2017, 134.

### 3.2.5. Are the heirs liable for deceased's debts and under which conditions?

According to § 1967 of the BGB heirs are "liable for the obligations of the estate" (usually, also with their own assets).<sup>73</sup> They "are liable for the joint obligations of the estate as joint and several debtors" (see §§ 2059 et seq. of the BGB).

Spouses can also limit their liability to the legal estate (*Erbmasse*), requesting administration of the estate on behalf of the creditors or the estate insolvency proceedings (*Nachlassinsolvenzverfahren*, see §§ 1975 et seq. of the BGB).

Heirs can also initiate a public notice procedure (*Aufgebotsverfahren*), requiring the creditors to notify the court of their claims (§ 1970 of the BGB; §§ 433 et seq. and 454 et seq. of the FamFG). The procedure is aiming to avoid liability for debts they were not notified.

Heirs are not liable, if they renounced to the inheritance within the deadline foreseen by law (see point 3.2.6).<sup>74</sup>

### 3.2.6. What is the manner of renouncing the succession rights?

According to § 1942, paragraph 1 of the BGB, the heir has the right to disclaim the inheritance "by a declaration to the probate court" (which must be "made in the presence of and recorded by the probate court" – *Nachlassgericht*; "or in notarially certified form": § 1945, paragraph 1 of the BGB) within 6 weeks of having knowledge of the opening of the inheritance and of "the reason of" his or her "entitlement" as a heir or having been notified "of the disposition *mortis causa* by the probate court". The "period is six months if the deceased had his last residence only abroad or if the heir is resident abroad at the time of the beginning of the period" (§ 1944 of the BGB). The heir cannot disclaim the inheritance if: a) "he has already accepted it"; b) "the time of six weeks laid down for disclaimer" (§ 1944 of the BGB) "had passed" and the inheritance is therefore "deemed to have been accepted" (§ 1943 of the BGB).

## 3.3. Disposition of property upon death.

### 3.3.1. Testate succession.

#### 3.3.1.1. Explain the conditions for testate succession.

German law guarantees the testator's freedom (within the limits of §§ 134 and 138 of the BGB) (see §§ 1937 et seq. of the BGB and Articles 2, paragraph 1 and 14, paragraph 1 of the GG). A will can be revoked at any time by the testator (§ 2253 of the BGB).

The will can be drawn up in one of the forms foreseen by law.<sup>75</sup>

The testator must be capable according to § 2229 of the BGB and he "may make a will only in person" (§ 2064 of the BGB). Pursuant to § 2065, paragraph 1 of the BGB "the testator cannot make a testamentary disposition in such a way that another person has to determine whether it should be effective or not". Furthermore, he "cannot leave to another person the specification of the person who is to receive a gift and the specification of the object of the gift" (§ 2065 of the BGB).

German law doesn't prohibit joint and mutual Wills (§§ 2265 et seq. of the BGB). Succession agreement are allowed as well (§§ 2274 et seq. of the BGB).

<sup>73</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 182 et seq.

<sup>74</sup> See [https://e-justice.europa.eu/content\\_succession-166-de-en.do#toc\\_1](https://e-justice.europa.eu/content_succession-166-de-en.do#toc_1) (13.5.2019).

<sup>75</sup> Zimmermann, R., 2011, 197 et seq. and 205 et seq.

### 3.3.1.2. Who has the testamentary capacity?

Persons who are already 18 years old are fully capable to testate. The testamentary capacity is regulated by § 2229 of the BGB. According to this provision also “a minor may make a will”, but “only once he has attained his sixteenth year of age”. In this case, he “does not need the consent of his legal representative to make a will” (for the allowed forms, see § 2233, paragraph 1 of the BGB and § 2247, paragraph 4 of the BGB; for more details, see point 3.3.1.4). The one who has not yet reached the age of 16 cannot make a will (neither through a representative as the will can only be made in person: see point 3.3.1.1).

The law also provides that a will cannot be made by “a person who is incapable of realising the importance of a declaration of intent made by him and of acting in accordance with this realisation on account of pathological mental disturbance, mental deficiency or derangement of the senses”. According to § 2229, paragraph 4 of the BGB, also the one who is contractually incapable cannot draw up a will.

### 3.3.1.3. What are the conditions and permissible contents of the will?

In his will the testator may appoint an heir (§ 1937 of the BGB) or disinherit a relative, his spouse or his civil partner (§ 1938 of the BGB).

Substitute heirs may be appointed according to § 2099 of the BGB. Pursuant to § 2100 et seq. of the BGB the deceased may also appoint a reversionary or subsequent heir, *i.e.* an heir that only becomes such “after another heir has first been heir”.

One or more executors may be appointed as well (§ 2197 of the BGB).

It is also possible for the deceased to foresee a bequest (§ 1939 of the BGB; see §§ 2147 et seq. of the BGB) (also a preferential one: § 2150 of the BGB).

The testamentary gift can be made subject to a condition (a precedent or a subsequent one: §§ 2074 et seq. of the BGB). Furthermore, § 1940 of the BGB allows testamentary burdens (see also §§ 2192 et seq. of the BGB). Thus, the deceased may “oblige his heir or a legatee to perform an act without giving another person a right to the performance” (for the “claim for fulfilment” see § 2194 of the BGB).

The deceased may also give directions for the partitioning (§§ 2048 et seq. of the BGB); or exclude it with regard to the estate or individual objects of the estate or make it dependent on a notice period (§ 2044 of the BGB). According to §§ 2050 of the BGB a compensation obligation may be ordered or excluded.

An executor can be appointed by a testamentary disposition (§§ 2197 et seq. of the BGB). In the same way, a foundation can be established (§ 83 of the BGB). Additionally, the deceased may stipulate that one parent shall not manage the child’s property (§ 1638 of the BGB) or that the parents or the guardian are not to manage the property of the person subject to their custody (§ 1909 of the BGB). A guardian can be named according to § 1777 of the BGB. A declaration that the acquisition upon death is to be reserved property can be made by means of a will as well (§ 1418, paragraph 2, no 2 of the BGB).<sup>76</sup>

A will can also be used to revoke a previous one.

A choice of the law applicable to the succession may be included in the will as well (see Article 22, paragraph 1 of the European Succession Regulation).

### 3.3.1.4. Describe the characteristics of will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a will?

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<sup>76</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 144.



In the German legal system, a will can be a handwritten or holographic or a public one (see § 2231 of the BGB).<sup>77</sup>

The handwritten or holographic will (§ 2247 of the BGB) is made “by a declaration written and signed by” the testator “in his own hand”. “The deceased should state the time when and the place where he wrote it down”. “The signature should contain the first name and the last name of the testator. If the testator signs in another manner and this signature suffices to establish the identity of the testator and the seriousness of his declaration, such a signature does not invalidate the will”.

If “the will does not contain any information about the time when it was made and this causes doubts about its validity, the will is to be deemed to be valid only if the necessary ascertainments about the time when it was made can be established in some other manner. The same applies with the necessary modifications to a will that does not contain any information about the place where it was made”.

A handwritten will can only be made by a person who turned 18. A minor (*i.e.* the one who hasn’t already reached the age of majority) may not make a handwritten will (the same is for a person incapable of reading) (§§ 2233, paragraphs 1 and 2 and 2247, paragraph 4 of the BGB; see also §§ 22 et seq. of the BeurkG).

The public or notarial will requires a declaration of the deceased’s last will to a notary. The latter records it in writing. The deceased can also hand the notary “a document with the statement that it contains his last will”. He “may hand over the document either unsealed or sealed” and “it is not required to be written by him” (§ 2232 of the BGB). A public will can be drawn up by minors, if they’re already 16 years old (see point 3.3.1.2).

Special rules apply to the emergency will(s) (§§ 2249 et seq. of the BGB).<sup>78</sup>

Spouses and registered partners are permitted to draw up joint (and reciprocal) wills too (§ 2265 et seq. and § 2270 et seq. of the BGB). In case of a joint handwritten will, “it suffices if one of the spouses makes a Will in the manner provided there, and the other spouse co-signs the joint declaration in his own hand. The co-signing spouse should thereby state the time (day, month and year) and the place at which his signature was affixed” (§ 2267 of the BGB).<sup>79</sup>

**3.3.1.5. Is there a (public) register of wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

Handwritten and notarised dispositions put in custody by the local court (§§ 344 and 246 of the FamFG; §§ 2248 and 2259 of the BGB) are registered electronically in the Central Register of Wills (*Zentrales Testamentregister*) at the Federal Chamber of Notaries (*Bundesnotarkammer*) which exists since 2012 (§ 78b of the BNotO).<sup>80</sup>

**3.3.2. Succession agreement (*negotia mortis causa*). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.**

Succession agreements or contracts of inheritance are allowed under the German law (§§ 2274 et seq. of the BGB).

As provided by § 2278 of the BGB, “in a contract of inheritance, each of the parties to the contract may make contractual dispositions *mortis causa*”. However, “dispositions other than appointments of heirs, legacies and testamentary burdens may not be made contractually”.

<sup>77</sup> Zimmermann, R., 2011, 197 et seq. and 205 et seq.

<sup>78</sup> Zimmermann, R., 2011, 212 et seq.

<sup>79</sup> See [https://e-justice.europa.eu/content\\_succession-166-de-en.do#toc\\_1](https://e-justice.europa.eu/content_succession-166-de-en.do#toc_1) (13.5.2019).

<sup>80</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 142. See [https://e-justice.europa.eu/content\\_succession-166-de-en.do#toc\\_1](https://e-justice.europa.eu/content_succession-166-de-en.do#toc_1) (13.5.2019).

Succession agreements can also be concluded in order to renounce to succession rights (see § 2348 of the BGB: the notarial form is required). A renunciation to the compulsory share is possible (§ 2346 of the BGB).

The deceased may conclude the succession agreement (only) in person (§ 2274 of the BGB). Pursuant to § 2275 of the BGB “a person can only enter into a contract of inheritance as testator if he has unlimited capacity to contract”. However, “a spouse may enter into a contract of inheritance, as testator, with” his or her “spouse, even if” he or she “has limited capacity to contract”. In such case, the consent of the legal representative is required. If the latter is a guardian, a family court’s ratification is needed as well. Note, that the same “exception also applies” (with the necessary modifications) “to engaged persons, including engaged persons in the meaning of the Civil Partnership Act (*Lebenspartnerschaftsgesetz*)”.

As stated in § 2276 of the BGB “a contract of inheritance may be made only by being recorded by a notary in the simultaneous presence of both parties”. Additionally, “the provisions of § 2231 No. 1 and § 2232 and 2233 concerning the will also applies to each of the parties to the contract”. However, “for a contract of inheritance between spouses or between engaged persons that is joined with a marriage contract in the same document, the form prescribed for a contract of marriage suffices” (§ 2276, paragraph 2 of the BGB).

A contract of inheritance may not be revoked unilaterally (§ 2289 of the BGB).<sup>81</sup>

There’s also the possibility to conclude a contract for the benefit of third parties (§ 328 of the BGB), which is going to be performed “after the death of the person to whom it is promised” (§ 331 of the BGB).

### **3.3.3. Are conditions for validity of wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

The conditions for validity of wills and succession agreements are governed by specific SL rules (§§ 2077 et seq. of the BGB).

### **3.3.4. Are succession interests of certain family member protected regardless of the deceased’s disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

German law protects the interests of some family members. The surviving spouse (or registered same-sex partner: see § 10 LPartG), children and other descendants or parents have the right to a compulsory portion. This one consists of 1/2 of the value of their legal share (§§ 2303 et seq. of the BGB). Thus, if they are excluded from succession or affected by a disposition made by the deceased (e.g. a gift made within the last 10 years before the death, which is “taken into account by one-tenth less within each further year prior to the devolution of the estate”: see § 2325 of the BGB), they may pretend their compulsory share demanding a monetary payment from the heir(s). On the contrary, they cannot get a part of the estate and they don’t become heirs.

Note, that the persons mentioned above have no right to receive the compulsory portion, if they waived the inheritance or their compulsory portion or in case of unworthiness (confront §§ 2345, paragraph 2 and 2346 of the BGB).

The claim prescribes in 3 years of the beneficiaries having knowledge of the inheritance and of the disposition affecting his or her rights (and within no more than 30 years of the inheritance: see §§ 195 and 199, paragraph 3a of the BGB). However, “the heir can demand additional time to satisfy the compulsory share if the immediate satisfaction of the entire claim would constitute an inequitable hardship for the heir on account of the nature of the objects of the estate” (“in particular, if it would force him to give up his family home or to sell business assets”: § 2331a of the BGB).

<sup>81</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 151.

The right to a compulsory portion is guaranteed by the Constitution (see Articles 6, paragraph 1 and 14, paragraph 1 of the BGB).<sup>82</sup> Nevertheless, a withdrawal of the compulsory portion is possible under the conditions provided by § 2333 and 2336 of the BGB (*i.e.* due to a serious crime). Furthermore, the one who is unworthy to inherit is also unworthy to get the compulsory portion (§ 2345, paragraph 2 of the BGB).<sup>83</sup>

### 3.3.5. Cross-border issues.

#### 3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?

In Germany the Succession Regulation 650/2012 is hardly discussed in literature.<sup>84</sup>

In 2015 the European Regulation was implemented by the *IntErbRVG* (see point 3.1.1).

There're also some court's decisions dealing with the Regulation too.

- OLG München ZEV 2017, 333 and OLG Hamm ZEV 2018, 343 (concerning the interpretation of the notion of last habitual residence);
- AG Hamburg-Wandsbek BeckRS 2018, 18828 (regarding the interpretation of a will set up prior to 17.8.2015 in case that the deceased died after the 17.8.2015);
- OLG Köln FD-ErbR 2018, 403324 (which submitted to the CJEU the question whether the form IV in annex 4 is to be considered mandatory by issuing a Certificate of Succession or not);
- OLG Nürnberg ZEV 2017, 579 (dealing with the content of the European Certificate of Succession);
- KG DNotZ 2017, 471 CJEU (concerning the submission to the CJEU of the question concerning the interpretation of the article 4 of Regulation);
- OLG Düsseldorf FGPrax 2017, 36 (dealing with article 4 of the European Regulation);
- KG FGPrax 2017, 33 (which submitted to the CJEU the question whether § 1371, paragraph 1 of the BGB falls within the scope of the European Regulation or not);
- KG NJW-RR 2016, 1100 (concerning the application of article 4 of the European Regulation to the border commuters).
- AG Pinneberg BeckRS 2016, 15701 (which excluded the application of the European Regulation in case that the deceased's death occurred prior to 17.8.2015).

#### 3.3.5.2. Are there any problems with the scope of application?

It was hardly discussed under the German law, whether § 1371, paragraph 1 of the BGB (see points 2.2.2 and 3.2.4) falls within the scope of the application of the Regulation or not. BGH ZEV 2015, 409 stated *e.g.* that the provision is not to be considered as a provision concerning the succession law. The most scholars were of the same opinion. However, KG FGPrax 2017, 33 submitted the question to the CJEU. In its decision of 1 March 2018, Mahnkopf (C-558/16), ECLI:EU:C:2018:138) the CJEU stated that "article 1(1) of Regulation (EU) No 650/2012 [...] must be interpreted as meaning that a national provision, such as that at issue in the main proceedings, which prescribes, on the death of one of the spouses, a fixed allocation of the accrued gains by increasing the surviving spouse's share of the estate, falls within the scope of that regulation".

Furthermore, it was not clear whether a foreign legatee *per vindicationem* needs to be converted in Germany in a legatee *per damnationem*. In its decision of 12 October 2017, Kubicka (C-218/16), EU:C:2017:755 the CJEU decided that article 1(2)(k) and (l) and article 31 of the Regulation "must be interpreted as precluding refusal, by an authority of a Member State, to recognise the material

<sup>82</sup> See BVerfG 112, 332, in NJW 2005, 1561.

<sup>83</sup> [https://e-justice.europa.eu/content\\_succession-166-de-en.do#toc\\_1](https://e-justice.europa.eu/content_succession-166-de-en.do#toc_1) (13.5.2019).

<sup>84</sup> Dutta, A., Weber, J., 2016.

effects of a legacy ‘by vindication’, provided for by the law governing succession chosen by the testator in accordance with article 22(1) of that regulation, where that refusal is based on the ground that the legacy concerns the right of ownership of immovable property located in that Member State, whose law does not provide for legacies with direct material effect when succession takes place”.

Some problems arise also in relation to the application of the Regulation *ratione temporis*. Regarding the wills set up prior to the 17.8.2015 AG Hamburg-Wandsbek, BeckRS 2018, 18828 stated that their interpretation has to follow the former private international law rules also in case that the deceased died after the 17.8.2015. Furthermore, AG Pinneberg BeckRS 2016, 15701 excluded the application of the European Regulation as the deceased’s death occurred prior to 17.8.2015. In fact, according to article 83, paragraph 1 of the Regulation, the latter “shall only apply to the succession of persons who died on or after 17 August 2015”.

Another question concerns the mandatory character of the form IV in annex 4 by issuing a Certificate of Succession. OLG Köln FD-ErbR 2018, 403324 submitted the question to the CJEU.

It is then discussed, what should be the content of the European Certificate of Succession. OLG Nürnberg ZEV 2017, 579 stated that the indication of a list of single assets in the European Certificate of Succession is not consistent with the principle of universality of succession in § 1922 of the BGB. Furthermore, according to OLG Nürnberg, an only informative indication of the assets (without the effects foreseen by the Regulation for the indications contained in the Certificate) would be in contrast with the spirit of the European Regulation.

In Germany also arises the question if article 4 of the abovementioned Regulation must be interpreted as precluding the application of the rules which provides that the national courts are competent to issue the national certificates, if the estates’ assets are located in the national territory or the deceased was a citizen of the State, even if he had a residence in another State at the time of his death. The question was submitted to the CJEU. In its decision of 21 June 2018, Oberle (C-218/16), ECLI:EU:C:2018:485, the Court stated the existence of a preclusion based on article 4 of the Regulation.

**3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country had experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?**

It was discussed in Germany if article 4 of Regulation must be interpreted as precluding the application of the rules which provides that the national courts are competent to issue the national certificates, if the estates’ assets are located in the national territory or the deceased was a citizen of the State, even if he had a residence in another State at the time of his death. The question was submitted to the CJEU and decided in the decision of 21 June 2018, Oberle (C-218/16), ECLI:EU:C:2018:485, which stated the existence of a preclusion based on article 4 of the Regulation.

There’re some decisions dealing with the notion of habitual residence. OLG München ZEV 2017, 333 and OLG Hamm ZEV 2018, 343 stated that the subjective element, *i.e.* the deceased’s intention to live in a certain place (*e.g.* a nursing home), is also relevant to establish his habitual residence.

Additionally, KG NJW-RR 2016, 1100, dealing with the application of article 4 of the European Regulation to the border commuters, stated that considerations no 23 and 24 of the Regulation must be taken into account in order to establish the last habitual residence pursuant to article 4 of the Regulation. Hence, in case of a border commuter his or her integration in a certain State is relevant too.

**3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?**

Some problems arise in relation to the application of the Regulation *ratione temporis*. With regard to wills set up prior to the 17.8.2015 AG Hamburg-Wandsbek, BeckRS 2018, 18828 stated that their interpretation has to follow the former international private law rules also in case that the deceased died after the 17.8.2015.

Furthermore, AG Pinneberg BeckRS 2016, 15701, excluded the application of the European Regulation as the deceased's death occurred prior to 17.8.2015. In fact, according to article 83, paragraph 1 of the Regulation, the latter "shall only apply to the succession of persons who died on or after 17 August 2015".

### **3.3.5.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?**

Public policy could only be invoked regarding the discriminatory rules. It's not clear, if the regulation of compulsory shares can be considered as part of the public policy. The scholars tend to exclude a public policy problem, if there're rules protecting the compulsory heirs (even though these are of different character).

### **3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?**

In Germany the probate court (*Nachlassgericht*, which is a division of the local court) is competent to issue the European Certificate (see § 34, paragraph 2 of the IntErbRVG). For the local competence, see Article 64 of the European Regulation and §§ 2, 34, paragraph 1, sentence 1 of the IntErbRVG. In particular, according to § 2 No. 1 of the IntErbRVG the court of the district of the last habitual residence has the jurisdiction.<sup>85</sup>

### **3.3.5.7. Are there any national rules on international jurisdiction and applicable law (besides the Succession Regulation) concerning the succession in your country?**

Articles 25 and 26 of the EGBGB, containing private international law provisions, were amended in 2015. According to the new article 25 "insofar as the succession doesn't fall within the scope of application of Regulation (EU) No. 650/2012 chapter III of this Regulation shall apply *mutatis mutandis*".

Article 26 deals with inheritance law as well. Pursuant to its paragraph 1, "in implementation of article 3 of the Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (Federal Law Gazette 1965 II p 1144, 1145) a testamentary disposition, also when it is made by several persons in the same document or when an earlier testamentary disposition is revoked by it, is valid as regards form if its form complies with the formal requirements of the law which governs the succession or would govern at the time when the disposition was made". With regard to the form of other dispositions *mortis causa*, paragraph 2 of the same article states, that it "is governed by the law determined by article 27 of the Regulation (EU) No. 650/2012". Articles 25 et seq. of the EGBGB are complementary.<sup>86</sup>

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<sup>86</sup> Schwab, D., Gottwald, P., Lettmaier, S., 2017, 128.

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## Greece

Vassiliki Koumpli and Vassiliki Marazopoulou

### 1. Social perspective.

- 1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without *affectio maritalis*).**
- 1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.**
- 1.3. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.**
- 1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).**

#### Answer to questions 1.1.-1.4.

According to information available on the website of the Hellenic Statistical Authority ([www.statistics.gr](http://www.statistics.gr)) based on the results of the latest census (2011), the resident population of Greece is 10.816.286, of which 5.303.223 male (49,0 %) and 5.513.063 female (51,0%).

Among them, 9.904.286 people have Greek citizenship, 199.121 people are citizens of other EU countries, 708.054 people are citizens of other countries and 4.825 people are either without citizenship or they have no specified citizenship.

Moreover, 50,3% of Greece's population is legally married (married, under registered partnership, separated), while 39,1% of the population of the country is single, with single males (21,5% of total population) being significantly more numerous than single females.

Resident population by marital status	
Total	10.816.286
Single	4.227.476
Married	5.364.763
Widowed	820.449
Divorced	331.686
Under registered partnership	1.765
Separated	69.737
Widowed from registered partnership	78
Divorced from registered partnership	332

## 2. Family law

### 2.1. General.

#### 2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?

Article 21 of the Greek Constitution provides that marriage, family and succession fall under the protection of the State.

Under Greek law, the main source of substantive family law (hereinafter: 'FL') is Greek Civil Code (hereinafter: CC)<sup>1</sup>. In addition, Law 3719/2008 (Reforms concerning family, children, the society and other provisions)<sup>2</sup> introduced a number of amendments in the FL. Among these modifications special reference is to be made to the establishment of civil partnership between opposite-sex couples. After the European Court of Human Rights issued its judgment in *Vallianatos and Others v. Greece*<sup>3</sup>, Law 3719/2008 was amended by Law 4356/2015<sup>4</sup> (on registered civil partnerships) in order to include in its scope of application the same-sex couples as well. Reference is also made to Law 4538/2018<sup>5</sup> which introduced special provisions on foster care and adoption.

Family Law provisions of procedural nature can also be found in the Greek Code of Civil Procedure (hereinafter: CP)<sup>6</sup>, Law 344/1976<sup>7</sup>, Law 411/1989<sup>8</sup>, Law 3719/2008<sup>9</sup> etc.

Greece has ratified several relevant international treaties, such as the European Convention on the Adoption of Children (1967), the Hague Convention on the Civil Aspects of the International Child Abduction (1980), then United Nations Convention on the Rights of the Child (1989), the European Convention on the Legal Status of Children Born out of Wedlock (1975), the European Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and Restoration of Custody of Children (1980), the European Convention on the Rights of the Child (1996) et alia.

Greece exceptionally recognized the direct implementation of religious law (i.e. implementation without reference by conflict of laws rules) in the case of Jews and in the case of Muslims of Western Thrace (see analytically Annex).

#### 2.1.2. Provide a short description of the main historical developments in FL in your country.

Historically, FL was based on the Byzantine law, which was codified in Pandektes, and the laws of the Macedonian emperors (Basilica). Subsequently, FL was regulated by the first Civil Code of 1940/1946, which unified the regional civil law rules that were in force until this time point. At that time point it is notable that FL was influenced by Greek tradition, including the attitude of the Orthodox church, A

<sup>1</sup> Presidential Decree 456/1984 Civil Code (Government Gazette A 164).

<sup>2</sup> Law 3719/2008 Reforms concerning family, children, the society and other provisions (Government Gazette A 241).

<sup>3</sup> ECHR, *Vallianatos and Others v. Greece* (Applications Nos 29381/09 and 32684/09) Grand Chamber (November 7, 2013) HUDOC. The case concerned sexual orientation discrimination due to the exclusion of same-sex couples living in Greece from registering a civil partnership.

<sup>4</sup> Law 4356/2015 Civil partnership, exercise of rights, criminal and other provisions (Government Gazette A 181).

<sup>5</sup> Law 4538/2018 Measures to promote the institutions of foster care and adoption and other provisions (Government Gazette A 85).

<sup>6</sup> Presidential Decree 503/1985 Code of Civil Procedure (Government Gazette A 182).

<sup>7</sup> Law 344/1976 on registrar acts (Government Gazette A 143).

<sup>8</sup> Law 411/1989 on community of matrimonial property book (Government Gazette A 175).

<sup>9</sup> Law 3719/2008 Reforms on the family, the child, the society and other provisions (Government Gazette A 241).



significant amendment of the FL provisions and of the stance of the Greek legislator included in the Civil Code which provides for the civil marriage, the equality between spouses and particular issues on the legal regime of divorce. More recent revisions in the 1990s and the 2000s concerned filiation, medically assisted reproduction, children adoption and handicapped individuals.

### **2.1.3. What are the general principles of FL in your country?**

Traditionally, the nuclear and patriarchal family model was prevailing in FL. The 1980s revision explicitly introduced the principle of equality between the spouses, which has been constitutionally established as well. As core principles of FL one could also highlight the mutual obligation of spouses and registered partners to collaborate in the interest of the family, the obligation of maintenance and assistance between the members of the family and the duty to take into account and protect the best interest of the child as regards upbringing issues.

### **2.1.4. Define “family” and “family member” in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

Greek law does not contain a specific provision giving a single definition of the terms "family" and "family member" for the entire legal system. The term "family" is considered an indefinite legal concept, specified in the context of the application of FL law rules.

This lack of specific legislative provision reflects the reluctance of the legislator to provide for a binding definition of an institution that, out of its nature, is necessarily affected by the social variations evolving over time.

### **2.1.5. Family formations.**

#### **2.1.5.1. Define the “spouse” in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

A spouse is the person who has entered into marriage (religious and/or civil) with another person of the opposite sex. This definition of the term is valid for the entire legal system.

The substantive requirements for a valid marriage are:

- a) sex difference;
- b) marriageable age, i.e. both persons must be over the age of 18, otherwise a permission by the court is required stating the existence of a serious reason (article 1350 CC);
- c) consent, i.e. future spouses must agree by a simultaneous personal unconditional declaration (article 1350 CC);
- d) capacity to contract and convey, i.e. persons of unsound mind and those interdicted by the court cannot marry validly (article 1351 CC);
- e) absence of a pre-existing marriage or registered partnership which has not been dissolved (article 1354 CC);
- d) absence of blood relationship between the future spouses (in direct line without limit and in collateral line up to the fourth degree, article 1356 CC);
- e) absence of in-law relationship between the future spouses (in direct line without limit and in collateral line up to the third degree, article 1357 CC);
- f) absence of adoption, i.e. marriage between an adoptive parent and his descendants and the adopted child is forbidden (article 1360 CC).

**2.1.5.2. What types of relationships/unions between persons are recognised in FL of your country? In particular, formal (registered) and informal (de facto) unions, heterosexual and same-sex unions, unions with and without *affectio maritalis*. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

Apart from marriage, the Greek legal order regulates registered partnership of both opposite-sex and same-sex couples. Registered partnership is defined as the agreement between two persons organizing their common life. For the validity of such agreement, a notarial authentication and its registration in the special book of the locally competent Registrar is required (Laws 3719/2008 and 4356/2015).

*De facto/free* unions / cohabitations (i.e. unregistered) are not uncommon in Greece. Greek legislator acknowledges their existence, as it arises from certain provisions referring thereto. An example may be found with art. 1444 para. 2 passage a' of the CC pursuant to which a right to maintenance ceases if the beneficiary of the maintenance marries another individual or lives with another individual in a free union/cohabitation. Another example may be found with article 6 of Law 4356/2015, which provides that in case of a *de facto/free*, non-regulated union, the general provisions on unjust enrichment shall apply to the issue of the fate of assets acquired after the commencement of the cohabitation. Taking into consideration some specific exceptions, and without prejudice to possible analogous application of certain family law provisions of the CC regarding the specific (permissible) agreements to cohabitation as well, *de facto/free* union remain essentially unregulated by law.

**2.1.6. What legal effects are attached to different family formations referred to in question 2.5.?**

Marriage establishes a reciprocal obligation of cohabitation for both spouses (article 1386 CC). Decisions concerning family life are taken by mutual consent (article 1387 CC). Each spouse has the duty to contribute personally and financially to the family needs in proportion to his means (articles 1389, 1390 CC). In principle, the family name of each spouse does not change after marriage. Each spouse may add the other spouse's surname to his own on the condition that both spouses make a relevant declaration before the Registrar (article 1388 CC).

The provisions concerning the legal effects of marriage apply to both personal and non-personal relationships, including the right of succession of registered partners (Laws 3719/2008 and 4356/2015).

**2.1.7. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/de facto family formations? Explain briefly.**

Currently, there are no official reform proposals. It is however notable that lately the FL lies within the centre of interests of the academic community.

**2.2. Property relations.**

**2.2.1. List different family property regimes in your country.**

The patrimonial property regime is governed by the principle of autonomy of the parties. Marriage does not change the patrimonial self-determination of the spouses (article 1397 CC). This means that the spouses are free to decide about the kind of property relation they prefer. In the absence of such choice, each spouse owns and manages his property separately during the marriage according to the provisions of articles 1397-1402 CC (statutory matrimonial property regime). The spouses may also

formally agree on community of property, which is governed by articles 1403-1415 CC (contractual matrimonial property regime). This regime of conventional ownership is, however, not often used in practice.

The provisions governing the matrimonial property regime also apply to registered partnerships unless the partners agree otherwise, on the condition that the principles of equality and solidarity are fulfilled (article 5 of Law 4356/2015).

In the case of free unions, it is provided that issues relating to assets acquired after the commencement of cohabitation are governed by the general provisions of the CC on unjustified enrichment (article 5 of Law 4356/2015).

**2.2.2. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?**

The default legal regime is the statutory matrimonial property regime provided in articles 1397-1402 CC, according to which the whole property of the spouses does not become joint property, i.e., each spouse manages freely his own property, which includes all kind of assets. The spouse has legal capacity for all judicial acts concerning his property, needs no consent of the other spouse, and is liable towards his own creditors.

Practically it is often the case that one of the spouses manages the property of the other spouse. If such management is voluntarily entrusted (by either an explicit or a tacit agreement) the spouse entrusted with this task is not obliged to render account or to return revenues derived from such management, unless the spouses agreed otherwise. However, the managing spouse is obliged to use the revenues in accordance with his duty to contribute to the family needs (article 1399 CC).

**2.2.3. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a “new regime just for them”?**

The spouses may formally agree on the community of property, pursuant to articles 1403-1415 CC. Such an agreement may take place before or during marriage, but formally it has to be drafted as a notarial act registered in the special public book (see answer to question 2.4.5.). The agreement may be concluded either before or during marriage. This is a system of joint ownership in equal parts regarding the assets of the estates of the spouses, without a right of disposal by either of them of his individual share (article 1403 CC). The relevant notarial act determines the particular details of the system of community of property (e.g. its extent, the administration of the common property, the apportionment of the common assets after its termination etc.) based on the principle of equality of the spouses (article 1404 CC). The community can include all or some patrimonial assets of the spouses, according to their will. Therefore, the spouses may choose between a) the system of catholic community (every patrimonial asset acquired before or during marriage becomes common, with the exception of assets destined for personal use, rights of intellectual property etc.) and b) the system of partial community. In case that the spouses choose the community system, but do not determine its extent, it is provided that the common property includes only whatever is acquired during marriage (article 1405 CC). Transactions concerning the common property shall be carried out either jointly by the two spouses or by one of them with the consent of the other. Only in exceptional cases may one spouse perform such transactions without the consent of the other spouse. Such situations may occur when the court grants permission to that respect, when the other spouse is not

capable due to illness or absence and when the other spouse unreasonably refuses to cooperate or to consent (article 1407 CC).

**2.2.4. Explain briefly the rules on the administration of family property and compare if there are differences for different property regimes.**

See answers to questions 2.2.1.-2.2.3. and 2.2.5-2.2.7.

**2.2.5. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

Agreements on community of matrimonial property concluded by the spouses under articles 1403-1415 CC shall be registered in the special public book on community of matrimonial property, as provided by Law 411/1989. Such book is kept in the Court of First Instance of Athens and contains all agreements concluded in the national territory and their amendments. The registration takes place upon request of any person having a legitimate interest or the notary who drafted the relevant agreement.

**2.2.6. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

Under the (default) statutory matrimonial property regime, each spouse manages freely his own property and is liable towards his own creditors. However, article 1398 CC introduces three rebuttable presumptions concerning movable property, due to the common use of certain movables by the spouses. These presumptions apply both to the relationships between the spouses and to the relationships of each spouse with his creditors. Specifically: (a) For the benefit of the creditors, movables being in possession of or held by one or both spouses are presumed to belong to the spouse who is the debtor. The presumption does not hold in case of interruption of life in common (where there is a presumption of ownership in favour of the possessor of a movable, under article 1110 CC). (b) In disputes arising between the spouses, movables in the possession of, or held by both spouses, shall be presumed to belong to both of them equally. (c) In disputes between the spouses or between spouses and creditors, movables destined for personal use of each spouse are presumed to belong to such spouse.

Under the community of property regime, the common property is mainly liable towards its own creditors and subsidiary liable towards the personal creditors of each spouse. In particular, the common property, apart from any real rights or other burdens, also guarantees: a) any obligation assumed by one spouse within the limits of his administrative authority; b) any obligation assumed by one spouse for the family needs; and c) any obligation assumed jointly by both spouses (article 1408 CC). The common property also guarantees up to the half of its value and in so far as the personal creditors of each spouse cannot be satisfied by his personal property: a) obligations assumed by one spouse alone for the purpose of managing the common property beyond the limits of his administrative authority; b) personal debts of such spouse (article 1409 CC). The personal property of each spouse is mainly liable for his personal debts and subsidiary liable up to the half of its value towards the creditors of the common property (article 1410 CC).

**2.2.7. Describe allocation and division of property in case of divorce, separation or dissolution of the union.**

In case of separation of the spouses, the Court may concede to one of the spouses the exclusive use of the whole or part of the family residence, after taking into account the special circumstances of each spouse (professional, financial etc.) and the interest of the children (article 1393 CC). Moreover,

each spouse shall be entitled to recover the movables belonging to him, even if they were used by both or by the other spouse alone. The spouse is obliged, however, to allow the other spouse to make use of household items that are absolutely necessary for his/her separate installation (article 1394 CC). Movables belonging to both spouses shall be apportioned according to their personal needs; in case of disagreement, the apportionment is decided by the Court (article 1394 CC).

Under the (default) statutory matrimonial property regime, in case of dissolution (through divorce or death) or annulment of the marriage or separation that lasted more than three years, if there has been an increase in the property of one spouse since the celebration of the marriage, the other spouse is entitled to claim the increase that is due to his contribution, provided that he has contributed in any manner to such increase. In those cases, there shall be presumed that such contribution amounts to one third of the increase, unless a greater or lesser contribution or no contribution at all can be proven. The increase shall not include what has been acquired through donation, inheritance and legacy or through disposal of their proceeds (article 1400 CC). The claim shall be prescribed two years after the dissolution or the annulment of the marriage and shall not arise to the benefit of the heirs of the deceased spouse (article 1401 CC). In case of institution of legal proceedings for divorce or annulment of marriage or of legal action to assert such claim, each of the spouses has the right to demand from the other spouse or his heirs to furnish security if the satisfaction of the claim is imperilled (article 1402 CC).

The community of property regime ends automatically a) with the dissolution or the annulment of the marriage (article 1411 CC); b) by virtue of an agreement between the spouses evidenced by notarial act (article 1412 CC); and c) by court decision after action by one of the spouses in case of interruption of the marital cohabitation for at least one year, if the interests of one spouse are in danger and if the other spouse does not fulfil his obligation to contribute to family needs (article 1413 CC). With the termination of the community of property regime, the spouses shall revert to the (default) statutory matrimonial property regime (article 1414 CC), which is evidenced to third parties by the registration of the event causing the termination in the special public book (article 1413 CC).

**2.2.8. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?**

There are no special rules concerning property relationships between spouses and partners with reference to their culture, tradition, religion or other characteristics. Article 1416 CC stipulates that the provisions on the matrimonial property regime apply independently of the religion or the dogma to which the two spouses belong as well as of the form under which the marriage was celebrated (religious or civil).

The institution of dowry, initially provided by the CC, was abolished in the 1980s revision as inconsistent with the principle of equality of sexes.

**2.3. Cross-border issues.**

Before embarking to particular answers a general remark based on our experience at the Hellenic Institute of International and Foreign Law is necessary. It may be noticed that only rarely do Greek lawyers refer to the EU Regulations when handling a case; whereas Greek courts, particularly of lower instance, appear equally reluctant to apply such EU Regulations, maybe due to lack of familiarity with this field.

**2.3.1. Is your country participating in the enhanced cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?**

Yes, Greece participates in the enhanced cooperation with regard to both Regulations, i.e. both EU Regulation 1103/2016 and EU Regulation 1104/2016.

**2.3.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as "marriage", "matrimonial property agreement", "partnership property agreement" etc.?**

It is in our view already understandable that Member States will encounter problems with the application scope of the Property Regimes Regulations. Among various issues that are likely to arise in this respect, the most distinguishing is the determination of matters falling within the material application scope of the Property Regimes Regulation or / instead of the Succession Regulation's application scope.

The following are to be further noted as to the legal qualification of particular concepts:

As to the legal notion of "*marriage*", it is to be defined by the national laws of the Member States (Regulation on matrimonial property regimes, Preamble n. 17). Without prejudice to our general comment on cross-border issues, we assume that it is likely for Greek courts to adapt the notion of "*marriage*" as such notion is understood in the sense of article 13 CC, i.e. the Greek conflict-of-laws rule on issues concerning marriage<sup>10</sup>. Pursuant to abovementioned article entitled "*Marriage*": "1. The substantive preconditions of marriage shall be governed in regard to the two persons about to be married by the national law of one of them. The form of marriage shall be governed either by the national law of one of the individuals about to be married or by the law of the place of celebration. 2. When both individuals to be married or one of them are Greeks and the marriage is celebrated abroad, the declaration provided therefor in article 1367 of the CC may be made also before the Greek Consular authority". Marriage is construed in this context as any contract between two individuals (whether monogamous or potentially or even actually polygamous), that results in the union of the couple on a potentially lifelong basis. Notwithstanding the fact that legal qualification for the purposes of Greek private international law is made in broader terms compared to substantive (Greek law), still it seems likely that same-sex marriages and polygamous liaisons shall not be deemed to fall under the abovementioned notion.

In contradistinction to the aforementioned and based on their inclusion in the definitions of the Property Regimes Regulations, it may be argued that the legal concepts "*matrimonial property agreement*" (article 3 para. 1 of EU Regulation on Property Consequences of Registered Partnerships) and "*partnership property agreement*"<sup>11</sup> (article 3 para. 1 of EU Regulation on Matrimonial Property Regimes) are to be autonomously construed. In this case, and without prejudice to our general comment, Greek courts applying the Regulations shall presumably take into consideration relative CJEU judgments on the interpretation of said legal concepts.

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<sup>10</sup> See analytically our answer under 2.3.6.

<sup>11</sup>Reference may also be made to the conflict-of-laws rule included in article 13 of Law 4356/2015 on registered partnerships. Although said article is entitled "application scope" only the first paragraph thereof deals with said issue, stipulating that: "This Act shall apply to all civil partnerships entered into in Greece or before a Greek consular authority". A pure conflict-of-laws rule however is included in para. 2 of article 13, stipulating that: "The conditions for the conclusion, the relations between the parties and the conditions for and consequences of the dissolution of civil partnerships not submitted to paragraph 1 of this Article shall be governed by the law of the place where they have been entered into. In relation to hereditary succession, the relevant rules of private international law shall apply. For the rest, civil partnerships of this paragraph shall not develop in the Greek legal order more effects than those provided for in this Act". Therefore, pursuant to the Greek conflict-of-laws rule, *lex loci actus* is the applicable law for all issues regarding registered partnerships.

### **2.3.3. Are you expecting any problems with the application of the rules on jurisdiction?**

From a general point of view Member-States are expected to encounter problems with the application of the rules of jurisdiction included in the Property Regimes Regulations. These Regulations have definitely departed from the Brussels I Regime, by virtue of which a true system of international jurisdiction for civil and commercial matters was established. The jurisdictional bases included in both Regulations seem to have generally followed those of the Succession Regulation. To a certain extent they also resemble EU Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

Among these problems, reference may already be made to the application of the general rule included in both Regulations, pursuant to which where a court of a Member State is seized in matters of the succession of a spouse/ a registered partner (respectively) under the Succession Regulation, the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime/ on the property consequences the registered partnership (respectively), which arise in connection to such succession case. Among various interpretation issues that may arise in the future, an important one would be the determination of the court that has been "seized", i.e. whether a cumulative application of the jurisdictional rules of the Succession Regulation is necessary and whether and under what circumstances the evident aim of this provision, i.e. concentration of disputes, may be used as an interpretation principle by the courts.

In the same vein, it may be predicted that the construction of the jurisdictional bases such as articles 6 of 7 of each of the Property Regime Regulations may follow potential prior construction of articles 10 and 11 of the Succession Regulation.

Finally, it may be estimated that article 9 of the Regulation on matrimonial property regimes (2016/1103) which stipulates that, by way of exception if a court of the Member State that has jurisdiction pursuant to Article 4, 6, 7 or 8 holds that, under its private international law, the marriage in question is not recognised for the purposes of matrimonial property regime proceedings, it may decline jurisdiction. Greek courts may therefore decline jurisdiction in case, for instance, of a polygamous union.

### **2.3.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

It is notable that, since the autonomous Greek private international law does not acknowledge party autonomy in matrimonial property matters, choice of the applicable law is a novelty in this respect.

### **2.3.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

Both Regulations have followed the twofold system of enforceability of the initial Brussels I Regulation (EC Regulation n. 44/2001) with regard to enforceability and enforcement, with minor differences. This means that the abolition of exequatur has not been envisaged in these Regulations. Generally speaking, it seems that Greek courts are to a significant extent familiarized with said system. In case Greece is the place of enforcement, actual enforcement will of course be regulated by the Greek Code of Civil Procedure. Based on the Brussels I Regulation experience it may be said that in general terms (and always without prejudice to the general comment hereinabove) Greek courts apply this two-stage system for the declaration of enforceability.

It is likely that Greek public policy may interfere at the stage of recognition (and assuming that following issues have not been resolved already at the legal qualification stage) in cases of foreign

same-sex marriages; of polygamous liaisons; of unequal allocation of assets between spouses based on their sex *et alia*.

**2.3.6. Are there any national rules on international jurisdiction and applicable (besides the Regulations) concerning the succession in your country?**

It is noted from a general point of view that pursuant to Greek procedural law the bases for territorial competence also serve as international jurisdictional bases ("Prinzip der Doppelfunktionalität")<sup>12</sup>.

Apart from its general jurisdictional bases, Greek Code of Civil Procedure also includes specific jurisdictional provisions regarding what is called "marital disputes". Pursuant to article 39 of CCP<sup>13</sup> (which serves as aforementioned not only as a residual jurisdiction basis, but also as an international jurisdictional basis): "Marital disputes may also be brought before the court in the district of the last common habitual residence of the spouses". In addition, pursuant to article 592 of CCP marital disputes are adjudicated under a special procedure. However, matrimonial property disputes such as those envisaged to the Property Regime Regulations are not outright qualified as marital disputes<sup>14</sup>. It is stipulated in article 610 CCP that in order for such disputes to be adjudicated pursuant to the special procedure of marital disputes, they have to be adjoined to proceedings concerning disputes, which are outright, qualified as marital proceedings. In case they are not adjoined, the general jurisdictional rules of CC apply, such as article 22 of CC (general jurisdictional basis, domicile of the defendant).

The applicable law on matrimonial property regime under autonomous Greek private international law arises from the combination of articles 14 and 15 of CC. Pursuant to article 15 CC: "The applicable law is the law regulating the spouses' personal relations immediately after the marriage is celebrated". The Greek conflict-of-laws rule on personal relations of the spouses is included in article 14 CC, to which said article 15 refers. Article 14 CC stipulates that: "Personal relations of the spouses are regulated in sequence by: 1. the law of the last common nationality of the spouses, provided that one of them still has such nationality; 2. the law of the last common habitual residence of the spouses during their marriage; 3. the law with which the spouses are most closely connected".

Finally, it may also be noted as to the extent of the applicable law designated by virtue of the conflict-of-laws rule included in article 13 of Greek Law 4356/2015 on registered partnerships<sup>15</sup> pursuant to which the applicable law for all issues regarding registered partnerships is the *lex loci actus* (the law where the registered partnership was concluded), also encompasses the matrimonial property questions in our view.

<sup>12</sup> We assumed that this question refers to matrimonial property disputes.

<sup>13</sup> See *infra* our answer under question 3.5.5.7.

<sup>14</sup> Article 592 para 1. of CC provides that: "Marital disputes concern: (a) divorce, (b) annulment of marriage, (c) recognition of the existence or non-existence of marriage, (d) relations between spouses during the marriage, which arise out of such marriage, except for those subject to paragraph 3 of this article". Para. 3 of the same article stipulates that (among others) determination of the contribution to family needs, regulation of the use of the family home any other pecuniary dispute arising out of the spouses' relations are qualified as "other family disputes" (i.e. they do not outright fall within the concept of marital disputes).

<sup>15</sup> See analytically *infra* footnote n. 11.



### 3. Succession law.

#### 3.1. General.

##### 3.1.1. What are the main legal sources of Succession Law (SL) in your country? What are the additional legal sources of SL?

SL is regulated by Book V of the CC (articles 1710-2035). Provisions on SL are also included in the CCP (e.g. articles 807 *et seq.*). Particular issues concerning the succession of Greek citizens residing abroad are regulated by Legislative Decree 472/1974<sup>16</sup>. Reference may also be made to article 21 of Law n. 1738/1987 establishing an exception to forced heirship for Greek nationals domiciled abroad under certain preconditions<sup>17</sup>.

The succession of Orthodox monks and nuns is still governed by the rules of Byzantine-Roman law. Moreover, Greece exceptionally recognized the direct implementation of religious law (i.e. implementation without reference by conflict of laws rules) on particular issues in the case of Muslims of Western Thrace (see Annex).

##### 3.1.2. Provide a short description of the main historical developments in SL in your country.

The first historical sources of Greek SL can be found in the Attic law, and subsequently in Roman-Byzantine law. The provisions of SL currently in force reflect Roman law as it has been incorporated in the German *BGB*, introducing important improvements to the already crystalized concepts and institutions.

##### 3.1.3. What are the general principles of succession in your country?

The right of succession is protected in Article 17 of the Greek Constitution under the same regime as property. Greek SL is based on inheritance according to the last will of the deceased. Among its fundamental principles there shall be included: a) the principle of universal succession (i.e. the property of the deceased is transferred as a whole to his heirs); b) the principle of succession of liabilities (i.e. the inheritance also includes all liabilities of the deceased); c) the application of intestate succession by operation of law if the deceased dies intestate; d) the free unilateral disposition *mortis causa*; e) the provision of a compulsory legitimate share, which has to remain free for the surviving spouse and the closest relatives of the deceased; f) the provision of legacy, under which a person may confer by will a pecuniary advantage on another person without instituting the

<sup>16</sup> Legislative Decree 472/1974 on the regulation of certain issues concerning the succession of Greek citizens residing abroad. Government Gazette A 174. Article 1 thereof stipulates: "1. Contracts concluded abroad by virtue of which renouncement of heirship is agreed either in whole or in part, either in the form of a private document or in the form of a notarial deed, between individuals to be married in case one of them is Greek, while the other is a foreigner and provided that they are both domiciled abroad at the time of conclusion of the contract and that the foreigner renounces succession of the Greek individual are valid, provided that the marriage did take place. 2. The provisions of the previous paragraph apply under the same conditions to contracts concluded after celebration of the marriage of these same individuals. 3. The provisions of paras. 1 and 2 also apply to contracts concluded until entry into force of the present, provided that the contracting Greek party is alive during at the time of entry into force of the present law".

<sup>17</sup> "Greek nationals who have been domiciled abroad for at least twenty five consecutive years prior to their death, are not subject to the Greek law provisions concerning forced heirship and (compulsory) beneficiaries to it, as far as the mortis causa disposal of their property situated abroad is concerned. If the aforementioned prerequisite is met, non-compliance with the provisions concerning forced heirship and (compulsory) beneficiaries to it, has no legal effect to the validity of wills (testaments) or other mortis causa dispositions as concerns the property abroad".

latter his heir; g) the provision of charge, under which a person may oblige by will an heir or a legatee to specific performance without conferring on the latter a right to receive such performance.

**3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.**

The court of succession is the county court in whose area the deceased had his residence at the time of his death (article 810 CCP). It is the competent court for the publication of wills, the submission of declarations of renunciation of the succession and of acceptance of the succession under the benefit of inventory, the appointment and dismissal of the administrator of the estate and for the issuance of the certificate of succession.

The issuance of the certificate of succession is governed by articles 1956-1966 CC and 819-824 CCP. At the request of an heir, the county court may grant such certificate stating the persons among whom the estate is to be distributed. This establishes a rebuttable presumption that the persons mentioned therein have the rights mentioned therein. There is no deadline for the filing of the relevant application.

**3.1.5. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?**

Intestate succession takes place when there is no testament. When the deceased has not disposed his whole property by a testament, intestate succession takes place for the rest of the estate (partially intestate inheritance, article 1710 CC).

**3.1.6. What happens with the estate of inheritance if the decedent has no heirs?**

In case there exists no intestate or testamentary heir, the estate of the deceased is inherited by the Greek State (article 1824 CC).

**3.1.7. Are there special rules or limitations concerning succession with reference to the deceased's (or heir's) culture, tradition, religion or other characteristics?**

Currently, there are no special rules concerning succession with reference to the deceased's or the heir's culture, tradition, religion or other characteristics (see Annex as to the particular case of the Muslims of Western Thrace).

**3.2. Intestate succession.**

**3.3.1. Are men and women equal in succession? Are domestic and foreign nationals equal in succession? Are decedent's children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?**

Men and women, domestic and foreign nationals, children born in wedlock, recognized children born out of wedlock and adopted children, including children conceived but yet unborn at the time of entry of succession and children born after a *post-mortem* artificial insemination (article 1711 CC), as well as spouses and same sex and opposite sex registered partners (article 8 of Law 4356/2015) are equal in succession.

**3.2.2. Are legal persons capable of inheriting? If yes, on which basis?**

Legal entities are capable of inheriting in case of testamentary succession (cf. articles 61-62, 1813 et seq. CC).

**3.2.3. Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.**

Articles 1860-1864 CC govern the unworthiness of succession. An heir considered unworthy is divested of his succession right by a court decision. Persons unworthy to inherit are: a) those who have intentionally killed or attempted to kill the deceased, his children, his parents or his spouse; b) those who have been convicted for having falsely accused the deceased of a crime; c) those who intentionally and illegally hindered the deceased from making or revoking a will; d) those who fraudulently, illegally or immorally forced the deceased to make or alter his will; and e) those who have changed, falsified or destroyed the deceased's will. The disqualification shall cease in cases where the deceased granted his pardon by means of a public document or will. Any person having an interest in the estate may file the relevant suit against the unworthy heir. As soon as the judgment becomes *res judicata*, devolution is considered as never having occurred.

**3.2.4. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?**

Succession in intestacy is based on the kinship with the deceased. The CC enlists the relatives and, therefore, the legal heirs of the deceased in classes (articles 1813-1824 CC).

In the first class, as heirs of the deceased shall be called his descendants (i.e. children, grandchildren, great-grandchildren). The nearest descendant excludes the more remote one of the same lineage. The children shall inherit in equal shares. Children also include adopted children as well as recognized children born out of wedlock (article 1813 CC). In the second class, as heirs of the deceased shall be called his parents and siblings and, if they have passed away before the deceased, their children and grandchildren. Half-brothers and half-sisters concurring with parents or full brothers and full-sisters or their children and grandchildren shall receive one-half of the share of full-brothers and full-sisters (articles 1814-1815 CC). In the third class, as heirs of the deceased are called his grandparents and, if they are not alive, their children and grandchildren. If at the time of entry of succession grandparents of both lines are alive, they alone inherit in equal shares; children inherit in equal shares excluding grandchildren of the other lineages; grandchildren inherit *per stirpes* (article 1816 CC). In case that none of the above exist, as legal heirs of the deceased (heirs of the fourth class) are called his great-grandparents, who inherit *per capita* irrespective of whether they belong to the same or different lines or not (article 1817 CC). As sole heir of the fifth class, inherits the surviving spouse (article 1820 CC), while, if none of the above exist, sole heir of the sixth class is the Greek State (article 1824 CC).

Relatives of previous classes exclude relatives of more remote classes. In case of succession *per stirpes*, each person belonging to several lineages shall receive the share attributed to each lineage, which is considered a distinct hereditary share. If an heir of the first three classes is not in the position to inherit (e.g. due to his previous death, unworthiness or renunciation), his place and his share passes to his descendants (articles 1818-1819 CC).

The surviving spouse, i.e. the spouse from a valid marriage –as well as the registered partner– shall be also called as heir together with the relatives of the first class to one fourth of the estate and with the relatives of the second, third and fourth classes to one half of the estate, while in the fifth class inherits the whole estate. In addition, he receives the furniture, houseware, clothing and other similar domestic objects that were being used by him or by both spouses, taking into consideration

the needs of the children of the deceased. Such accretion shall be interpreted as a legacy and is acquired immediately and *ipso jure* by the surviving spouse. The surviving spouse may lose his right to succession and to additional accretion when the deceased spouse instituted legal proceedings for divorce against the surviving spouse based on a justified ground for divorce, which must exist at the time of devolution of the inheritance (articles 1820-1822 CC).

### **3.2.5. Are the heirs liable for deceased's debts and under which conditions?**

The heir who has accepted the estate is in principle personally liable for the deceased's debts in proportion to the value of his share of inheritance (article 1901 CC).

The acceptance consists in the informal, explicit or implicit declaration of a person that he wishes to be an heir and, consequently, waives the right to renounce the succession (articles 1846 et seq. CC). If the estate includes immovable property, such declaration must be incorporated in a notarial act and registered in the real property registry and the cadastre. The CC does not provide for a specific deadline for the acceptance. However, after the expiry of the deadline for renunciation of the succession (see answer to question 3.2.6), it is conferred that the heir has accepted the estate<sup>18</sup>. The acceptance cannot be revoked.

The heirs may also accept the estate under the benefit of inventory (articles 1901-1912 CC). In such case, the heir obtains, by causing an inventory to be made, the privilege of being liable only up to the net value of the estate. The heir is, thus, discharged from the debts of the succession. To enjoy this privilege, the heir must make a declaration of acceptance "under the benefit of inventory" before the clerk of the court of succession. The inventory must be made within four months from the declaration. The heir shall be deprived of the benefit if he fails to make the inventory within the deadline, if he intentionally makes an incorrect inventory, if he administers the estate fraudulently or if he sells its immovable or securities without the permission of the court. The acceptance of the estate by incapable persons or persons of limited capacity is always made under benefit of inventory; the benefit is lost, however, if they do not draw up the inventory within one year after they have gained full capacity.

### **3.2.6. What is the manner of renouncing the succession rights?**

The succession may be renounced by declaration of the heir made before the clerk of the court of succession (articles 1847-1859 CC). The renunciation shall take place within four months from the time that the heir acquired knowledge of the entry of the succession; the deadline is extended to one year when the deceased lived abroad or the heir acquired knowledge of the entry of the succession while living abroad. After the declaration of renunciation, the devolution of the estate upon the heir is considered as never having occurred and the estate passes to the person who would have inherited it, if the renouncing heir had not been alive at the time of death of the deceased. In case of several heirs, each one may renounce his succession right. The renunciation cannot be revoked.

## **3.3. Disposition of property upon death.**

### **3.3.1. Testate succession.**

#### **3.3.1.1. Explain the conditions for testate succession.**

Testate succession is guaranteed by articles 5 para. 1 and 17 para. 1 of the Greek Constitution as a form of the right to personal development and as a part of the human right to property.

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<sup>18</sup> At the same time, it should be borne in mind that the heirs must file an inheritance tax statement within six months, if they reside in Greece, or within twelve months, if they reside abroad, which is considered an acceptance of the estate.

Testate succession is governed by the CC (articles 1710, 1712, 1713, 1716-1812 CC). The relevant provisions are characterised by strict formalism, given that a testament can be validly formed only under their prerequisites.

### 3.3.1.2. Who has the testamentary capacity?

Every adult person of sound mind can make a will.

The following categories have no capacity to draw up a will: a) those who are underage (i.e. under 18 years old); b) those placed under judicial assistance and fully deprived of their legal capacity or deprived of the capacity to make a will; c) those who at the time of drawing up the will were not conscious of their acts or were in a spiritual or mental disturbance that limited decisively the functioning of their will and their ability to express their wishes (articles 1719-1720 CC)<sup>19</sup>.

Incapable of making specific kinds of wills are the persons who cannot read and write, and therefore, cannot make a holographic will or a secret will, as well as mute persons, who cannot make secret wills or public wills (articles 1723-1724, 1738 CC).

### 3.3.1.3. What are the conditions and permissible contents of the will?

It is important that the testamentary dispositions correspond to the true wishes of the testator. A will made fictitiously, with no testamentary intent, is null. A disposition made in favour of a non-determined person shall be null (article 1781 CC). A disposition as a result of fraud as well as of threat exerted illegally or contrary to morality is subject to annulment (article 1782 CC). A will is also voidable if the testator was in error concerning the identity of the person he wished to designate or the thing he intended to give (article 1783 CC) as well as due to erroneous causes mentioned therein, without which the testator would not have made such disposition (article 1784 CC). A disposition in favour of the spouse, in case of doubt, may be voidable if the marriage is null or was dissolved while the testator was still alive or if the testator relying on a justified ground of divorce had commenced a legal action for divorce (article 1785 CC). The whole will is void if the testator has omitted a compulsory heir whose existence he was unaware at the time of his death or who was born or became an heir after the making of the will. The annulment is barred if there is evidence that the testator would have proceeded with the making of his will even if he had known the actual situation (article 1786 CC).

### 3.3.1.4. Describe the characteristics of will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a will?

CC provides for two categories of wills, the ordinary and the extraordinary (articles 1721 et seq. CC). The formalities provided for drawing up a will shall be strictly observed, otherwise the will is null. The testator must make his will in person, being, thus, impossible to draw up a will by the intervention of an agent or representative. The CC does not recognize the form of joint or mutual will.

#### Ordinary wills

*Holographic will:* The holographic will is handwritten, dated and signed by the testator. It may be written in any language. Additions made in the margins or as a postscript by the testator must be also signed by the testator. Obliterations, erasures or other defects are noted by the court publishing the will and may cause its nullity in whole or in part (article 1721 CC). Persons who cannot read and write cannot draw up a holographic will (article 1723 CC). The testator may deposit such will with a notary for safekeeping (article 1722 CC).

<sup>19</sup> By virtue of special statutes of Byzantine-Roman law still in force, Orthodox monks and nuns are also incapable of disposing of their property, which passes to the monastery where they live, subject to the share of forced heirs.

Public will: A public will is made before a notary in the presence of three witnesses or of another notary and one witness. This type of will may be used by persons who cannot read, write or sign, makes impossible the destruction of the will and limits considerably the possibility of nullity due to vagueness; it also has the increased evidentiary force of an authentic instrument and is enforceable. Deaf testators read the statement themselves. The will of deaf testators who cannot read is made in the presence of five witnesses or another notary and three witnesses. The testator declares orally that the document is his last will in the presence of the notary and the witnesses. He may dictate from a draft or use notes. The following persons cannot serve as notaries or witnesses: a) the spouse or the former spouse of the testator; b) a relative of the testator in direct lineal relationship or in collateral relationship up to the third degree; c) persons who are mentioned as beneficiaries or executors in the will; d) persons who are relative to the notary. The following persons cannot serve as witnesses: a) those deprived of the sense of sight or hearing; b) the clerks or servants of the notary; c) underage persons. The public will shall be written in the Greek language. An interpreter is appointed if the testators does not know Greek (articles 1724-1737 CC).

Secret will: The secret will is an intermediate form between the holographic and the public will. The testator is not obliged to put down his will in his own handwriting, but must only sign it. The instrument, in a sealed envelope, is then handed to the notary in the presence of three witnesses or another notary and one witness. The testator declares that the instrument is his testament. The notary writes on the envelope the name of the testator and the date of its presentation. Then both the testator and the witnesses sign under the note. If the testator declares that he is unable to sign, such declaration shall replace the signature. The notary then draws an act including the date and place, the names of the testator, the notary and the witnesses and the fact that all legal formalities have been observed. The act is read aloud to the testator and the witnesses and is then signed by them. A person who is not capable of reading cannot make a secret will. A secret will that is not valid may be effective as holographic will, if it can be validated as such (articles 1738-1747 CC).

Extraordinary wills

Extraordinary wills made in a simple manner (i.e. orally before an officer) under extraordinary circumstances are:

*Testaments made at sea* (articles 1749-1752, 1756 CC); *military testaments* (articles 1753-1756 CC); *testaments during blockade* (article 1757 CC). Such wills shall become invalid when three months have elapsed since the exceptional circumstances have ceased and the testator is still alive (article 1758 CC). The testator may hand the will to a notary functioning in Greece or to a Greek consular authority abroad, which is obliged to send a copy to the Greek Ministry of Justice (article 1761 CC).

**3.3.1.5. Is there a (public) register of wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

As a general rule, the notary with whom a will (holographic, public or secret) has been deposited is obliged to proceed with its publication, as soon as he acquires knowledge of the death of the testator. Wills made, deposited or published abroad may be published in Greece as well (articles 1769-1773 CC, 807-809 CCP).

In particular, with regard to holographic wills, on acquiring knowledge of the death of the testator any person having in his possession such a will must present it for publication to the court of succession, which is the county court of the last domicile or the last residence of the testator or of his own residence. In the latter case, a copy of the minutes relating to the publication shall be sent to the court of the testator's last domicile or residence. In any case, a similar copy shall be sent to the Registrar of the Court of First Instance of Athens (article 1774 CC). The holographic will shall be declared main will by the court of succession upon request of the person who requests its publication. If within five years from its declaration as main the holographic will is not contested, it is presumed to be authentic (article 1777 CC).

The registrars of the county courts as well as consular authorities shall keep a registry of their published wills. The registrar of the Court of First Instance of Athens shall keep a registry of wills published in all courts and consular authorities (article 1778 CC).

Non-observance of the provisions on publication shall not entail the nullity of the will (article 1779 CC).

**3.3.2. Succession agreement (*negotia mortis causa*). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.**

According to article 368 CC, agreements concerning the succession of a living person concluded either with such person or with a third party and, relating either to the whole or to a part of the succession, shall be void. The same rule applies with regard to an agreement aiming to limit the freedom of disposition by last will.

Such prohibition of succession agreements, although a fundamental principle of Greek succession law, is nevertheless not absolute. Greek law contains certain provisions introducing exceptions to this rule:

(i) Article 1 of Legislative Decree 472/1974 provides for the validity of agreements concluded abroad between persons to enter to marriage or between spouses, the one of whom is Greek national and the other foreigner and both reside abroad, which provide that the foreigner resigns from his succession right to the estate of the Greek national, including his right to compulsory share.

(ii) Articles 1891 et seq. CC provides that during his lifetime an ascendant may distribute his property among his descendants. Such distribution shall be made through agreement and may only include the property then existing. The ascendant, nevertheless, is free to stipulate otherwise in his testamentary dispositions.

(iii) Articles 1942 et seq. CC regulate the sale of succession. According to them, an heir may sell in whole or in part the estate attributed to him by the succession.

(iv) Articles 2032 et seq. CC regulate the donation *mortis causa*. According to them, a donation may be concluded under the condition of predecease of the donor or the simultaneous death of both parties. In the meantime, the donee may not dispose of or enjoy the donated property.

(v) Article 8 of law n. 4356/2015 introduces a specific exception to the succession agreements' prohibition. Pursuant to this provision, the contracting parties to a registered partnership may waive his or her right to a legally reserved portion.

A final private international law note is due in this respect. Pursuant to the dominant point of view in Greek doctrine is that the prohibition of succession agreements by Greek law is to be considered as an (international) public policy rule. However, the liberal stance of the Succession Regulation regarding succession agreements (articles 25-27 thereof) may indirectly affect this stance.

**3.3.3. Are conditions for validity of wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

See answer to question 3.1.1.

**3.3.4. Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

The provisions of the CC on compulsory heirship (articles 1825 et seq. CC) protect the family and, in particular, the closest relatives of the deceased, who is not allowed to exclude them. In general, compulsory heirs are the descendants, the parents and the surviving spouse of the deceased. If there are descendants, the parents are excluded. Compulsory heirs are always entitled to a certain percentage of the estate and they have all the rights and duties of other heirs. Specifically, they are

entitled to one-half of their intestate share (the share of the surviving spouse may, thus, vary between one-eighth and one-half, depending on the concurring compulsory heirs). Testamentary dispositions to the prejudice of compulsory heirs or restricting their share are null.

An exception to this rule is introduced by article 1 of Legislative Decree 472/1974 (see answer to question 3.3.2.).

### **3.3.5. Cross-border issues.**

It is noted that our general remark (*hereinabove under 2.3.*) applies in this section of the Report as well.

#### **3.3.1.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?**

To the best of our knowledge there are only a few Greek judgments insofar applying the Succession Regulation. The Greek courts do not seem to have insofar been presented with the opportunity to consider in depth certain of the numerous issues posed by the Succession Regulation.

#### **3.3.1.2. Are there any problems with the scope of application?**

From a general point of view we note that numerous issues are likely to arise with regard to the application scope of the Succession Regulation.

A point of interest already noted in Greek legal theory is whether the *donation mortis causa* regulated in articles 2032- 2035 of CC<sup>20</sup> falls within the application scope of the Succession Regulation, or within the application scope of Rome I Regulation.

However, to the best of our knowledge there are no Greek judgments yet dealing with the (substantive) application scope of the Succession Regulation. Reference however may be made to the preliminary question submitted by County Court of Leros, which led to the issuance of the CJEU judgment n. C-565/16<sup>21</sup>. In the context of said preliminary question the County Court of Leros correctly conceived the issue brought before it (an issue regarding the application for judicial authorisation to renounce an inheritance on behalf of a minor child) as a matter falling within the interpretation scope of art. 12 (3) (b) of EC Regulation n.2201/2003, instead of the application scope of the Succession Regulation.

#### **3.3.1.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country had experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?**

To the best of our knowledge there is no Greek case-law insofar applying the Regulation's jurisdictional bases. Particularly as to the construction of the concept of "habitual residence" under the Regulation, given the Succession Regulation's Preamble (especially n. 23 and 24 of the Preamble) as well as autonomous Greek law, it may be estimated that Greek courts will consider the notion of "habitual residence" as approximate to the notion of "domicile" under autonomous Greek law. Further and always without prejudice to our general comment, it is noted that, where Greek courts actually apply the EU Regulations on private international law, they do follow the correct approach

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<sup>20</sup> Article 2035 of CC stipulates: "Where a donation has been concluded under the suspensive condition of predecease of the donor or of the concomitant death of both the parties to the act of donation without in the meantime the donee having the enjoyment of the things donated (*donation mortis causa*) the provisions governing donations to the extent that the law has not provided differently shall apply".

<sup>21</sup> CJEU 19.04.2018 Alessandro Saponaro & Kalliopi-Chloi Xylina, C-565/16, EU:C:2018:265.



on autonomous interpretation, based on the authoritative CJEU judgments. Such is the (limited in any case) experience concerning application of the notion of habitual residence under EC Regulation 2201/2003, where for instance county courts referred to CJEU judgments in order to properly construe the connecting factor. It does not however seem likely that Greek courts will proceed to posing questions such as whether construction of the legal concept of "habitual residence" within the application scope of the Succession Regulation should follow a coordinated interpretation with the homonymous concept of Brussels IIbis Regulation and/or potentially also Rome I Regulation. Further and to the best of our knowledge Greek courts have not insofar been presented with any case and applied either article 6 or article 7 of the Succession Regulation.

**3.3.1.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?**

As to choosing the applicable law it has to be underlined before all that autonomous Greek private international law does not provide for *professio juris* in matters of succession. Therefore, this constitutes a novelty for Greek courts.

**3.3.1.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?**

As concerns use of the twofold enforceability system envisaged in the Succession Regulation (following the Brussels I Regulation as well as the twin Regulations 2016) see hereinabove our answer under (2.3.5).

It is possible that public policy issues may arise in case recognition and enforcement of a judgment falling within the application scope of the Succession Regulation. Insofar there are no known cases. Based on previous existing Greek law doctrine and case-law it may be assumed that, for instance the provisions on forced heirship do not form part of Greek public policy. Given the Succession Regulation's provisions on agreements as to succession it may be difficult for Greek courts to uphold that succession agreements are contrary to Greek public policy. The same may be also true as to joint wills.

**3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?**

As already referred to under question 3.1.4, Greek law provides for a succession certificate pursuant to national law provisions (arts 1956-1966 of CC and arts. 819-824 of CCP)<sup>22</sup>. Under Greek law, the heirship certificate serves the aim to facilitate the persons entitled to hereditary rights (for instance the heir, the trustee, the legatee etc.) in order for them to prove their rights, since the rules of hereditary succession are numerous and complicated. Further, a succession certificate might be necessary for the proof of the heirship rights to third parties, i.e for the protection of third parties that might contract with the persons entitled to the hereditary rights. As a result the facilitation of transactions is also secured.

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<sup>22</sup> Pursuant to art. 1956 of CC: "The competent court for the succession shall at the request of an heir deliver to him/her a certificate stating his right of inheritance and the portion attributable to him/her (heirship certificate)". Pursuant to art. 1957 of CC: "A person requesting the delivery of an heirship certificate must state in the request: 1) the date of death of the deceased; 2) the will and its contents or the relationship on which he/she bases his/her right of inheritance; 3) that there are no other persons who exclude or limit his right of inheritance, or that, any such persons have forfeited their rights and the grounds on which such forfeiture occurred; 4) in the event that other wills existed the content of such wills; 5) whether there is any pending Court action concerning the right of inheritance".

### 3.3.5.7. Are there any national rules on international jurisdiction and applicable (besides the Succession Regulation) concerning the succession in your country?

For succession law cases that fall outside the application scope of the Succession Regulation, autonomous Greek law provides both for a jurisdictional basis, as well as for a conflict-of-laws rule. Taking into consideration our initial statement on Greek procedural law following the "Prinzip der Doppelfunktionalität"<sup>23</sup> article 30 CCP provides for an *exclusive* jurisdictional basis for succession law matters. Pursuant to said article: "Actions concerning the recognition of a succession right, a succession's partition, an heir's claims against possessors of the succession, and claims related to legacies or other gifts mortis causa must be brought to the court of the deceased's domicile or, in serves as a basis for international jurisdiction in succession law cases under autonomous Greek law". As to the autonomous Greek conflict-of-laws rule, pursuant to article 28 of CC: "The national law of the person succeeded to when he died governs relations arising from inheritance" (*lex hereditatis*). This law applies to the entirety of the deceased's estate, article 28 CC following the principle of unity. Pursuant to this principle, the inheritance of property rights to movable or immovable property located outside the jurisdiction of the state of the nationality of the deceased shall be governed by the *lex hereditatis* and not by the *lex rei sitae*. However, the *lex rei sitae* still determines whether the deceased had acquired legal title in these things prior to his or her death. The *lex rei sitae* also determines how the successor acquires legal title to the estate of the deceased.

## ANNEX – Religious Law

### A. Jews

Israelite Communities in Greece are characterized as legal entities of public law and are governed by Law 2456/1920<sup>24</sup> granting them a kind of self-administration in many matters. Law 147/1914<sup>25</sup> had already provided that the substantive law regulating the formation and the dissolution of marriage of Israelites was the Judaic religious law whereas state courts had jurisdiction over the relevant disputes.

Article 4 of Law 2456/1920 transferred jurisdiction over all Israelites in Greece to the *Beth Din*, the rabbinical court of Thessaloniki. After the Holocaust of 1943, which resulted in the enormous decrease of the Hebrew population, and the enactment of the New Greek Civil Code, in 1946, this provision was abolished by virtue of Article 6 of the Introductory Law to the Civil Code<sup>26</sup>.

Subsequent Law 1029/1946<sup>27</sup> made an effort for this regime to be preserved, providing for the application of Judaic religious law to issues concerning the engagement, the conditions for marriage, the dissolution of marriage and the dissolution of the bond of *Halitsa*. The application of this Law, however, entailed interpretation implications that ought to be resolved by a decision of Areios Pagos (the Hellenic Supreme Civil Court). Jews chose not to bring the issue to Areios Pagos, tacitly agreeing, thus, to be governed by the CC and be subjected to Greek state courts as regards disputes about marriage formation and dissolution.

Nevertheless, the jurisdiction of *Beth Din* still applies to Hebrews who are citizens of other states whose legislation recognizes the validity of Judaic religious law as well as to Greek Israelites, who,

<sup>23</sup> See our answer infra under n. 2.3.6.

<sup>24</sup> Law 2456/1920. On Israelite Communities. Government Gazette A 173.

<sup>25</sup> Law 147/1914. On the applicable legislation to the annexed countries and their judicial organization. Government Gazette A 25.

<sup>26</sup> Mandatory Law 2783/1941. Introductory Law to the Civil Code.

<sup>27</sup> Law 1029/1946. Regulation of marital relationships of Israelites. Government Gazette A 79.

after having their divorce issued by a state court, may apply to the *Beth Din* for the spiritual dissolution of their marriage<sup>28</sup>.

Therefore, the Judaic religious law and the jurisdiction of *Beth Din* have nowadays a very limited practical application in Greece and have raised no particular legal and cultural concerns.

## B. Muslims of Western Thrace

The Muslim minority of Western Thrace<sup>29</sup> historically emerged from the Ottoman Empire's demise and the creation of a new Turkish nation. The direct implementation of Islamic law and jurisdiction to their personal status issues is based on a series of international treaties between Greece and Turkey dated back to 1881<sup>30</sup>.

In compliance with the treaties, two national Laws have been enacted and are still in force, Law 147/1914<sup>31</sup> and Law 1920/1991<sup>32</sup>, which introduce both substantive and procedural law provisions. According to Article 4 of Law 147/1914 (substantive law provision), issues pertaining to the formation and the dissolution of marriage, the personal relationships between spouses as well as the kinship of Greek Muslims are governed by their religious law. According to Article 5 of Law 1920/1991 (procedural law provision), the Mufti, who is the religious leader of the Muslims of Western Thrace, has jurisdiction over exclusively enumerated issues: marriage, divorce, maintenance, custody and guardianship matters, the emancipation of minors, Islamic wills as well as the intestate succession of Greek Muslim citizens who reside within the district of the Mufti, provided that Islamic law is applicable. At the same time, the case law introduced an opt-out possibility so that the parties could escape the application of the Islamic regime to their family matters if they abstained from entering a religious marriage, but they entered a civil one instead<sup>33</sup>.

Pursuant to Law 1920/1991, the Mufti is appointed by Presidential Decree and has religious, administrative and judicial authority. His decisions are not final, but they can be declared enforceable by the Court of First Instance. No procedural rules are provided, the whole process being, thus, unstructured and informal. Currently, there are three Mufti Offices: in Komotini, in Xanthi and in Didymoteicho.

The abovementioned legislative framework has given rise to numerous questions with regard to the Mufti jurisdiction and, subsequently, the scope of direct application of the Sacred Islamic Law in Greece.

Recent Law 4511/2018<sup>34</sup>, which was enacted on 15 January 2018, adds a new paragraph to the abovementioned Article 5 of Law 1920/1991, according to which matters concerning the formation and dissolution of marriage, maintenance, custody and guardianship, the emancipation of minors, Islamic wills and intestate succession are governed by Greek substantive and procedural law. The Mufti jurisdiction ceases to be obligatory and exclusive solely on the basis of the religion of the parties. Only exceptionally may such disputes be brought to the jurisdiction of the Mufti provided

<sup>28</sup> Papastathis, C. K., 1998, 37 et seq., 48; Assimakopoulou, K., 2014, 731 et seq., 738-739.

<sup>29</sup> Western Thrace is an area in Northeastern Greece.

<sup>30</sup> Convention of Constantinople of 1881 (ratified by Law ΠΛΖ'/1882 and implemented by Law ΑΛΗ' of 22 June 1882. On spiritual leaders and Muslim communities); Treaty of Athens of 1913 (ratified by Law ΔΣΙΓ'/1913); Treaty of Lausanne of 1923 (ratified by Legislative Decree of 25 August 1923. Government Gazette A 238).

<sup>31</sup> Law 147/1914. On the applicable legislation to the annexed countries and their judicial organization. Government Gazette A 25.

<sup>32</sup> Law 1920/1991. Ratification of the Legislative Order of 24 December 1990 "On Muslim Religious Officers". Government Gazette A 182. Law 2345/1920. On the temporary chief Mufti and Muftis of the Muslims of the State and on the management of the property of Muslim Communities. Government Gazette A 148, was also enacted so as to fulfill the obligations set out in the Treaty of Athens. It remained in force until 1991 when it was repealed by Law 1920/1991.

<sup>33</sup> Single Member Court of First Instance of Xanthi 1623/2003, Armenopoulos 2004, 366; Single Member Court of First Instance of Xanthi 66/2017, NOMOS.

<sup>34</sup> Law 4511/2018. On Muslim Religious Officers (Government Gazette A 2).

that both parties submit an application to him stating that they want to resolve their dispute under the Sacred Islamic Law. The subjection of a case to the jurisdiction of the Mufti is considered final and precludes the jurisdiction of ordinary courts as regards the particular dispute. The Law explicitly establishes a presumption of jurisdiction of Greek civil courts clearly stating that, in any case, if any of the parties refuses to subject its case to the Mufti jurisdiction it can appeal to civil courts under the common substantive and procedural legislation. Furthermore, the Law provides that succession matters are in principle regulated by Greek law unless the testator solemnly declares before a notary public his will to subject succession matters to the Sacred Islamic Law. Such declaration can be freely revoked in accordance with the relevant provisions of the CC. This new enactment introduces, therefore, an opt-in regime as to the subjection of a matter to the Sacred Islamic Law and to the Mufti jurisdiction, according to which Muslims shall have the right to directly appeal to Greek courts, whereas Islamic courts will still be available, but only upon request.

In addition, as regards the safeguard of procedural rights and guarantees, Law 4511/2018 provides for the upcoming issuance of a presidential decree, which shall introduce for the first time the necessary procedural rules concerning the Mufti jurisdiction, and in particular a) the process of the filing of the relevant application by the parties, which must contain an explicit and irrevocable declaration of each party regarding its option to subject the dispute to the Mufti jurisdiction, b) the representation of the parties by lawyers, c) the process of service to the respondent, d) the particular process of the hearing before the Mufti and the issuance of his judgments as well as e) all issues concerning the organization and the functioning of the Mufti office.

According to the new regime, alike, the Mufti judgments do not constitute final judgments unless they are declared enforceable by the competent Court of First Instance, which shall examine a) whether the Mufti acted within the field of his competence and, moreover, b) whether the Islamic law applied contravenes the Constitution, and in particular Article 4 paragraph 2 thereof (stating that Greek men and women have equal rights and obligations) and the European Convention on Human Rights. In contrast with the previous legislation, the new enactment makes, thus, an explicit reference to the constitutional principle of equality and the European Convention on Human Rights obviously underlining their importance also, and particularly, as regards the implementation of Islamic law.

Allegedly, the Greek Government enacted the new Law in order to avoid a negative ruling in the *Molla Sali v. Greece* case, which was pending before the European Court of Human Rights<sup>35</sup>. Mr. Molla Sali, a Muslim Greek national, left his entire estate to his wife in his will, which was drawn up by a notary in accordance with Greek civil law. His two sisters contested the will on the grounds that he was a member of the Muslim community in Thrace, and, thus, that Islamic law rather than Greek civil law governed inheritance in his case. Areios Pagos held that questions of inheritance in the case of Muslims fell within the jurisdiction of the Mufti, not of the civil courts. Mrs. Molla Sali brought the case before the ECHR, arguing that the Greek decision was discriminatory<sup>36</sup>. On 19 December 2018,

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<sup>35</sup> ECHR, *Molla Sali v. Greece* (application no. 20452/14) HUDOC. The Chamber of the European Court of Human Rights to which the case was allocated, announced, on 8 June 2017, that it has relinquished jurisdiction in favor of the Grand Chamber. The hearing at the Grand Chamber took place on 6 December 2017.

<sup>36</sup> The two sisters' claims were dismissed by the Greek court at first instance (Multi-Member Court of First Instance of Rodopi 50/2010, unreported) and on appeal (Court of Appeal of Thrace 392/2011, NOMOS). The Thrace Court of Appeal found that the decision by the deceased, a Greek Muslim and a member of the Thrace religious minority, to request a notary to draw up a public will, determining for himself the persons to whom he wished to leave his property and the manner in which this was done, was an expression of his statutory right to have his estate disposed of after his death under the same conditions as other Greek citizens. However, Areios Pagos quashed that judgment on the grounds that questions of inheritance within the Muslim minority should be dealt with by the Mufti in accordance with the rules of Islamic law. It, therefore, remitted the case to a different bench of the Court of Appeal for new consideration (Areios Pagos 1862/2013, Nomiko Vima 2014, 887). The Court of Appeal ruled that the law applicable to the deceased's estate was the Islamic religious law and that the public will in question did not produce any legal effects (Court of Appeal of Thrace 183/2015,

the Grand Chamber of the European Court of Human Rights held unanimously that there had been a violation of Article 14 (prohibition of discrimination) of the European Convention on Human Rights, read in conjunction with Article 1 of Protocol No. 1 (protection of property) to the Convention on the grounds of the Mrs. Molla Sali's husband and her religion. In particular, the Court found that the difference of treatment suffered by Mrs. Molla Sali, as a beneficiary of a will drawn up in accordance with the Civil Code by a testator of Muslim faith, as compared to a beneficiary of a will drawn up in accordance with the Civil Code by a non-Muslim testator, had no objective and reasonable justification. It also noted with satisfaction that Law 4511/2018 came into force, holding, nonetheless, that its provisions have no impact on this case, which was decided with final effect under the old system in place prior to the enactment of that law<sup>37</sup>.

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unreported). Following an appeal on points of law by Mrs. Molla Sali on 8 February 2016, Areios Pagos dismissed such appeal on 6 April 2017 (Areios Pagos 556/2017, *Hellikini Dikaiosyni* 2018, 441).

<sup>37</sup> An analysis can be found in Koumpli, (under publication).

## Hungary

Mirela Župan, Tímea Drinóczi, Mónika Márton and Ágnes Vihart

Mirela Župan, Tímea Drinóczi and Mónika Márton (all except 3.1.7., 3.2.2., 3.2.3., 3.3.1.1.-2., 3.3.3.)  
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### 1. Social perspective.

#### 1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without *affectio maritalis*).

Marriage rates have declined over the past few decades in entire Europe.<sup>1</sup> Rate of concluded marriages has been on the three decade scale dropping in Hungary, lately the rate has increased and become stable.<sup>2</sup> Pluralization of family forms started in the middle of the 80's. The changing structure of the economy, the broadening possibilities for enrolment in university, the growing career opportunities for both young men and women, on the one hand, and unemployment and growing inequalities, on the other hand, had some effect on family formations. Not only real factors but attitudes and values have also changed during the last thirty years. The political changes in Eastern Europe during the 1990s in long term influenced the demographic transformation of both the region and Hungary. Behavioural patterns of Western countries has influenced the youth, hence their path of living have become different as compared to the previous generations.

In Hungary during the past centuries, but even in the first half of the 20th century, the majority of children were born within a marriage. In the socialism, Hungarian family was of a relatively modern type with some traditional features. The overwhelming majority of the population lived in families which were made up of married couples and two children. Typically, both husband and wife were full-time wage-earners as employees of the state.<sup>3</sup> However, family formations and demographic picture of Hungary has significantly transformed in the last two decades.

According to the census of 1970, 86% and of 1990, 81% of the population of Hungary lived in a family. Since 1970, both the number of single-parent families and married couples without children has increased. The number of families with many children has decreased, while the number of families with two children has increased. These figures are a consequence of the increasing rate of couples with only one child and families without children.<sup>4</sup> In general, the population now has less births and smaller families. The number of first marriages has decreased and couples get married for the first time later in their life. The number of divorces got high; less and less people get married again after a divorce or widowhood. The single-lifestyle and the fact that adult child and parents live together, along with the fewer number of newborn children, caused a decreasing number of families. These changes have started even before the transformation of 1989 but have been amplified in the years of 2000.<sup>5</sup>

Another change relating to children born out of wedlock became noticeable already in the mid 1980's. Nowadays, a quarter of live-born children come from parents who have not married before

<sup>1</sup> OECD (2016) <http://www.oecd.org/els/family/database.htm> (20.5.2019).

<sup>2</sup> Hungary 2017 (2018) <http://www.ksh.hu/docs/hun/xftp/idoszaki/mo/mo2017.pdf>, (20.5.2019), 10.

<sup>3</sup> Dupcsik, Cs., Tóth, O., 2014, 9.

<sup>4</sup> <http://mek.oszk.hu/02100/02185/html/192.html#198> (20.5.2019).

<sup>5</sup> Népszámlálás 2011, [http://www.ksh.hu/docs/hun/xftp/idoszaki/nepsz2011/nepsz\\_16\\_2011.pdf](http://www.ksh.hu/docs/hun/xftp/idoszaki/nepsz2011/nepsz_16_2011.pdf) (20.5.2019), 7.

the birth of a child. The majority of them lives in a cohabitation and do not consider to legalize their relationship. Having in mind a rather modest marriage rate in comparison to the rest of Europe, cohabitation is, in certain proportion of population, a transitory state toward marriage.<sup>6</sup> 45,1 % of newborn children were in 2017<sup>7</sup> born outside marriage. From the point of view of the fertility and reproduction necessary for ensuring a stable preservation of population size, in the view of some authors, these partnerships represent a loss because in this family forms the partners volunteer for a smaller number of children than those living in a marriage. It is notable that lifestyle is often related to rather limited financial circumstances of families.<sup>8</sup>

The main demographic picture of Hungary in the second decade of the 21<sup>st</sup> century can briefly be summarized as follows: population decline (accelerated decline of fertility), but less neonatal mortality, decreasing number of marriages and divorces, high rate of out migration, changing rate of expats returning to the country, accelerated aging society. An interesting development is that “living apart together” (LAT) relationships are also spreading in Hungary.<sup>9</sup> LAT means that despite acting as partners, these couples do not share the same household.<sup>10</sup>

### **1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.**

The decrease in the number of marriages is considered a general trend in the majority of European countries. Hungarian data do not deviate from the overall trend. Between 1990 and 2011, the number of marriages decreased by nearly a half. In the past few years (since 2013) a slight increase has been experienced, breaking the previous tendency of steady decrease. Thus, it appears that the long-term tendency of the declining popularity of marriage has stopped in Hungary. According to the Statistical Office, marriage rate was low in the first years of the 21<sup>st</sup> century and it has significantly decreased between 2006 and 2010. Between 2010 and 2016, the number of couples getting married increased; it amounted to more than 50 000 in 2016. 2017 experienced less marriage (2,3 % less than in 2016) but the total number of marriages in 2017 was still more than 50 000 (50600) which means the second highest rate since 1996.<sup>11</sup>

As said, the average age of the spouses at the time of their first marriage is continuously increasing. In 1990, women got married at the average age of 21.5 and men at the age of 24.5. In 2013 the average age of women was 29.5 and that of men was 32.3 years. Since the 2010s, men more frequently get married after their 40th year.<sup>12</sup> In 2016, it was almost 30 years for female getting into first marriage and 32 years for male.<sup>13</sup>

Based on the data collected during censuses, it can be ascertained that living in a partnership during socialism was an existing phenomenon even if it was available only to a limited extent. At first, it started to gain more importance as a formation that was only available after marriage but later on, especially by the end of the 80's, it has become a form of co-habitation before the marriage or as an alternative to marriage.<sup>14</sup> Cohabitation is nowadays an alternative to marriage rather than a form of living together before getting married.<sup>15</sup>

<sup>6</sup> Bradatan, C., Kulcsar, L., 2019.

<sup>7</sup> Hungary 2017 (2018), 6.

<sup>8</sup> László Cseh-Szombathy, L., 2003, 10.

<sup>9</sup> Hungary 2017 (2018), 9, 10.

<sup>10</sup> Ragadics, T., 2018, 92.

<sup>11</sup> Hungary 2017, 2018, 10.

<sup>12</sup> Ragadics, T., 2018, 92-93.

<sup>13</sup> OECD (2016).

<sup>14</sup> Spéder Zs., 2005, 191.

<sup>15</sup> Ragadics, T., 2018, 92.

According to the mini-census in 2016, in the last decades the number of persons living in a partnership has increased: in 1990 251 000 persons lived in a partnership, in 2016 this number was 1 087 000, out of which 976 000 person live together with the partner in the same household.<sup>16</sup>

Since 2009, it is possible in Hungary for same sex couples to enter into a registered partnership. The 2011 census indicated 85 registered partnerships. In 2012, 41 same sex couples entered into a registered partnership. The number of registered partnerships has decreased until 2015, but since then it started to gradually increase. In 2017, 87 same sex couples registered their partnership. More male couples tend to go through the procedure of registration but in the last couple of years the number of female couples has tripled.<sup>17</sup>

**1.3. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.**

In general the declining rates of marriage have been accompanied by increases in rates of divorce. More than half of marriages in Hungary (around 67%) end in divorce. It is noteworthy that such a jump in the divorce rate occurred truly quickly – at the end of the last century, during the transition (1989/1990), only 31% of marriages ended in divorce, and another 20-30 years ago the share was only 25%.<sup>18</sup> There were 18 600 divorces in 2017, which is 4,9% less than those occurred in 2016.<sup>19</sup>

**1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-border elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).**

There is no available data on marriages, the spouses of which live in Hungary, concerning the citizenship of the spouses, or other cross-border element in the marriage. Regarding the Hungarian citizens living abroad, according to the statistics from 2013, around 52 350 persons/individuals live in marriage or cohabitation, and there are around 3 497 single parents living mainly in Austria (1 937) and Germany (1 144).<sup>20</sup>

<sup>16</sup> [https://www.ksh.hu/docs/hun/xftp/idoszaki/mikrocenzus2016/mikrocenzus\\_2016\\_3.pdf](https://www.ksh.hu/docs/hun/xftp/idoszaki/mikrocenzus2016/mikrocenzus_2016_3.pdf) (20.5.2019), 15.

<sup>17</sup> 2011 Népszámlálás, [http://www.ksh.hu/docs/hun/xftp/idoszaki/nepsz2011/nepsz\\_16\\_2011.pdf](http://www.ksh.hu/docs/hun/xftp/idoszaki/nepsz2011/nepsz_16_2011.pdf) (20.5.2019), [http://www.ksh.hu/docs/hun/xftp/idoszaki/nepsz2011/nepsz\\_16\\_2011.pdf](http://www.ksh.hu/docs/hun/xftp/idoszaki/nepsz2011/nepsz_16_2011.pdf) (20.5.2019), <http://www.ksh.hu/docs/hun/xftp/idoszaki/mo/mo2017.pdf> (20.5.2019), 17.

<sup>18</sup> Népszámlálás 2011. [http://www.ksh.hu/docs/hun/xftp/idoszaki/nepsz2011/nepsz\\_16\\_2011.pdf](http://www.ksh.hu/docs/hun/xftp/idoszaki/nepsz2011/nepsz_16_2011.pdf) (20.5.2019), 7

<sup>19</sup> More at: <https://dailynewshungary.com/divorce-rate-in-hungary-2018-year-tendencies> (20.5.2019).

<sup>20</sup> Lakatos, J., 2015, 12-13.



	Austria	Germany	UK	Other EU member states	Other countries	Total
Age						
15–29	10 033	6 836	4 280	3 062	2 347	26 558
30–49	27 012	17 448	4 116	7 021	2 390	57 987
50–	5 715	5 004	470	1 403	844	13 436
Marital status						
Husband, wife, cohabitant	26 094	16 355	1 724	6 643	1 534	52 350
Single parent	1 937	1 144	102	172	142	3 497
Child	11 679	9 997	6 399	3 694	2 918	34 687
Single or other	3 050	1 792	641	977	987	7 447

## 2. Family law.

### 2.1. General.

#### 2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?

Family rights are recognized on the highest hierarchical level in the *Fundamental Law* of 2011,<sup>21</sup> the *Family Protection Act* which has been adopted as a cardinal act of two-thirds of the Parliament in 2011.<sup>22</sup> As of sectoral legal sources the main legal source is the *Hungarian Civil Code* of 2013,<sup>23</sup> whose Fourth Book is *Family Law Book*. Act No CCXI on the Protection of Families of 2011<sup>24</sup> and Act No. XXIX on registered partnership of 2009 stands alone.

Several other acts and decrees are applicable in child welfare and guardianship administration as well.<sup>25</sup> Among others, the UN Convention on the rights of a child of 1989 and CEDAW - Convention on the Elimination of All Forms of Discrimination against Women have been ratified.<sup>26</sup>

#### 2.1.2. Provide a short description of the main historical developments in FL in your country.

Historically, family law is part of private law in Hungary.<sup>27</sup> Formation of Hungary's traditional legal system begins in the middle of 19<sup>th</sup> century when the outdated feudal system opened space for development of civil right institutions. Hungary's traditional legal system consisted of different laws, decrees and customs that have covered areas of private law. Among them were the provisions on marriage as well.<sup>28</sup> Introduction of Austrian *Allgemeines bürgerliches Gesetzbuch* (ABGB) into force in Hungary on 1 May 1853 brought to the scene another set of rules related to family law. Consequently, Hungary's traditional legal rules were applied in conjunction with ABGB. Although introduction of ABGB was involuntary, there was genuine need for the rules it offered in the field of

<sup>21</sup> Fundamental Law of April 2011, entered into force on 1 January 2012.

<sup>22</sup> Act No CCXI 2011 on the protection of families was passed in December 2011.

<sup>23</sup> Act No V 2013. It entered into force on 15 March 2014.

<sup>24</sup> Act No CCXI 2011 Hungarian Official Gazette 31 December 2011. It entered into force on 1 January 2012

<sup>25</sup> Act No XXXI, 1997 on the child welfare and guardianship administration; Order of Government No 149/1997 on public guardianship authority and proceedings in child welfare and guardianship cases.

<sup>26</sup> General Assembly resolution 34/180 of 18 December 1979 entry into force 3 September 1981.

<sup>27</sup> Kőrös, A., 1999, 1. 4.

<sup>28</sup> Vékás, L., 2004., 9.

personal rights (for instance declaring a person major or declaring a person legally dead) and family law disputes, particularly adoption and termination of marital property.<sup>29</sup>

Since 1861 the work on Hungary's own code of private law resulted with several drafts. Public presentation of the draft was as follows: general part (1871, 1880), property law, contract law and inheritance law (between 1880 and 1885), and family law (1892). From 1900 on, German private law codified as *Bürgerlichen Gesetzbuches* (BGB) and *Zivilgesetzbuch* (ZGB) of Switzerland exerted a major influence on the evolution of Hungarian private law. However, due to political reasons, Draft Private Law Code (*Magánjogi Törvénykönyv Javaslat*) was never codified.<sup>30</sup> It was only in the late 50's when the *Hungarian Civil Code* (HCC) of 1959 was introduced. However, in the socialist era, family law was not part of the HCC. A separate *Family Act* (Act on Family Law IV of 1952) regulated the matters of marriage, family and guardianship. It is notable that the cohabitation was not regulated by Family Act but HCC. In 1998 the Hungarian Government reached a consensus on having a new Civil Code framed. Recodification of the Civil Code opened a question if family related rights should be incorporated or stand alone.<sup>31</sup> A holistic approach to private law resulted in a break up with the ideas of socialism and led to the incorporation of family law to a separate book of civil code. Separate section was justified as legal regulation of personal relations among family members required independent treatment to their property relations.<sup>32</sup> The Family Law Book consists of five major parts: principles, marriage, family law consequences of cohabitation, relationship of relatives and guardianship.

In 1977 rules on the cohabitation have been introduced in the HCC while the contractual perception of cohabitation prevailed. These rules were twice amended (in 1996 and 2009). Registration of Cohabitants' Statements was introduced in 2009. In the recodification of civil code cohabitation gained double status: cohabitation is regulated in the Sixth Book, but the family law consequences of cohabitation were placed in the Fourth Book.

At the level of the constitution, the Constitution (1949, radically changed in 1989 and 1990) provided for the protection of marriage and family in its Article 15. The Fundamental Law, in its Article L) represent a different approach to the self-determination of persons regarding their personal life, as it does not provide for the same legal acknowledgment of the many types of family formations. (See more about it below.)

### 2.1.3. What are the general principles of Family Law in your country?

General principles of Family Law in Hungary derive from the *Family Law Book* and *Fundamental Law*. There are **four general principles of family law** enlisted by §§ 4:1-4:4 of the Family Law Book: protection of marriage and family, protection of the child's interest, equality of spouses and lastly fairness and the protection of the weaker party.

The first principle is the **protection of marriage and family**. The notion of marriage or the family, and related principles should be read in conjunction with the *Fundamental Law*. The *Family Protection Act* at the time of its enactment in 2011 employed a rather narrow concept of family. The Fundamental Law, in its original text, before the Fourth Amendment in 2013, defined it as the basis of the survival of the nation (Art. L)). Thus, family, based on the text of the *Family Protection Act* of 2011, was considering merely "the marriage between a man and a woman or lineal affinity or guardianship". The Constitutional Court declared this formulation unconstitutional and annulled it.<sup>33</sup> 'As for the definition of 'family', the main argument of the Court in this decision was that Article L) of the Fundamental Law cannot be interpreted as a provision excluding those in a partnership who take care of and raise each other's children, different sex-couples without a child and many other forms of

<sup>29</sup> Vékás, L., 2004., 9.

<sup>30</sup> Vékás, L., 2004., 9.

<sup>31</sup> Weiss E., 2000., 2. 5.

<sup>32</sup> Szeibert, O., 2016, 109; Szeibert, O., 2013.

<sup>33</sup> Decision of the Constitutional Court No. 43/2012 (XII. 20.)

longstanding emotional and economic cohabitation, which are based on mutual care and fall within wider, more dynamic sociological notion of family from the state's objective positive obligation to provide constitutional protection. The new provision supplementing Article L), as a result of the Fourth Amendment in 2013, is as follows: 'Family ties shall be based on marriage and the relationship between parents and children', which is too narrow and discriminatory. It is clearly discriminatory and contrary to common sense and legal considerations and case laws.<sup>34</sup>

In summary, the Fundamental Law declares that Hungary protects the institution of marriage, "the conjugal union of a man and a woman based on voluntary and mutual consent and the family". There is only one basis of the family, and this is marriage. Legal consequences of this definition are far reaching. Namely, merely the spouses in a marital union may enjoy the principle of fairness and weaker party protection once legal consequences are questioned. Citizens living in other types of family unions, registered partners and cohabitants are not afforded with equality preserved only in regards the spouses. This situation may affect the life of children living in rainbow families.

The **child's interests and rights** stand up as a second principle. The principle enshrines that a child, its interests and rights are specially protected in family relationships. It further establishes that the child has a right to be brought up in his or her own family and familial environment. Should that be impossible, child has to maintain his / her family relationships. A child can be deprived of his family environment and relationship to his family only exceptionally, in situations prescribed by the law, if such a restriction is in the best interest of a child.

The third principle is the **equality of the spouses**. It is a traditional family law principle stemming to equality in family issues and matrimonial life.

The fourth principle relates to the **fairness** and **protection of weaker party**. These principles are particularly important in the property relations of the spouses.

#### **2.1.4. Define "family" and "family member" in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

The *Fundamental Law* contains the definition of family: "Hungary shall protect the institution of marriage, the conjugal union of a man and a woman based on voluntary and mutual consent and the family as the basis for the survival of the nation. The basis of the family is marriage and the parent-child relationship". Hence, in the Hungarian legal system family members are citizens in a community based on marriage spouses and children.<sup>35</sup> "Family" or "family members" are not the citizens in a community based on cohabitation or registered partnership. This narrow concept of family is strongly criticized.<sup>36</sup> It is in opposition to ECtHR case law on the definition of family. The legislators approach is supported by neither the academia nor judiciary. To assure enjoyment of full rights to all family formations, the extensive interpretation is advocated.<sup>37</sup>

If family may not be founded on cohabitation or same sex registered partnership, it is doubtful if participants of these unions enjoy some rights in sectors such as tax law. Strictly interpreting the Fundamental Law, no one is entitled to anything, who does not fall under the definition of Art L) of the Fundamental Law.

In reality, however, there are contradictory examples. Rules applicable for marriage are also applicable for registered partnerships (that is available only for same-sex couples), save for the following: common name in marriage chosen at the time of the registration of the partnership, different procedure for entering and dissolution of the registered partnership, they cannot adopt a child together. But otherwise, same rules apply. Heterosexual couples enjoy fewer guarantees as

<sup>34</sup> Drinóczy, T., 2016, 84-85.

<sup>35</sup> Szeibert, O., 2016, 110.

<sup>36</sup> Opinions of the Venice Commission regarding the constitution making process in Hungary (Opinion on the new Constitution of Hungary [17-18 June 2011]; Blagojević, A., Drinóczy, T., 2012, 225-286., Drinóczy, T., 2016.

<sup>37</sup> Kőrös, A., 2008, 24-26.

opposed to those living in a marriage. They can request the public notary to register their cohabitation (this cannot be called registered partnership as it is for the same sex couples). It would help them to prove that they have actually lived together and the relationship is a *de facto* marriage if they have to initiate a court proceeding for any kind of matters (inheritance, accommodation, allowance in case of widowhood, etc.)

If heterosexual and homosexual couples can prove their cohabitation, they are entitled to family tax allowances, widow-pension, and can make medical decisions.

In a reported case in which the bureau denied to give GYED (kind of paid parental leave) to the partner of the man who adopted the child (partners to a same sex couples can adopt individually), the court later on decided that the GYED shall be given to the non-adopting partner as well; and it did not consider the sex of the other partner as a decisive factor. Other facts of the case: they have lived in a registered partnership. The *Háttér Társaság* legal aid service reports that neither the bureau nor the citizens are really aware of the rights that couples in a registered partnership are entitled to.<sup>38</sup>

### 2.1.5. Family formations.

According to the Hungarian legal system, family formation is the marriage. HCC's wording "family" coincides with that of the Fundamental Law. Avoiding the wording "family formation" is purposive. In a tacit way it serves to exclude other formal and informal unions of the enjoyment of family rights.<sup>39</sup>

Marriage is regulated by Family Law Book of the Civil Code. Registered cohabitation is regulated by a separate Act on Registered Partnership since 2009. Cohabitation is regulated by Civil Code (since 1977), but under the new regime of 2014. It is divided to two books: definition, property and contractual issues of common household are within the Sixth Book, whereas family law consequences are in the Family law Book.

#### 2.1.5.1. Define the "spouse" in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?

The spouse is the person who has entered into a marriage with another person of a different sex. The new status emerges when entering into a marriage. Conjugal union of a man and a woman is based on voluntary and mutual consent.

In front of the registrar, the future spouses must prove that they comply with legal preconditions for marriage. Persons of opposite sex may enter a marriage if they comply with the following conditions:

- age (above 18; minors of 16 can enter a marriage, but only if authorization is granted by the holder of parental responsibility or custodian)
- free marital status (if one of them is a foreign citizen, then it is necessary to determine whether they have the right to marry according to their domicile right)
- not relatives
- not legally incapacitated under full custody.

If the parties do not marry within one year this procedure must be repeated. Marriage is concluded in front of the registrar with the mandatory attendance of the bride and the groom and two witnesses. It is concluded in the official premises, but upon request of the parties it may be displaced to another appropriate place. The celebration of marriage is evidenced by an entry to a status book, which has merely a declaratory nature. Marriage is considered concluded with the given consent of the future spouses.

<sup>38</sup> <https://ado.hu/tb-nyugdij/meleg-paroknak-is-jar-a-gyed/> (20.5.2019).

<sup>39</sup> Szeibert, O., 2017, 183.

There are no different definitions of a spouse for different areas of law. Hence, the definition of a spouse in family law is considered valid for other areas of the legal system (succession law, tax law etc.).

**2.1.5.2. What types of relationships/unions between persons are recognized in Family Law of your country? In particular, formal (registered) and informal (de facto) unions, heterosexual and same-sex unions, unions with and without affectio maritalis. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

The relationships acknowledged, according to the Hungarian legal system, are those related to marriages, cohabitation and registered cohabitation.

The **marriage** is the act concluded among opposite sexes before the registrar of civil status. By this act a man and a woman express consent to enter a marriage and commit themselves to realize a communion of life and affections. This communion has to be based on reciprocal assistance and respect. Rules of Family Act of 1952 are in relation to marriage formation and dissolution mainly retained in the new Civil Code.

**Cohabitation** is a de facto communion of unmarried partners, two persons either of different sexes or same-sex persons (since 1995, based on a decision of the Constitutional Court<sup>40</sup>), who live together without entering into a marriage or, since 2009, registered partnership. The requirement of existence of a cohabitation is a common household, and community of life that reflects as emotional fellowship and economic partnership. Cohabitants may not be relatives or siblings/half-siblings. Cohabitants must be free of other formal or informal relationships with third persons – neither of them may be in a marriage, cohabitation or registered partnership with third person.

Cohabitation is formed and terminated with the facts of the couple. Once real community of life is created it exist – as community of life ceases to exist, the cohabitation is terminated.

Since 2010 different sex-cohabitants may register a common statement confirming the existence of the cohabitation. It is performed in front of public notary and is of a declarative character in terms of their status; some additional rights are conferred to the couple. Registration is however used to form a parental status – as the presumption of fatherhood counts for a couple in cohabitation with registered statement.<sup>41</sup>

**The registered partnership** is the relationship established between two adult persons of the same sex. Formal procedure to conclude a registered partnership does not differ much to the procedure of conclusion of a marriage. Parties must give a declaration before a registrar. The validity of a registered partnership is conditioned to monogamy- neither of the partners may be in a marriage, registered partnership with a third person. Registered partnership is terminated either before a court or before a public notary (if it is asked jointly); rules for divorce apply.

**2.1.6. What legal effects are attached to different family formations referred to in question 2.5.?**

**The legal effects of the marriage** emerge when entering into a marriage and stay fixed. Legal effects are personal or relate to a property.

In Hungary, spouses are equal in terms of rights and duties, but special protection is afforded to the weaker party. Spouses are obliged to solidarity and fidelity. Married spouses are obliged to be faithful, to cooperate and reach decisions jointly, to take care of the interests of the family, to take care of a child, to assist each other in achieving common family interests. The spouses jointly decide on their habitual residence. These obligations do not fully cease even after a divorce. Further

<sup>40</sup> 14/1995 (III. 13.) AB határozat.

<sup>41</sup> Szeibert, O., 2016, 118.

personal rights are also concerned with the use of personal names and surnames. Legal effects that relate to property may be the maintenance obligation of a spouse or former spouse.

Legal effects that relate to property and successions would be elaborated on later.

**Legal consequences of the registered partnership** are very close to that of a marriage, with some exceptions (name, joint adoption, procedures of entering and dissolving the registered partnership; otherwise the rules on marriage applies).

One of the main points of departure relates to related personal consequences. Registered partnership act does not afford a partner to use the partners surname by virtue of a mere status. Registered partner is further deprived of parental options – they cannot adopt jointly, one partner cannot adopt a child of the other partner and there are deprived of medically assisted reproduction. But they can adopt individually. This legislative choice may have negative implications to the rights and best interest of the child, if for example the adopting parent dies or leaves the child.

Registered partners must reach an agreement of their common residence. Legal consequences in relation to maintenance of the parties do not differ to such consequences in marriage.

Property consequences of registered partnership are equal to the marriage property consequence. Legal effects that relate to property and successions would be presented later in a more detailed manner.

**Legal consequences of cohabitation** are rather different to the above mentioned consequences of formal unions. The cohabitant's parental options are slightly better than the ones afforded to registered partners. Parental rights are equal to those of parents in marriage, though the procedure of establishing parentage differs. There is no automatic application of a presumption of fatherhood; a declaration of fatherhood, which is a separate act of the father, is advised to be made to ensure parental rights. No joint adoption possibility is foreseen either. However, for opposite sex cohabitants the medically assisted reproduction is allowed. There is no maintenance obligation among the cohabitants.

**2.1.7. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/de facto family formations? Explain briefly.**

There are currently no proposals for reform. The legislative reform just took place in 2013.

**2.2. Property relations.**

**2.2.1. List different family property regimes in your country.**

The default **matrimonial property regime** is the community of property. This is the only default regime since 1952 as it is considered to protect equal rights of the spouses. Stemming from the principle of equality between spouses, Hungarian property regime lies on an obligation of both spouses to contribute in material sense. The new Family Law Book provides for two alternative regimes: the participation in acquisitions regime and the separation of property regime. Civil code gives spouses greater autonomy to marital property contracts: spouses may enter a "matrimonial agreement" to define every aspect of division and management of the property. Hence, spouses are allowed to deviate from the default and alternative property regime by their contractual freedom. If matrimonial property agreement is not stipulated, in the time of marriage duration, irrespective of the actual existence of marital community, the default regime applies.

The property regimes of **registered partners** are completely overtaken from the marriage property consequences.<sup>42</sup> Hence, the above mentioned applies.

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<sup>42</sup> Art. 3 (1) a-c) of Act XXIX of 2009 on Registered Partnership and Related Legislation and on the Amendment of Other Statutes to Facilitate the Proof of Cohabitation.

The property consequences of **cohabitation** are different to those in marriage, and for political reasons this difference is retained. Cohabitants are considered contractual partners and their mutual property regime is regulated as such. Partners may arrange their property relations by means of a contract for the duration of their partnership. Civil Code prescribes formal requirements for such a contract: it has to be executed in an authentic instrument or in a private document countersigned by an attorney. Cohabitants are free to arrange any regime otherwise applicable for married couples under a marriage contract.

In the absence of partnership contract the partners are considered independent in their property acquisitions during their cohabitation. Cohabitants acquire common property in proportion amounting to their contribution in acquiring it. It is notable that work done in the household is calculated as contribution. In case the proportion may not be calculated, the presumption on equal shares applies. In event of a cohabitation breakdown, each partner may request the division of property jointly acquired during the period of cohabitation.<sup>43</sup> There is no statutory provision on division on special items of property. Property consequences, such as maintenance, cannot be claimed. Neither is there a statutory rule on “protection of family home”. However, partners may enter an agreement on the further use of their common home in event of partnership termination. Formal validity of such an agreement is subject to form of either authentic instrument or a private document countersigned by an attorney.<sup>44</sup>

As of 1 January 2010, opposite sex couples are entitled to request the registration of their cohabitation with a public law notary. This registration has to be distinguished from the one described in the first paragraph (registered partnership). It does not create any new rights or obligations but merely facilitates proof of the existence of the partnership (Art. 36/E-36/G of Act XLV of 2008 on Certain Non-Litigious Notarial Procedures).

Successions rights are not afforded to the cohabitant, except by the will.

**2.2.2. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?**

The default legal property regime is the **community of property** (statutory matrimonial property regime) acquired by spouses after the marriage was concluded. This regime may be effective also retroactively, for the time of the spouses’ life partnership preceding marriage. Community of property regime lasts for the duration of their joint marital life.<sup>45</sup>

It is a joint indivisible (undivided, common) property, which belongs to spouses in equal parts of the corresponding property. It relates to all assets the spouses have acquired together or separately, as well as the burdens and obligations that one of them took the burden.<sup>46</sup> The exceptions are the assets belonging to a spouse's personal assets. However, if profits from separate assets were accrued during the joint marital life, they are also part of the common property. If such separate property profit required administrative or maintenance costs and charges, they are deducted from the profits.<sup>47</sup>

Personal assets - individual property of each spouses are the property each spouse had acquired before the marriage, or the assets acquired in the marriage lifetime as a result of gift / donation or succession without compensation being imposed, intellectual property, compensation for damages received for personal injury, property for personal usage (of customary value) and fruits of the property obtained through the sale of individual property of each of the spouses.

<sup>43</sup> Art. 6:516 of the Civil Code.

<sup>44</sup> Art. 6:517 of the Civil Code.

<sup>45</sup> Art. 4:34 (2) and 4:35 (1) of the Act V of 2013 on the Civil Code.

<sup>46</sup> Art 4: 34-35 of the Act V of 2013 on the Civil Code.

<sup>47</sup> Art. 4:37 (1) and (3-4) of the Civil Code.

Part of the individual property acquired before the marriage are also the debts, burdens and interest. If part of individual property is in everyday usage by both spouses, it becomes a common property after spouses have been married for five years.<sup>48</sup>

**2.2.3. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a “new regime just for them”?**

Since 1986 spouses were allowed to enter a property agreement. It was allowed under the 1952 Family Act, though it was rarely employed in practice. The prevailing socialist attitude was the personal nature of family law, disregarding the proprietary aspect of the family.

The recodification of Family Law opened up a space to align with modern European trends, particularly as promoted by the CEFL Principles of European family law regarding property relations between spouses.<sup>49</sup> The new Family Law Book strongly encourages contractual freedom of the spouses and it is permissible to conclude **marital agreement relating to matrimonial property**. The spouses are allowed to deviate from the default and alternative property regime by their contractual freedom. This possibility presents a departure from the CEFL principles as well.<sup>50</sup>

Marital agreement is concluded by the future spouses (before marriage celebration) or present spouses for the duration of their matrimonial relationship, if such deviation is not precluded by the Civil Code. Marriage contract enables spouses to deviate from the rules on default and alternative property regimes. Spouses may define several different property regimes relating to certain specific assets (depacage). The parties shall also have the option to make arrangements for the use of the common home in the marriage contract (4:78 CC). The marriage contract is considered null and void if almost all of the separate and all of the common assets are given to one spouse, with no real compensation to the other spouse.

Formal requirements for a marriage contract: the marriage contract is validly concluded if it has been drawn by a civil law notary in a form of an authentic instrument, or, if it is a private instrument countersigned by an attorney<sup>51</sup> If the marriage contract is concluded prior to marriage, it comes into effect upon commencement of the joint marital life of the spouses. In case the marriage contract is concluded after the marriage celebration, its effects are valid of the signature of the contact.<sup>52</sup> Spouses are free to terminate or modify the marriage contract, but not to the detriment of a third party.<sup>53</sup>

**Registered partnership** is in terms of property consequences equal to marriage, hence the above mentioned applies analogously.

**Partners in cohabitation** may arrange their property relations by means of a contract for the duration of their partnership. Civil Code prescribes formal requirements for such a contract: it has to be executed in an authentic instrument or in a private document countersigned by an attorney. Cohabitants are free to arrange any regime otherwise applicable for married couples under a marriage contract. A partnership contract has to be recorded in the national register of partnership contracts to become effective against third parties. Absent such record, the contract is effective against the third party if the partners successfully prove the awareness of the third party of such contact and its content.<sup>54</sup>

<sup>48</sup> Art 4: 37-38) of the Civil Code.

<sup>49</sup> <http://ceflonline.net/wp-content/uploads/Principles-PRS-English1.pdf> (20.5.2019).

<sup>50</sup> Szeibert, O., 2016, 189.

<sup>51</sup> Art. 4:65 (1) of the Civil Code.

<sup>52</sup> Art. 4:64 (1) of the Civil Code.

<sup>53</sup> Art. 4:66, 4:67 of the Civil Code.

<sup>54</sup> Art. 4:65 (2) of the Civil Code.



**2.2.4. Explain briefly the rules on the administration of family property and compare if there are difference for different property regimes.**

Both spouses are entitled to administer common property by common and mutual agreement. Each of them may use the assets for the purpose they regularly serve. Each of them should be cautious not to exercise his rights with prejudice to the rights and lawful interests of the other spouse.

The management is performed always with the consent of the other spouse, whereas they jointly decide on the protection and preservation of shared property. One of the spouses may, without the consent of the other spouse, take immediate action to preserve the property. In the event of urgent measure for the protection of the common assets by one spouse, he/she is obliged to immediately notify the other spouse.<sup>55</sup>

Parts of the shared property which are used to perform a business are used by the spouse that performs the business, with the consent of the other spouse.<sup>56</sup>

Spouses from common property bear the costs of maintaining and managing joint property and households, and if they are not sufficient, then they have to bear them from their individual property. If only one of them has a personal property, then he has to bear the costs.<sup>57</sup>

The joint house of spouses is a space they live, over which one or both spouses have the right of ownership, enjoyment or a rent. If the spouses share joint right of enjoyment of a house they share joint responsibility in its management. Spouses may enter a special agreement on use of a joint house. It can be in the form of a public notary, private agreement certified with a signature of an attorney or special agreement on joint shared property management.<sup>58</sup> If such contract is concluded using only an electronic signature, or it is concluded in electronic form and signed electronically, it is null and void.<sup>59</sup>

**2.2.5. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

Specific register of agreements concerning property regime was a widely discussed topic in the stage of recodification of the family law. The new Civil Code established the National Register of Marriage and Partnership Contracts (Register).

Data contained in the Registry relate to contracting parties (their personal data: name, birth information), data on contract (authentic instrument >ID< or data on private document countersigned by an attorney), data on a notary performing registration, data on termination of a contract.<sup>60</sup>

Any person with legal interest may access the information on existence of a contract at any Hungarian notary. Subject to taxes, notary can deliver a certificate on the existence or non-existence of a contract in the register. If a person is interested in the content of the contract, they have to address the notary that registered (or later modified or terminated) the contract. The notary is entitled to reveal the content of the contract only if they have received written permission of one of the contracting parties.

Legal consequences of the registration. There is a rebuttable presumption that the Register attests with authenticity that the recorded contract exists.<sup>61</sup> A partnership contract has to be recorded in the national register of partnership contracts to become effective against third parties. Absent such

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<sup>55</sup> Art. 4:42 (1-2) of the Civil Code.

<sup>56</sup> Art. 4:43 (1-2) of the Civil Code.

<sup>57</sup> Art 4: 42-44 of the Civil Code.

<sup>58</sup> Art. 4:65 of the Civil Code.

<sup>59</sup> Boros, Zs., Kőrös, E., Makai, A., Szeibert, O., 2013, 123.

<sup>60</sup> Art. 36/K of the Act XLV of 2008 on Certain Non-Litigious Notarial Procedures.

<sup>61</sup> Art. 36/H (4) of the Act XLV of 2008 on Certain Non-Litigious Notarial Procedures.

record, the contract is effective against the third party if the partners successfully prove the awareness of the third party of such contact and its content.<sup>62</sup> The provisions pertaining to the register of marriage contracts apply *mutatis mutandis* to the register of partnership contracts.<sup>63</sup>

**2.2.6. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

Dispositions relating to the common property are performed collectively, or subject to the other spouse's consent. There are however no statutory requirements on form of the other spouse's consent.<sup>64</sup> There is in general a presumption that a contract for pecuniary interest concluded by a spouse is concluded with the other spouse's consent, unless the contracting third party was aware, or should have been aware that the other spouse had not given his/her prior consent for the contract.

In relation to a contract aimed at satisfying one of the spouse's everyday needs, or within the framework of the pursuit of profession or business activity of one of the spouses, the lack of consent may be invoked by the other spouse if he has expressed objection before the contract was concluded to the contracting third party.<sup>65</sup>

Where a sole spouse enters into a contract involving community property, such a spouse is liable for any debts arising out of or in connection with such contract. That spouse has to bear these costs from his own individual property or that spouse's share of the community property. If a spouse did not take part in concluding a contract entered by the other spouse, but initially concluded with the consent of the non-participating spouse, such non-participating spouse is only liable against third parties with his/her share of the community property.<sup>66</sup>

There is no statutory presumption on the consent of the other spouse if a sole spouse disposition relates to a real estate property serving as the jointly owned family home. The rule relates to such dispositions done in the course of a marriage or in the period between the termination of the marriage and the division of community property.<sup>67</sup> Hence, such disposition is null and void.

If a spouse did not consent to a contract related to a community property concluded solely by the other spouse, and no consent can be presumed or the presumption has been rebutted, the spouse shall not be held liable for any obligation arising out of or in connection with that contract. Such a contract concluded without the spouse's consent has no effect against the non-consenting spouse, if the acquiring party acted in bad faith or had a gratuitous advantage originating from the contract. If the other spouse concluded the contract with his/her relative, bad faith and gratuitous nature shall be presumed.<sup>68</sup>

In the absence of a consent of the other spouse a spouse cannot have a jointly owned apartment or joint property in favour of a private enterprise, a company or a co-operative. A spouse who, without the consent of a spouse, concludes a contract with which he or she is burdened, is obliged to compensate for the incurred damages, unless he proves that the legal job served the interests and will of the other, and especially if it prevented the damage of the common property.<sup>69</sup>

Any debts incurred during the marriage should be covered out of the community property, if the debts arise out of or are in connection with obligations undertaken by either of the spouses during community of property. Burdens and debts arising out of the separate property of either spouse are

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<sup>62</sup> Art. 4:65 (2) of the Civil Code.

<sup>63</sup> Art. 6:515 of the Civil Code.

<sup>64</sup> Art. 4:45 of the Civil Code.

<sup>65</sup> Art. 4:46 of the Civil Code.

<sup>66</sup> Art. 4:49 of the Civil Code.

<sup>67</sup> Art. 4:48 of the Civil Code.

<sup>68</sup> Art. 4:50 of the Civil Code.

<sup>69</sup> Art. 4:52 of the Civil Code.

treated separately and community property shall not include those assets.<sup>70</sup> Rather similar is the position of debts in connection to an act that took place prior to marital life, which shall be charged of the separate property.

However, even a debt that belongs to the separate property of one of the spouses makes the other spouse liable for it in relation to third parties.<sup>71</sup>

Spouses bear the costs of maintaining and managing joint property and households, as well as raising the children from common property. If they are not sufficient, they shall be covered from the spouses' separate property. If only one of them has a personal property, then he has to bear the outstanding costs.<sup>72</sup>

### **2.2.7. Describe allocation and division of property in case of divorce, separation or dissolution of the union.**

Shared property ceases if the spouses enter a marriage contract and exclude its existence. Shared property ceases to exist if such court decision is rendered or marriage is terminated. The court can break the joint property: if a spouse has entered into a contract without the consent of the other party or has caused a debt that is endangering part of the joint property belonging to the spouse or if he is performing its business activity has become bankrupt, or if it is executed on joint property which also endangers part of the common property belonging to the other spouse, as well as if it is a spouse placed under guardianship.<sup>73</sup> In the event of a joint property breaking, spouses from the court may request a split of property. The extent of the spouse's share is determined based on the condition and value at the time of termination of the joint property. The contract of spouses about the division of property should be made in the form of a notary public or a private document signed by a lawyer.<sup>74</sup> It should be stored in the state registry in order to produce effects in relation to third parties. Otherwise, it is necessary to carry out special evidence procedure to determine whether the third person knew about the contract that the particular property is under joint ownership of the spouses.

The court together with the question of abolishing the common property solves the abolition of the joint ownership of the house which one of the spouses has filed in a divorce or divorce request.

The court that performs the division of the rights in rem and rights and claims forming part of community property shall establish the share of a spouse from community property on the bases of the status and value prevailing at the time of termination of community of property. Specific items of community property shall be divided subject to provisions on the termination of joint ownership.<sup>75</sup> Spouses are invited to present an agreement of the distribution of the assets, which is taken into account by a judge. If some assets are used by one of the spouse's profession or private entrepreneurial activities, such assets would accrue to that spouse.<sup>76</sup>

After the termination of the community of property, the spouses are liable for the joint debt in proportion to their respective shares in the common property, i.e. on a 50-50% basis.<sup>77</sup>

Spouses are entitled to a claim for compensation for expenses spent from community property on separate property, from separate property on community property and from the separate property of one spouse on the separate property of the other spouse. Where an expenditure results in a considerable increase in the value of real estate property, the spouse entitled to compensation may also claim to an ownership share corresponding to the increase in the

<sup>70</sup> Art. 4:37 (2) and (4) of the Civil Code.

<sup>71</sup> Art. 4:39 (1-4) of the Civil Code.

<sup>72</sup> Art. 4: 42-44 of the Civil Code.

<sup>73</sup> Art. 4: 53-56 of the Civil Code.

<sup>74</sup> Art. 4: 60-62 of the Civil Code.

<sup>75</sup> Art. 4:60 of the Civil Code.

<sup>76</sup> Art. 4:61 (1-2) of the Civil Code.

<sup>77</sup> Art. 4:61 (4) of the Civil Code.

property's value. However, if the spouse liable to provide compensation has no separate property, or there is no community property at the time of termination of the marriage, there shall be no right of compensation.<sup>78</sup>

In event of a death of one of the spouses the matrimonial property is divided subject to dispositions of the marriage contract, or in event of its absence, as described above. Once the share of the surviving spouses is established, the share of the deceased spouse is divided under successions rules.

**2.2.8. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?**

No.

**2.3. Cross-border issues.**

**2.3.1. Is your country participating in the enhanced cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?**

The attitude of Hungary towards the regulations adopted under the enhanced cooperation umbrella is diverse. Hungarian state adopted the Rome III Regulation,<sup>79</sup> but it does not take part in the enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and the property consequences of registered partnerships.

It is not likely it would join.

**2.3.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as "marriage", "matrimonial property agreement", "partnership property agreement" etc.?**

Hungary does not take part in the enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and the property consequences of registered partnerships.

**2.3.3. Are you expecting any problems with the application of the rules on jurisdiction?**

Hungary does not take part in the enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and the property consequences of registered partnerships.

**2.3.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

Hungary does not take part in the enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and the property consequences of registered partnerships.

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<sup>78</sup> Art. 4:59 of the Civil Code.

<sup>79</sup> Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III Regulation), OJ 2010 L 343/10.

### 2.3.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?

Hungary does not take part in the enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and the property consequences of registered partnerships.

### 2.3.6. Are there any national rules on international jurisdiction and applicable (besides the Regulations) concerning the matrimonial property regime in your country?

Hungary is among the Member States that have recently amended the private international law legislation. The Hungarian Parliament adopted Act XXVIII of 2017 on private international law on 4 April 2017, it entered into force on 1 January 2018 (hereinafter: PIL Code).<sup>80</sup> This Act has fully replaced the decree-law on private international law of 1979. The new regime was investable due to changed economic and social circumstances, as well as intensive international and European private international law unification.<sup>81</sup> It is an integral law covering areas of applicable law, jurisdiction, recognition and enforcement of foreign decisions, institutes of international civil procedure.<sup>82</sup> Since Hungary does not participate in enhanced cooperation, the regulation of matrimonial property matters has remained of national competence. The PIL Code had to adopt rules regulating the matrimonial property regime as well. Moreover, in this area it is seriously departing from the former 1979 regime by introducing the restricted autonomy to choose the applicable law in property matters for spouses and (registered) partners. It is worth nothing that legal effects of marriage and registered partnership are equalized in cross-border issues as well.

In applicable law area the first connecting factor is the party autonomy. Spouses, or men and women intending to marry, have an option to choose the law applicable to their property relationships.<sup>83</sup> The regime is equal for registered partnership as well.<sup>84</sup> The choice of law is however limited to enumerated connecting factors. Hence, they can select the law of the state of citizenship of any of the spouses, the law of the state of the habitual residence of any of the spouses or the law of the state of the court seised. The choice is valid *pro futuro*, unless otherwise agreed. The list of connecting factors of limited party autonomy coincides with the ones listed in the EU property regulations,<sup>85</sup> with a minor exception. Namely, the choice is extended in Hungarian PIL to possibility to choose the *lex fori* as well.

In the area of jurisdiction the general jurisdiction is with the domicile of the defendant. For proceedings on the personal and property relationships of spouses, a Hungarian court has jurisdiction if the habitual residence of the spouse who is the defendant is located in Hungary; if the last common place of habitual residence of the spouses was located in Hungary, provided that the place of habitual residence of one of the spouses is still located in Hungary at the time of bringing the action; or if both spouses are Hungarian citizens. In these matters, the jurisdiction of a Hungarian court is also established if the property constituting the subject of the legal dispute is located in Hungary.<sup>86</sup>

If the matrimonial property issues appears as a request in the proceedings concerning the marriage, a Hungarian court may settle the property issue if it has valid jurisdiction for settling divorce. Another mode of joining the property claim to other proceedings relates to proceedings on inheritance.

<sup>80</sup> Szabados, T., 2018, 972–1003.

<sup>81</sup> Vékás, L., 2015, 292–299.

<sup>82</sup> Basedow, J., Rühl, G., Ferrari, F., Pedro de Miguel Asensio, 2017.

<sup>83</sup> s. 28(1) PIL Code.

<sup>84</sup> s. 36 PIL Code.

<sup>85</sup> Art. 22 Matrimonial Property Regulation.

<sup>86</sup> Szabados, T., 2018, 1000-1001.

Hence, should a Hungarian court hold jurisdiction for successions proceedings, it may also adjudicate on a matrimonial property matter joined to that main proceedings.

One of the main departures of the PIL Act of the Matrimonial Property Regulation relates to autonomy in choice of *fora*. Under Art. 7 of the MPR the prorogation is allowed, but the Hungarian law does not contain any corresponding provision.

The provisions on the recognition and enforcement of foreign decisions apply only if the case does not fall under the scope of application of any EU regulation or international convention. In section on the recognition of foreign judgements general and special rules are provided for. The general conditions for recognition are that a) jurisdiction of the foreign court seised was founded (based on the Hungarian PIL Code); b) decision became final or has an equivalent legal effect under the law of the state in which it was rendered; c) none of the grounds for denial applies.<sup>87</sup> Reciprocity is not a precondition for recognition of foreign decisions.

Although the entire Hungarian system preserves the spousal relation merely to an opposite sex married couple, judicial practice has to a certain extent broadened the concept. Recently in 2017 Hungarian courts dealt with a refusal of the Registrar to give any effect to a same-sex marriage concluded in Belgium among the Hungarian and American national. Court of First Instance upheld the view of the Register that any recognition would violated the fundamental rights of the Hungarian society. Budapest District Court overturned this position and ruled that the Hungarian state administration must acknowledge the marriage of same-sex couples abroad as equivalent to registered partnerships in Hungary.<sup>88</sup>

### 3. Succession law.

#### 3.1. General.

##### 3.1.1. What are the main legal sources of the Succession Law (SL) in your country? What are the additional legal sources of SL?

The Fundamental Law establishes that: "Every person shall have the right to property and the right to succession."<sup>89</sup> Act V of 2013 on the Civil Code is the new Hungarian Civil Code, with the Book Seven on the successions.

##### 3.1.2. Provide a short description of the main historical developments in SL in your country.

The history of private law in general has been elaborated in chapter 2.1.2. The first private law codex in Hungary was the Act IV of 1959 on the Civil Code of the Republic of Hungary (former Hungarian Civil Code), with successions rules as their integral part. Due to many restrictions on private property in socialist era, such as shares in companies, intellectual property, the role of the law of succession was less relevant. By late 80-ies, the collapse of socialist system removed the limitations to private ownership expanding the range of assets that could be held by private individuals. The succession provision in the Civil Code retained in its original form for half a century. However, a broad amount of case law attributed to their interpretation.<sup>90</sup>

<sup>87</sup> s. 109(1) - 109(2) PIL Code.

<sup>88</sup> Case nr. 27.K.32.541/2016/6 (Administrative and Labor Court of Budapest as a court of first instance; <http://hatter.hu/sites/default/files/dokumentum/konyvlap/kulfoldihazassag-elfofok.pdf> (20.5.2019)) and case nr. 1.Kf.650.054/2017/4. (The Metropolitan Court as a court of second instance; <http://hatter.hu/sites/default/files/dokumentum/konyvlap/kulfoldihazassag-masodfok.pdf> (20.5.2019)).

<sup>89</sup> Article XIII (1).

<sup>90</sup> Csehi, Z., 2011, 170.

One of the main differences of the new regime is the abandonment of the “widows right”<sup>91</sup> and putting the spouse and a child to the first line of the intestate succession. In the old regime, the spouse would inherit only *usufruct*, the beneficiary ownership of the estate.

### 3.1.3. What are the general principles of succession in your country?

Initial legal principle is the devolution of succession founded on consanguinity, with preference to descendants, excluding more distant relatives.<sup>92</sup> Primary principle is the autonomy of the testator. Absence his testament the intestate succession comes as subsidiary.<sup>93</sup> Legal principle of the devolution of succession, based on consanguinity, preferring the descendants, excluding distant relatives, comes at place here.

“Universal succession” indicates that at the moment of the deceased’s death succession of the entirety of the estate (all the rights and duties) occurs automatically on the strength of law.

The principle of *ipso iure* succession applies, indicating that inheritance is transferred to the heir at the time of death of the testator without any separate legal act. In case heir waives a succession, it takes effect retroactively to the moment of the testator’s death and the estate is taken as not having devolved at all.

Another important principle is exemption of the inheritance from the statute of limitations.

### 3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.

In Hungary, the competent authority to perform the probate proceedings is a public notary or the court. The public notary would deal with a succession matter not disputed among the parties occurring as heirs. In such a non-contentious probate proceeding the notary performs the role of a court, and renders a “grant of probate” as a final formal decision. Court is a competent authority for probate procedures with disputed issues among heirs or any other interested parties.

Probate proceedings is initiated *ex officio*, involving all parties interested in settling the rights in connection to relevant succession. The intention of the legislator is to settle any legal issues among heirs, legatees, estate creditors etc. in a single procedure, if possible.

Probate proceedings consist of two stages. First stage is the inventory proceeding conducted by the inventory official of the competent local mayor’s office. His task is to list all personal and material facts of the succession, particularly property included in the estate, persons interested in successions, possible testament etc. Record of the inventory of the estate is forwarded to the competent notary public.

The second stage of the probate proceeding takes place before the public notary designated in accordance to territorial jurisdiction rules. Public notary exercises the public authority of the state in this proceeding. Probate procedure is performed under the rules of a non-contentious court proceeding. The competent notary in probate proceedings makes query of the Register in electronic form in order to inquire whether the deceased was a contracting party of a marriage contract. Should this be the case, the notary requires the transmission of the contract.<sup>94</sup> Public notary examines *ex officio* the facts and circumstances that determine the order of succession, including the eventual evidence indicating that testament has been drawn. Interested parties are summoned to attend the hearing.

The heirs are invited to conclude an allocation agreement, which would finally settle the proceedings once the public notary issues the grant of probate based on the agreement. In the course of probate

<sup>91</sup> Old Civil Code Article 615, para (1).

<sup>92</sup> Gárdos, P., 2013, 985–1031.

<sup>93</sup> Molnar, H., 2012, 91.

<sup>94</sup> Art. 36/K (3-5) and (10) of the Act XLV of 2008 on Certain Non-Litigious Notarial Procedures.

proceedings, the heirs and other interested parties may also reach an agreement to transfer the property acquired by succession, in whole or in part, to estate creditor.

The probate proceedings end with a formal decision, a grant of probate, by which a public notary legally transfers the estate to the heirs/legatees/creditors. A grant of probate is subject to an appeal before the competent regional court. The final grant of probate is an authentic public document that certifies the status of the heir to persons listed in it by name. The final grant of probate is ex officio forwarded to real estate register.

Heirs do not need to make a statement on acceptance of inheritance, while it is transferred to the heir at the time of death of the testator without any separate legal act. If an heir does not wish to inherit a statement to waive succession is given either in a written form and handed to the notary performing the probate, or the statement on waiver is given orally in front of the notary.

**3.1.5. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?**

Legal definition of a succession is retained of 1959 Civil Code, whereas the succession is: “The estate owned or controlled by a person at the time of decease shall pass in its entirety to the heir.”<sup>95</sup> Hungarian law acknowledges intestate and testate successions. If the deceased has left a will, the priority is afforded to testate successions. The rules applicable to intestacy govern succession in the absence of a will. Intestate succession takes place also in event that some estates of the deceased remained excluded of the will, hence cumulative application of legal titles is possible.

**3.1.6. What happens with the estate of inheritance if the deceased has no heirs?**

In the absence of legal heirs, all estate is given to the State. The State has the same legal status as other heirs, albeit the entitlement to waive an inheritance.<sup>96</sup>

**3.1.7. Are there special rules or limitations concerning succession with reference to the deceased’s (or heir’s) culture, tradition, religion or other characteristics?**

No, there are not. If there are some cross-border elements in the private law relationship, either the Regulation 650/2012/EU, or Act XXVIII of 2017 on the international private law applies. The Act required that the Hungarian public policy remains intact; this is the public policy clause. If the foreign applicable law is against the Hungarian public policy, i.e., the application of the foreign law would infringe the basic values of the Hungarian legal system or the constitutional principles, the Hungarian law shall be applied instead of the foreign one. So the cultural, traditional or religious characteristics of the applicable law can influence the case if the characteristic element is part of the applicable foreign law.

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<sup>95</sup> Article 7:1 of the Civil Code

<sup>96</sup> Section 7:74 of the Civil Code



### 3.2. Intestate succession.

#### 3.2.1. Are men and woman equal in succession? Are domestic and foreign nationals equal in succession? Are decedent's children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?

There is no discrimination of adults or child on the bases of gender or sex. Children are not discriminated regardless of the status: born in a marriage, outside the marriage, or adopted.

#### 3.2.2. Are legal persons capable of inheriting? If yes, on which basis?

The base of the legal person's inheritance is the Civil Code (Act V of 2013).

Yes. The Hungarian succession law is based on the principle „*ipso iure*” succession. Successor can be every natural or legal person or business organization without legal personality; the state can inherit, too.

The successional quality is independent from the legal capacity: even the *nasciturus*, provided that they born alive, and the legal person that is being under creation can be heirs; their capability to inherit depends on the time of the deceased's death. This capacity of a legal person is based on the Civil Code (Act V of 2013). Note, however, that according the Act CXXII of 2013 on conveyancing lands and forests, only human persons are capable to acquire ownership of lands and forests.

#### 3.2.3. Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.

Yes, it is regulated in the Act V of 2013,<sup>97</sup> but only in the case, if there's a valid will of the deceased, then the legal heir/heirs have the claim for compulsory share, but in the will the deceased can disinheritance her/his legal heir/heirs. There is no taxative list of grounds for the disinheritance.

Under Article 7:75, the descendants, spouse and parents of a testator shall be entitled to a compulsory share if such a person is a legal heir of the testator or would be one in the absence of a testamentary disposition at the time of the opening of the succession.

A person validly disinherited by a testator in his testamentary disposition shall be denied a compulsory share. Disinheritance shall be valid if the testamentary disposition expressly indicates the reason therefor.

Disinheritance can take place if the person entitled to a compulsory share<sup>98</sup>

- is unworthy of inheritance from the testator,
- has committed a serious crime to the injury of the testator,
- has attempted to take the life of the testator's spouse, domestic partner or his next of kin or has committed another serious crime to their injury,
- has seriously violated his legal obligation to support the testator,
- lives by immoral standards,
- has been sentenced to an executable term of imprisonment, and has not served his term,
- has failed to offer aid or assistance as it may be expected by the testator at a time of need.

The testator may disinherit a descendant of legal age of reasons of gross ingratitude the descendant has displayed toward the testator. A parent may be disinherited by the testator for wrongful conduct which would also serve ground for the termination of parental custody rights. A testator may disinherit their spouse because of a conduct seriously violating conjugal rights. Any person who is

<sup>97</sup> Article 7:75. – 7:79 of the Civil Code.

<sup>98</sup> Article 7:78 of the Civil Code.

debarred from succession for reason of disinheritance shall not be entitled to administer the inheritance of the person replacing him. The provisions pertaining to the termination of the parents' asset management right shall apply *mutatis mutandis* to the administration of such assets.

If the testator has condoned the reason for inheritance before making his/her testamentary disposition, the disinheritance shall be annulled and their heir shall be entitled to a compulsory share. If the testator has condoned the reason for disinheritance after making his/her testamentary disposition, the disinheritance shall become invalid even if the testamentary disposition is not revoked.

**3.2.4. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?**

The rules applicable to intestacy succession are applied in the absence of a disposition of property upon death. By intestate succession the relatives (in *kinship groups*) and the surviving spouse or registered partner of the deceased inherit. Relatives that may inherit are descendants, relatives in the ascending or lateral lines.

Legal heirs in descendants category<sup>99</sup> starts with the children of the testator. All children inherit in equal shares. If a child is debarred from succession, its descendants succeed in substitution. Descendants of an excluded person succeed the share that their debarred ascendant would have inherited in equal shares among themselves.

If the deceased has no children or a spouse, or they are debarred from succession, the parents of the descendant succeed in equal shares.<sup>100</sup> If one of the parents has deceased, descendants of such parent succeed in accordance with the rules of substitution. In case of no descendant the other parent alone or his descendants, in accordance with the rules of substitution, succeed.

If there are no relatives in prior categories or if there are relatives but they are debarred, grandparents and grandparents' descendants inherit.<sup>101</sup> In the place of a grandparent debarred from succession, descendants of such grandparent succeed in accordance with the rules of substitution. In case a grandparent is debarred from succession and has no descendant, the spouse of such grandparent succeeds in his stead. In the event the grandparents' are deceased or are debarred of succession, deceased great-grandparents in equal shares.<sup>102</sup> In case no legal heir inherits in the above mentioned kinship groups, distant relatives of the deceased person become legal heirs in equal shares.<sup>103</sup>

A spouse in a valid marriage with a deceased is a legal heir.<sup>104</sup> Spouse may be debarred of succession if the spouses were separated and the conjugal community has not existed at the time of death, not there were reasonable expectations of their reconciliation. These rules apply *mutatis mutandis* to a succession of a registered partner of the testator.<sup>105</sup> Persons who have lived in actual conjugal community with the testator out of marriage or registered partnership are not entitled to intestate succession.

Specific rules apply for intestate inheritance by spouses and descendants in conjunction.<sup>106</sup> Surviving spouse has a right of usufruct, life estate, on the family dwelling used together with the testator. Usufruct includes furnishings and appliances as well. As for the inheritance of the estate, the spouse

<sup>99</sup> Article 7:55 of the Civil Code.

<sup>100</sup> Article 7:63 of the Civil Code.

<sup>101</sup> Article 7:63 of the Civil Code.

<sup>102</sup> Article 7:65 of the Civil Code.

<sup>103</sup> Article 7:66 of the Civil Code.

<sup>104</sup> Article 7:58 – 7:62 of the Civil Code.

<sup>105</sup> Sec. 3(1) of the Act regulating registered partnership Act XXIX of 2009.

<sup>106</sup> Article 7:58 of the Civil Code.

has the same size of the share that belongs to a child. In the course of the probate proceedings, the descendants and the spouse may stipulate an allocation agreement, whereas a spouse would receive a life estate for the entire estate. The spouse may request the redemption of his life estate, which is conducted in due consideration of the reasonable interests of the other descendants.

Specific rules apply for intestate inheritance by spouses and parents in conjunction.<sup>107</sup> If there are no heirs in the descendant's kinship line, the spouses and the parents would inherit. The surviving spouse has a right of ownership title on the family dwelling used together with the testator and half of the remaining part of the estate. The parents inherit their share in equal parts.

Should there be no heirs in line of descendant or parents the spouse inherits the entire estate.<sup>108</sup>

Adoption creates rights in respect of intestate succession among the adopted person and the adoptive parent and the relatives.<sup>109</sup> Adoptee is treated as blood descendants of the adoptive parent for the purposes of intestate succession. However, if the adoptee was adopted by a relative in the ascending line, a sibling, or a descendant of such relative in the ascending line, the adoptee also retains his legal right to inherit from his blood relatives.

"Lineal succession" relates to a special mode of intestate succession for certain part of his estate.<sup>110</sup> Its function is to preserve and return the property to the testator's family, and prevent it being taken by the spouse. These rules come to place only if there are no descendants. "Lineal heirs" are the parents of the deceased, the grandparents and distant ancestors of the deceased. The lineal nature of the property must be proven by the person who would inherit under this title.<sup>111</sup>

Assets belonging to a lineal property are deceased belongings: acquired from an ancestor by inheritance or gift, inherited or received as a gift from a sibling or a descendant of a sibling. Property excluded from lineal succession' comprises of gifts of ordinary value; property that no longer exists and furnishings and household accessories of ordinary value if a spouse survived the deceased.

Even if the lineal heirs inherit the ownership title of lineal property, surviving spouse of the deceased person is entitled to its life estate.

Hungarian law acknowledges the obligation to restore gifts if the heirs are descendants of the deceased person. Each heir is obliged to present and calculate the value of advancements he received from the testator during his lifetime. That value is added to the value of the estate. The total consolidated value is then divided proportionately among the heirs, pursuant their shares of intestate succession.<sup>112</sup>

### **3.2.5 Are the heirs liable for deceased's debts and under which conditions?**

Yes. The principle of universal succession refers to the entire testator's rights and debts.

### **3.2.6 What is the manner of renouncing the succession rights?**

If an heir does not wishes to inherit a statement to waive succession is given either in a written form and handed to the notary performing the probate, or the statement on waiver is given orally in front of the notary.

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<sup>107</sup> Article 7:60 of the Civil Code.

<sup>108</sup> Article 7:61 of the Civil Code.

<sup>109</sup> Article 7:72, 73 of the Civil Code.

<sup>110</sup> Article 7:67 of the Civil Code.

<sup>111</sup> Article 7:68 of the Civil Code.

<sup>112</sup> Article 7:57(1) of the Civil Code.

### 3.3. Disposition of property upon death.

#### 3.3.1. Testate succession.

##### 3.3.1.1. Explain the conditions for testate succession.

Testate succession is regulated by Articles 7:10-7:24 of the Civil Code. Testators shall be entitled to freely dispose of their property, or a part thereof, at time of death by a will (freedom of testamentary disposition). An instrumental shall be recognized as a will if it contains the testator's disposition of his property to take effect after his death, and if it manifestly appears to have been made out by the testator. Disposition of property may be accomplished by means of a notarial will or written will that can also be a holographic will (these have to be written in a language that the testator understands), nuncupative wills are permissible in the cases specified in the Civil Code. This latter can be taken when the life of the testator is in exceptional danger that does not allow taking a written will. Married couples can compile their will in one document. The validity of this will is described by the Civil Code.<sup>113</sup>

##### 3.3.1.2. Who has the testamentary capacity?

The testamentary capacity is similar to the legal capacity, with the difference, that even those whose legal capacity is limited have the testamentary capacity, but for the validity of their will has to be drawn in the form of the public (notary) will. Only the natural persons have the testamentary capacity.

##### 3.3.1.3. What are the conditions and permissible contents of the Will?

Hungarian legal system acknowledges three types of wills, and each of them has different requirements regarding the conditions and permissible contents of a testament. They are described in detail below.

*3.3.1.4. Describe the characteristics of Will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a Will?*

Hungarian legal system acknowledges three types of wills: authentic wills, written private wills and oral wills.<sup>114</sup>

An authentic will is drafted before a public notary, in accordance with the provisions of the Act on public notaries applicable to notarial deeds.

There are different types of written private wills in Hungarian legal system. The testator writes and signs the holographic *will* entirely by in his own hand. Allographic will is written by other persons than the testator, but it must be signed by the testator in the contemporaneous presence of two witnesses. If the testator has already signed such a will, he must give a declaration before two witnesses in their contemporaneous presence that the signature is his own. Allographic will must be signed by the witnesses indicating their capacity as such. Any typewritten wills is considered to be allographic, even if typed by the testator himself.

An allographic or holographic will signed by the testator may be deposited with a public notary. This type is known as private will deposited with a public notary. It may be deposited as an open document or sealed document.

Formal requirement for the validity of the will. Any type of the will is formally valid only if the date when it was drafted is clearly indicated in the deed itself. Additional rules apply to wills consisting of several separate sheets, for example a sequential page number, signature of the testator and witnesses on every sheet. If the will is allographic, written in a language testator writes or speaks.

<sup>113</sup> Article 7:23 of the Civil Code.

<sup>114</sup> Article 7:13 of the Civil Code.

Oral wills (nuncupative wills) is an exceptional type of a will employed by the testator that found himself in an extraordinary life-threatening situation in which written will is not possible.<sup>115</sup> Testator may give an oral statement and express his will in the contemporaneous presence of two witnesses in a language understood by the witnesses. This will would become inoperative if in the period of thirty consecutive days following the oral will the testator had the opportunity to make a written will without any difficulty.

Spouses and registered partners<sup>116</sup> are allowed to make joint wills during the term of their conjugal community. Joint wills may take a form of an authentic will; holographic private will (one testator write it, spouse /registered partner handwrites a statement it is also his will), allographic will. Additional formal requirements apply for wills consisting of separate sheets.

**3.3.1.5. Is there a (public) register of Wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

Hungarian law established a national Register of Wills (*Végrendeletek Országos Nyilvántartása*). Only the wills that were drafted / modified / revoked before the public notary are enlisted to the Registry. Hence, the Registry would contain all of the authentic wills, and other types of wills and dispositions mortis causa that were drawn up by a notary public in an authentic instrument. These are: a private will deposited with a public notary, agreement as to succession if drawn up by a public notary in an authentic instrument, testamentary gift if drawn up by a notary public in an authentic instrument. The omission of such registration for any reason does not compromise the validity of the will. In general terms the validity of the disposition is not contingent upon its entry in any official register.

**3.3.2. Succession agreement (negotia mortis causa). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.**

An agreement on succession is a contract for pecuniary interest contracted among the testator and the other party named as a heir in exchange of maintenance, annuity or care.<sup>117</sup> Thereof the testator may nominate an heir of his entire estate or only its specific part. Testator may ask for a maintenance, annuity or care for himself or specify another third party.

The legal nature of an agreement on succession is twofold. It is a disposition of property upon death in respect of the contractual statement of the testator, whereas it a contractual stipulation in respect of the person providing maintenance, annuity or care.

Formal requirements for a validity of the wills *mutatis mutandis* apply for formal validity of an agreement on succession as well. An agreement on succession has to be in an authenticated form (authentic instrument by a notary public) or an allographic (with two witnesses).

Material validity of the agreement on succession is subject to a consent of the legal representative and the approval of the guardian authority if the testator does not have a full legal capacity. In concrete it is a situation where the testator is a minor or a person with limited or partially limited legal capacity.<sup>118</sup>

<sup>115</sup> Article 7:20 of the Civil Code.

<sup>116</sup> Article 7:23 of the Civil Code, Section 3(1) of the Act regulating registered partnerships.

<sup>117</sup> Article 7:48 of the Civil Code.

<sup>118</sup> Article 7:49(2) of the Civil Code.

### **3.3.3. Are conditions for validity of Wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

The succession law rules are governed in the Family Book of the Civil Code; only some special limitations are in other Acts (for example the Act on the conveyance of lands and forests). Procedural matters are ruled in other Acts (for example the Act XXXVIII of 2010 on probate proceeding).

Oral wills are only regarded as valid if they were made under life-threatening conditions and the lack of an ability to write.<sup>119</sup>

### **3.3.4. Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

The freedom of testamentary disposition extends to all the assets of the testator. He may freely dispose of his entire, or merely part of this property. Certain close relatives are in principle protected if a deceased would completely have left them out of inheritance. Hence, Hungarian law acknowledges a statutory arrangement of reserved share. Close relatives of the testator, i.e., a descendant, spouse and a parent may claim for a reserved share, but such a claim is subject to *contract* law. The period of limitation for this claim is five years. A descendant, spouse and a parent may claim for a reserved share and if granted it is enforced towards the heirs. However, these close relatives never become an heir nor they are entitled to *in rem* share of an estate.

### **3.3.5. Cross-border issues.**

#### **3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?**

Several problematic aspects in the overall application/non application / misapplication of the Succession Regulation may be identified.

Hungarian notarial practice is in many cases ignoring the existence of the Regulation, hence it is not applied at all. In terms of probate proceedings several issues may be identified. In cross-border cases public notary is often lacking information on the entirety of the property of the deceased. As the substantive law requires that the "decree of release" lists all of the assets, in cross-border cases the issue is to identify all of them. The issue is problematic in relation to bank accounts held in other Member States. To accomplish the task the evidence regulation is employed, where the Court acquires the information from the foreign bank and forwards to the Hungarian notary. Since domestic rules apply to the issue which information is the bank obliged to reveal, sometimes the information is not provided to the court by the evidence regulation either. Another issue relates to safe deposit boxes, where sometimes the applicable general terms prevent even the bank to open it. Hungarian notary then often nominates one of the heirs as an "executor of the will" to get the information in compliance to Article 63 (2) c) of the 650/2012 Regulation.

There are possible constrains in terms of applicable foreign law and recognition of foreign legal institutes not known to Hungarian system. Another important issue related to effects of the European Certificate of Successions issued in another member state, but lacking conformity to national land registry rules. This issue has been eliminated by adapting the national land registry rules.

Establishing the habitual residence of the deceased has been reported as an issue for the practice. Diverging interpretations of the Member States may in a single case lead to parallel proceedings. The issue is even more problematic in the lack of any European uniform cross-border notification system

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<sup>119</sup> Molnár, H., 2012.

or register of probates. Another side issue relates to taxation, which remained national. Unpredictable foreign regime may lead to legal insecurity for the heirs.<sup>120</sup>

**3.3.5.2. Are there any problems with the scope of application? Are there any problems concerning the application?**

Issues not reported to our knowledge.

**3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country had experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?**

Since main jurisdictional rule of the Regulation relies on a factual concept of habitual residence, its interpretation may affect the application of the jurisdictional and procedural rules of the regulation. Lacking any definition of the term “habitual residence”, interpretation of the concept may be different by different Member States. There are interesting reported cases where the habitual residence interpretation was decisive: a dual-citizen of Hungary and Austria had a bank account in both countries; an Austrian citizen with long duration life center in Hungary, but upon his death the Austrian authorities found the habitual residence was in Austria instead of Hungary, since his closest relative lived in Austria.<sup>121</sup>

Since no European cross-border notification system or register of probates is established, parallel procedures are possible. Authorities of more than one Member State (for example of the nationalities or habitual residence of the deceased) may be addressed to initiate a probate, and they do not know if there is already one initiated in another member state. The *lis pendens* rule is intended to prevent such a scenario, but in practice it does not function in event of lack of information.

**3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?**

There are possible constrains in terms of applicable foreign law with legal institutes not known to Hungarian system. If such an institute appears, the Central District Court of Buda has exclusive competence to decide on its adaption or substitution.<sup>122</sup> Pursuant to this rule the institute not known to Hungarian law would be adapted to the closest equivalent institute under the domestic laws. The practice indicated possible problems in adaptation of the “fideicommissarische Substitution” under Austrian law, or a possibility of a testator to designate a long term will-executorship” under German law.

**3.3.5.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?**

There are possible constrains in terms of recognition of foreign legal institutes not known to Hungarian system. If such an institute appears, the Central District Court of Buda has exclusive

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<sup>120</sup> Fuglinszky, Á., Szeibert, O., Tókey, B., 2018.

<sup>121</sup> Fuglinszky, Á. Szeibert, O., Tókey, B., 2018, 1-4.

<sup>122</sup> Act LXXI of 2015 on adaption proceedings of Article 31 of Regulation (EU) No 650/2012 of the European Parliament and of the Council.

competence to decide on its adaption or substitution.<sup>123</sup> Pursuant to this rule the institute not known to Hungarian law would be adapted to the closest equivalent institute under the domestic laws. The practice indicated possible problems in adaptation of the notaries' right to act as estate-trustees in Austria. Since Hungarian notary does not have such a power, nor could such rights be registered in Hungarian land register, this legal title is adapted as "restraint on alienation and encumbrance" known to Hungarian system.<sup>124</sup>

Having in mind the universal nature of choice of law rules of the Successions regulation, public policy rules require special attention. The issue of public policy gets controversial in legal areas of substantially very diverse material rules. Succession law has traditionally been perceived as a legal area reflecting legal tradition of a country. Consequently, comparative succession law reveals different substantive solutions in many respects. Mere fact that foreign law is different in respect of: types of legal heirs; order of succession, different conditions to inherit / reasons for debarment, would not suffice to call upon for public policy. However, if foreign law would infringe certain values of Hungarian legal order, it may be invoked. Discriminatory foreign law may infringe fundamental values of Hungarian law. Hungarian rules on freedom of disposition of the property, or the testamentary disposition embodied in § 7:10 of the Hungarian Civil Code, might be jeopardized by foreign law that does not allow free disposition of property or allows it in a discriminatory way. If foreign succession rules discriminate heirs based on their sex (a male son gets more than a female), or child as an heir on the bases of marital or extra-marital birth, it would be considered as contrary to the Hungarian public policy.

#### **3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?**

The problem occurred due to the fact that pursuant to the register of real estate, specifications of plots of land are essential for transferring or registering them. However, some of the Member States, particularly Germany, does not have a national rule obliging the authority issuing the Certificate of Succession to specify and list all of the plots in the mere Certificate. Since these specifications were missing, the national authorities had an issue in accepting them and transferring the real estate pursuant to a certificate, since that was contrary to their national registry law. In 2017 the German courts, and recently in 2018 the Austrian Supreme Court, have rejected the claims of the heirs asking the relevant authorities issuing the certificate to specify and list of the estates.<sup>125</sup>

German courts firmly stand on the requirements prescribed by the 650/2012 regulation. In terms of the content of the Certificate of Succession Art 68 of the 650/2012 Regulation the information's that form an obligatory part of the Certificate does not require the designation of the property. Hence, absence of this figure does not prevent a grant of incorporation on the basis of such a certificate. It is worth nothing that the national land registry rules of Hungary and Austria both ask for a particular and precise identification data of each piece of property/asset. Still, Austrian land registry is accepting the German certificate as a legal base of transfer of real estate since the Regulation has supremacy over the national rules.

Due to the lack of that specification and of the necessary identification data of the Certificate of Succession issues in Germany, the Hungarian land registration authorities could not register the ownership upon succession.<sup>126</sup> The Hungarian Act on Land Registration has been recently modified to meet the new challenges brought with the 650/2012 regulation. Registration of the change of ownership upon succession must be carried out even if the Certificate of Succession does not contain

<sup>123</sup> Act LXXI of 2015 on adaption proceedings of Article 31 of Regulation (EU) No 650/2012 of the European Parliament and of the Council.

<sup>124</sup> Fuglinszky, Á. Szeibert, O., Tókey, B., 2018, 4.

<sup>125</sup> Heidenhain, S., 2019, 10-11.

<sup>126</sup> Fuglinszky, Á. Szeibert, O., Tókey, B., 2018.



the estate identification data. So far this question was not a preliminary issue request before the CJEU.

**3.3.5.7. Are there any national rules on international jurisdiction and applicable (besides the Succession Regulation) concerning the succession in your country?**

Pursuant to the Act LXXI of 2015 on adaption proceedings of Article 31 of Regulation (EU) No 650/2012 of the European Parliament and of the Council, "The Central District Court of Buda" has the exclusive competence to decide on the adaption/substitution of the particular foreign legal institution that does not exist in Hungarian law.

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## Ireland

Elisa Sgubin

### 1. Social perspective.

**1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without  *affectio maritalis*).**

One third of families in Ireland are outside the “traditional model” of a married couple both of whom are in their first marriage. Alternative family structures are dominated by never-married cohabiting couples and lone mothers (both never-married and divorced or separated). Together with first-time marriages, these four family types account for 92% of families. Second relationships and step-families, though they exist in diverse forms, remain relatively rare in Ireland.

Childless couples with a mean age of less than 45 years are more likely to cohabit than be married, while the vast majority who have children are married. In one quarter of cohabiting couples at least one partner was previously married. The mean age of such couples is over 40 years, suggesting that it is not only the recent cohort of younger adults that is taking advantage of the acceptability of cohabitation.

The likelihood of cohabitation is linked to socio-economic status. Controlling for other background characteristics, including the presence of children, a couple in their thirties who both have third-level qualifications are less than half as likely to cohabit as a couple who both have lower second-level qualifications.<sup>1</sup>

**1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.**

In Ireland the married population increased by 4.9 per cent between 2011 and 2016, growing from 1,708,604 to 1,792,151 which was faster than the overall population growth of 3.8 per cent. Both first and second marriages increased. In 2016, there were 4,226 persons (2,526 males and 1,700 females) who indicated that they were in a registered same-sex civil partnership.<sup>2</sup>

**1.3. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.**

Separation and divorce have grown significantly since the legalisation of divorce, in 1996. The number of separated couples rose from 78,000 in 1996 to 116,000 in 2011. In the same period the number of divorcees rose almost tenfold, to 88,000. Almost 8 per cent of non-Irish-national adults are separated or divorced, versus 5.3 per cent of Irish nationals.

In the 2015 almost 3,000 people entered civil partnerships.<sup>3</sup>

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<sup>1</sup> <https://www.cso.ie/en/index.html> (16.5.2019).

<sup>2</sup> <https://www.cso.ie/en/releasesandpublications/er/mcp/marriagesandcivilpartnerships2015/> (16.5.2019).

<sup>3</sup> <https://www.cso.ie/en/index.html> (16.5.2019).

**1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).<sup>4</sup>**

This data cannot be quantified.

## **2. Family law.**

### **2.1. General.**

#### **2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?**

The sources of family law effective in the jurisdiction of Ireland are of both domestic and international origin.

The most important domestic laws relating to family law are Articles 41 and 42 of the Constitution of Ireland. Articles 41 and 42 concern respectively family and education, and recognise the family as the most important social unit in the State and accords a special position to the "family" based on marriage.

Ireland is also a signatory to many treaties and conventions concerning family law matters. Indeed, accession to the EU and other international treaties have facilitated the development of modern Irish family law, which is now primarily sourced within a statutory framework.

In any case the Constitution continues to afford special protection to the family based on marriage, and that protection now extends to same sex marriage, following the Marriage Equality referendum held on 22 May 2015. Furthermore, the Children and Family Relationships Act 2015 includes a number of significant changes with regard to the position of children in Irish family law, such that there will be less differentiation between marital and non-marital children. The legislation also provides for children of civil partners.

Today, the main family law acts are the Judicial Separation and Family Law Reform Act 1989 (1989 Act); the Family Law Act 1995 (1995 Act); the Family Law (Divorce) Act 1996 (1996 Act); the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (2010 Act); the Children and Family Relationships Act 2015; the Family Law (Maintenance of Spouses and Children) Act 1976; the Guardianship of Infants Act, 1964 as amended.

#### **2.1.2. Provide a short description of the main historical developments in FL in your country.**

In Ireland the domestic family laws in turn consist of statutes passed by the British parliament prior 1921 and statutes passed by the Oireachtas (i.e. both houses of Parliament) since that date. The last decade has witnessed the most expansive programme of family law reform with the enactment of modern statutes to cater for the advent of divorce. In addition, family law is largely common law based and has been developed in other common law jurisdictions and by the Irish judiciary. Furthermore, accession to the EU and other international treaties have facilitated the development of modern Irish family law, which is now primarily sourced within a statutory framework. The development of modern Irish family law emerges for example from:

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<sup>4</sup> <https://www.cso.ie/en/releasesandpublications/er/mcp/marriagesandcivilpartnerships2015/> (16.5.2019).

- The Judicial Separation and Family Law Reform Act 1989, that first introduced the concept of judicial separation and extensive ancillary relief orders. The Act of 1989 was subsequently amended and enhanced by the Family Law Act 1995, which remains in operation.
- Divorce, that was introduced by a narrow majority following a referendum on 24 November 1995 and has resulted in new provisions at Article 41 and the enactment of the Family Law (Divorce) Act, 1996.

### 2.1.3. What are the general principles of FL in your country?

The general principles of FL are given in articles 41 and 42 of Constitution of Ireland. In particular, article 41 states:

*“The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.*

*The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.*

*In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.*

*The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.*

*The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.*

*A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that:*

- *at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,*
- *there is no reasonable prospect of a reconciliation between the spouses,*
- *such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and*
- *any further conditions prescribed by law are complied with.*

*No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved.*

*Marriage may be contracted in accordance with law by two persons without distinction as to their sex”.*

### 2.1.4. Define “family” and “family member” in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?

Pursuant article 41 of Constitution of Ireland the family is *“the natural primary and fundamental unit group of Society, [...] a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law”*. In Ireland the family has enormous historical significance and retains a central position in the major social and policy discourses of the current era.



### 2.1.5. Family formations.

#### 2.1.5.1. Define the “spouse” in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?

Pursuant article 41 of Constitution the family is based on marriage, which may be also contracted in accordance with law by two persons without distinction as to their sex.

There is no definition of marriage but the classic statement by Lord Penzance (*Hyde v. Hyde* 1866) of the “*voluntary union for life (or until dissolution) of one man and one woman to the exclusion of all other*” has been accepted in Ireland in *Griffith v. Griffith* (1944) and comprises the four elements of being: voluntary, for life (until death or divorce), between one man and one woman, and monogamous. Only on the 22 May 2015 as a result of the Thirty Fourth Amendment of the Constitution the Irish public voted to make lawful same sex marriages which was given effect to by the Marriage Act 2015.

#### 2.1.5.2. What types of relationships/unions between persons are recognised in FL of your country? In particular, formal (registered) and informal (*de facto*) unions, heterosexual and same-sex unions, unions with and without *affectio maritalis*. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?

Pursuant article 41 of Constitution of Ireland “*Marriage may be contracted in accordance with law by two persons without distinction as to their sex*”. Indeed, following the Marriage Act 2015, the same sex marriages are lawful in Ireland.

Before 2015 the generally accepted position, prior to the Thirty Fourth Amendment to the Constitution, was that the parties to a valid marriage must be of the opposite sex. The matter was reheard in light of the decision of the European Court of Human Rights in *Goodwin v. The United Kingdom* (2002). The High Court held that there was a violation of the plaintiff’s right to respect family life and made a declaration that domestic Irish law was incompatible with the Convention

After 2015 a foreign civil partnership is recognised in accordance with section 5 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (2010 Act) and pursuant to the Civil Partnership (Recognition of Registered Foreign Relationships) Order 2010, which provides full recognition of certain registered foreign relationships so that these are declared to be entitled to be recognised as a civil partnership for the purposes of Irish law. Following the Referendum on Marriage Equality, a same-sex marriage in Argentina, Belgium, Canada, Iceland and so on will be recognised and treated as a valid civil marriage for the purpose of Irish law. Legal partnerships and/or civil partnerships between same-sex couples in scheduled jurisdictions such as Austria, Czech Republic, Denmark, Finland and so on are also treated as valid civil partnerships for the purposes of Irish law.

#### 2.1.6. What legal effects are attached to different family formations referred to in question 2.5.?

After 2015, in Ireland the civil partners are treated in the same way as married couples under the tax and social welfare codes. In addition, the protections afforded to married couples under the family law legislation regarding property disputes are afforded to unmarried couples who cohabit or are in civil partnerships.

**2.1.7. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/*de facto* family formations? Explain briefly.**

No, the last reform goes back to the Marriage Act 2015.

**2.2. Property relations.**

**2.3.2. List different family property regimes in your country.**

The principle of community of property does not apply under Irish law and property held by each of the spouses prior to the marriage or acquired by one spouse in the course of the marriage remains the property of that spouse. Furthermore, the spouses do not have a choice of matrimonial property regimes.

**2.3.3. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?**

The principle of community of property is not applicable. Whilst there is no automatic entitlement to a share in the property of the other spouse, upon separation and/or divorce the non-owning spouse can claim an entitlement in some or all of property held legally by the other spouse on the basis that such a claim is made in the interests of justice (section 16(5) Family Law Act 1995 and section 20(5) Family Law (Divorce) Act 1996), in light of the circumstances of the marriage and the impact of the separation/divorce order (section 16(2)(a)-(l) Family Law Act 1995 and section 20(2)(a)-(l) Family Law (Divorce) Act 1996).

**2.3.4. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a “new regime just for them”?**

The governing statutory provisions effective upon separation and divorce cannot be avoided by private, inter-spousal arrangement. All marital agreements are made in light of the governing provisions, and cannot be regarded as absolutely binding upon the parties as they remain subject to the approval of/amendment by the Irish courts. Typically they will not be enforced if they do not secure proper provision for the parties and/or where it is in the interest of justice not to enforce the terms agreed.

Marital agreements must be formally executed in the form of a deed and signed by both parties. They can be approved by the courts as a consent order, giving the agreement the status and effect of a court order. Where a marital agreement is made an order of court, its enforcement is then subject to the normal rules and expectations of compliance with court orders. The enforcement of the terms of an agreement not made an order of court is subject to the rules and enforcement mechanisms of contract law.

**2.3.5. Explain briefly the rules on the administration of family property and compare if there are difference for different property regimes.**

In the course of a valid subsisting marriage, each spouse is in charge of the administration of his/her property and does not typically require the consent of the other spouse for the administration or

disposal of that property. The family home of the parties receives special protection under Irish law (section 2(1) Family Home Protection Act 1976, as amended by section 54(1) of the Family Law Act 1995). Even where the family home is held in the sole name of one of the spouses, the spouse with legal ownership is not permitted to convey the family home or otherwise secure a charge on the family home without the written consent of the non-owning spouse (section 3(1) Family Home Protection Act 1976). Where such a conveyance occurs without the consent of the other spouse, the purported conveyance shall be void (section 3(1) Family Home Protection Act 1976). However no conveyance shall be void by reason only of this consent requirement where the conveyance is made to a purchaser for full value without notice (section 3(3)(a) Family Home Protection Act 1976).

**2.3.6. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

The matrimonial property regime cannot be registered. In Ireland the spouses have no choice regarding the matrimonial property regime. There is no obligation to register a marital agreement and no register for marital agreements exists.

**2.3.7. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

In Irish legal system, there are no community debts for the spouse. Each spouse is responsible for their own debts incurred in the course of the marriage, unless agreements provide otherwise.

**2.3.8. Describe allocation and division of property in case of divorce, separation or dissolution of the union.**

The principle of separation of property applies until separation or divorce. Upon both separation and divorce, the division and distribution of the property held solely or jointly by the parties is subject to the over-riding requirement that proper provision must be made for the spouses and any dependent children (section 3(2)(a) Judicial Separation and Family Law Reform Act 1989 and section 5 Family Law (Divorce) Act 1996) and also to the statutory requirement that all ancillary relief orders made must be in the interest of justice section 16(5) Family Law Act 1995 and section 20(5) Family Law (Divorce) Act 1996) and subject to the court having regard to the 12 statutory factors set out in section 16(2)(a)-(l) Family Law Act 1995 and section 20(2)(a)-(l) Family Law (Divorce) Act 1996. Thus a spouse's share in property is determined on a subjective basis by the presiding judge in each case, with reference generally to the circumstances of the marriage, including, but not limited to, an examination of the impact of the roles adopted by the spouses in the course of the marriage, any sacrifices and/or contributions made by one or both of the spouses and their current and future earning capacity. In lower income cases, the courts are typically most concerned with providing for the basic needs of the dependent spouse and children and this will include securing a home for these parties. However, the courts are not limited to simply providing for the needs of the dependent spouse and thus in ample resources cases, a trend of awarding one third of the assets to the non-earning or less wealthy spouse has emerged in the courts. As regards fault, unless the fault on the part of one of the spouses is regarded as "gross and obvious" it will not influence the division of property.

**2.3.9. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?**

No.

### 2.3. Cross-border issues.

**2.3.1. Is your country participating in the enhance cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?**

Ireland has not participated on the enhance cooperation with regard to the two Regulations (1103/2016 and 1104/2016). For this reason, it is not possible to answer the following questions.

**2.3.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as “marriage”, “matrimonial property agreement”, “partnership property agreement” etc.?**

Ireland does not participate in enhanced cooperation regarding two Regulations.

**2.3.3. Are you expecting any problems with the application of the rules on jurisdiction?**

Ireland does not participate in enhanced cooperation regarding two Regulations.

**2.3.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

Ireland does not participate in enhanced cooperation regarding two Regulations.

**2.3.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

Ireland does not participate in enhanced cooperation regarding two Regulations.

**2.3.6. Are there any national rules on international jurisdiction and applicable (besides the Regulations) concerning the succession in your country?**

International law arises from a variety of sources, such as customary international law, treaties, and international decisions of judicial bodies. For international law to have legal effect in Ireland, it must be brought into force by an Act of the Oireachtas. Article 29 of the Constitution acknowledges that the State accepts the generally recognized principles of international law in its relations with other states. Concerning family law matters, Ireland is a signatory to many treaties and conventions.

## 3. Succession law.

### 3.1. General.

**3.1.1. What are the main legal sources of Succession Law (SL) in your country? What are the additional legal sources of SL?**

The law in Ireland regarding Succession Law is contained in the Administration of Estates Act 1959 and primarily in the Succession Act 1965. The Succession Act 1965 provides for the manner in which a person may dispose of their property after their death. It further provides for who may inherit from

a person on their death and for the share to which a spouse and children are entitled. The shares that a spouse and children are entitled to depend upon whether a deceased person has made a valid and effective will.

In addition to statute law, succession law is also governed by the Rules of the Superior Courts.

**3.1.2. Provide a short description of the main historical developments in SL in your country.**

Before the coming into operation of the Act of 1965 on 1 January 1967, succession law in Ireland was comprised of a body of common law and a plethora of statutes, some of which dated back more than 700 years. The enactment of the 1965 Act was a significant step forward in attempting to lay down an almost codified system of succession law. There had been few amendments to the Act of 1965 up until the Status of Children Act 1987.

The old statute law was repealed by the Act of 1965.

The major reforms introduced by the Act of 1965 were:

- real estate and personal estate devolved in the same way. Previously, they would have devolved separately;
- introduced new rules relating to intestate succession, significantly different from those that applied prior to the Act of 1965;
- established significant restrictions on testamentary freedom by introducing the concept of the legal right share of the spouse, which is accorded a special priority;
- established the right of children to bring an action to court when their parent has failed in his or her moral duty to make proper provision for them.

**3.1.3. What are the general principles of succession in your country?**

The law of succession is concerned with the transfer or devolution of property on death and can be divided into two principal topics: the law of intestate succession and the law of Wills.

Where a person dies, their estate can be distributed according to the wishes of the deceased as contained in the Will or according to the rules of distribution provided for on intestate death. Where a person dies having made no Will or the Will is invalid owing to some defect in its execution, the deceased is intestate. A deceased person may also have died partly testate and partly intestate.

According to Succession Act 1965, the absolute right of a person to dispose of his property after his death is restricted in a limited form. The common law in relation to succession recognised the absolute right of a testator to dispose freely of his property. The justification for restricting freedom of disposing of property on death is Article 41 of the Constitution, which states that the family is a moral institution possessing inalienable and imprescriptible rights antecedent and superior to all positive law.

**3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.**

The estate of a deceased devolves to his personal representatives (i.e. the executors who are named and appointed by the testator in his Will or the administrators who are appointed by order of the court where the deceased dies intestate) on his death. The personal representatives administer the estate, which involves the payment of funeral, testamentary and administration expenses, and the discharge of debts and liabilities of the deceased following which the estate can be distributed according to the Will or on intestacy.

Where an executor is appointed under a Will, the entire estate vests immediately in the executor upon the death of the testator. The executor derives his authority from the Will. In the case of an

administrator, however, such a person derives his authority to administer the estate from the letter of administration granted by a court.

There would thus be a lapse in ownership between the deceased dying and the administrator being granted letters of administration. The Succession Act 1965 (Section 13) provides that in these circumstances the estate of an intestate shall vest in the President of the High Court. The estate of the deceased is protected by vesting it in the President of the High Court prior to grant of letter of administration. The estate of the intestate is further protected by the doctrine of “relation back”, which provides that the grant of administration is related back to the date of the death of the intestate, whereby the administrator of the estate may recover against a wrongdoer in an action for trespass or conversion for the seizure of goods during the period after the death of the intestate but before the grant of administration. The doctrine of relation back will not operate where an interest of the intestate has been terminated prior to the grant of administration. Further, an administrator cannot effect a conveyance of the intestate’s property prior to the grant of administration, but a purchaser in such circumstances may invoke the equitable principle of “feeding the estoppel” to obtain legal title to the subject matter of the conveyance.

**3.1.5. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?**

The law of succession is concerned with the transfer or devolution of property on death and can be divided into two principal topics: the law of intestate succession and the law of Wills.

Where a person dies, their estate can be distributed according to the wishes of the deceased as contained in the Will or according to the rules of distribution provided for on intestate death. Where a person dies having made no Will or the Will is invalid owing to some defect in its execution, the deceased is intestate. A deceased person may also have died partly testate and partly intestate. This arises, for example, where a deceased makes a Will only in relation to a portion of his estate. The remainder of the estate is distributed according to the rules on intestate succession.

**3.1.6. What happens with the estate of inheritance if the decedent has no heirs?**

If the decedent has no heirs, the State inherits the estate of the deceased. The Minister for Finance, however, has a discretion to waive the right of the State to inherit in favour of such person and upon such terms as he think proper.

**3.1.7. Are there special rules or limitations concerning succession with reference to the deceased’s (or heir’s) culture, tradition, religion or other characteristics?**

No, the Irish legal system does not know discrimination rules based on the above mentioned criteria (culture, tradition, religion or sex).

As a result of the Civil Partnership and Certain Rights and Obligations of Co-habitants Act 2010 civil partners enjoy the same rights as spouses for the purposes of Irish succession law.

### 3.2. Intestate succession.

#### 3.2.1. Are men and women equal in succession? Are domestic and foreign nationals equal in succession? Are decedent's children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?

Any person can succeed if he has capacity of inheriting. There are no different succession rights between men and woman, domestic and foreign nationals, children born in of wedlock and children born out of wedlock and adopted children.

Minors, however, have limited legal capacity.

According Succession Act 1965 (Section 111) a child can inherit on reaching the age of majority. In testate succession, a child has no right to inherit a share from a deceased parent. A surviving spouse is entitled to a minimum one-third share of the deceased spouse's estate. If there are no children born to the deceased spouse, the surviving spouse is entitled to one-half of the estate.

A child who receives no share from a deceased parent may apply under Section 117 of Succession Act 1965 for a share of deceased parent's estate. The share a child so receives is dependent upon whether the deceased parent failed in their moral duty to make proper provision in accordance with their means.

If a parent dies intestate, which is without having made a Will (or the Will is invalid), the surviving spouse is entitled to two-thirds of the estate with the remainder being distributed equally amongst the children of the deceased. If there is no surviving spouse, the children divide the estate equally.

Before 1987, a child born outside of marriage was not entitled to succeed to the estate of a deceased parent who died intestate. With Status of Children Act 1987 (Section 4), the Irish lawmaker provided that all children should be treated equally before the law regardless of whether their parents are married or not.

#### 3.2.2. Are legal persons capable of inheriting? If yes, on which basis?

In Irish legal system, legal persons are capable of inheriting only by a Will. Except in the case of acquisition of property by State where the inheritance devolves automatically on the State in the absence of other eligible to succeed.

#### 3.2.3. Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.

The Succession Act 1965 (Section 120) provides that any sane person who has been found guilty of the murder, attempted murder, or manslaughter of the deceased is precluded from taking any share in the estate of the deceased unless the deceased made provision for the person in a Will after the offence was committed. A person found guilty of one of the above offences is precluded from bringing an application under Section 117 of Succession Act 1965.

#### 3.2.4. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?

The estate of the intestate is distributed in the following order (once all expenses, debts and liabilities have been discharged):

- Spouse and no issue: Spouse takes all;

- Spouse and issue: Two-thirds to spouse and one-third divided equally among children. Issue of predeceased child take share of predeceased child *per stirpes*;
- Issue and no spouse: Children take equally. Issue of predeceased child take share of predeceased child *per stirpes*;
- Father, mother, no spouse, no issue: each parent take one-half;
- Father, no mother, no spouse, no issue: Father takes all;
- Mother, no father, no spouse, no issue: Mother takes all;
- Brothers and sisters, no spouse, no issue, no parents: Brothers and sisters take equally. Children of predeceased brother or sister take share of predeceased brother or sister *per stirpes*;
- Nephews and nieces and grandparent, no spouse, no issue, no parents, no siblings: Nephews and nieces take all equally;
- Nephews and nieces, uncles and aunts and great-grandparents, no spouse, no issue, no parents, no siblings: Nephews and nieces take all equally;
- Uncles and aunts and great-grandparents, no spouse, no issue, no parents, no siblings, no nephew, no nieces: Uncle and aunts take all equally;
- First cousin, great uncle, great nephew and great great-grandparent, no spouse, no issue, no parents, no siblings: First cousin, great uncle and great nephew take all equally;
- No heirs: the State inherits the estate of the deceased.

### 3.2.5. Are the heirs liable for deceased's debts and under which conditions?

No. The estate of the deceased is liable. When a person dies, any debts he has must be repaid from his estate before any other claims on the estate can be met. This is the case whether or not he has made a Will.

### 3.2.6. What is the manner of renouncing the succession rights?

According Succession Act 1965, the succession rights can be renounced voluntarily by either or both spouses/civil partners in a separation agreement. In granting a decree of judicial separation, a court can extinguish a spouse's succession rights if it is satisfied that adequate provision exists for the spouse whose rights are being extinguished (instead, once a decree of divorce/dissolution is granted, the parties are no longer married or in a civil partnership, and succession rights are automatically extinguished).

## 3.3. Disposition of property upon death.

### 3.3.1. Testate succession.

#### 3.3.1.1. Explain the conditions for testate succession.

There are two main characteristics of a Will:

- 1) a Will takes effect only on the death of the testator;
- 2) a Will is revocable prior to death and even if a Will is stated to be irrevocable, such may still be revoked by the testator.

Furthermore, the Succession Act 1965 (Section 78) requires that for a Will to be valid "*shall be in writing and be executed in accordance with the following rules:*

1. *It shall be signed at the foot or end thereof by the testator, or by some person in his presence and by his direction.*
2. *Such signature shall be made or acknowledged by the testator in the presence of each of two or more witnesses, present at the same time, and each witness shall attest by his signature the*



*signature of the testator in the presence of the testator, but no form of attestation shall be necessary nor shall it be necessary for the witnesses to sign in the presence of each other.*

*3. So far as concerns the position of the signature of the testator or of the person signing for him under rule 1, it is sufficient if the signature is so placed at or after, or following, or under, or beside, or opposite to the end of the will that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his will".*

### **3.3.1.2. Who has the testamentary capacity?**

According Section 71 of the Succession Act 1965, the capacity to make a valid Will encompasses the adulthood of the testator (alternatively the testator must be married). In addition, the testator must be also mentally capable of making a Will and his choices must not have been brought about by duress or undue influence.

The relevant time for determination of capacity is at the date of signing the Will: and indeed, the testator, although suffering from a mental disorder, may make a Will during a lucid interval.

### **3.3.1.3. What are the conditions and permissible contents of the will?**

A Will must be made in writing and must be signed or acknowledged by the testator. The Will contains the wishes of a person in relation to their property and how such is to be distributed after their death. In the Irish legal system, there are no restrictions on the freedom to dispose of property upon death, even if specified family members and persons shall be entitled to a part of the estate.

### **3.3.1.4. Describe the characteristics of will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a will?**

According to the Irish legal system, it is not necessary that a Will be witnessed by a lawyer, notary public, or other officer of the public.

Furthermore, Irish law recognizes:

- joint Wills, i.e. a single instrument executed by two persons expressing the testamentary wishes of each person, that can be revoked at any time by either party as far as they apply to him;
- mutual Wills, i.e. two separate testamentary documents executed by two persons each giving substantial identical rights to the other.

### **3.3.1.5. Is there a (public) register of wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

No, there is not a public register of Wills.

### **3.3.2. Succession agreement (*negotia mortis causa*). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.**

According to the UK legal system, a number of arrangements may be put by a person in contemplation of their death (i.e. gifts or trusts).

Generally, gifts to an heir prior to death are not set off against the heir's inheritance under the Will.

**3.3.3. Are conditions for validity of wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

The requirements for ensuring the validity of a Will are governed by specific articles of the Succession Act 1965 which focus specifically on the conditions for validity of Will.

**3.3.4. Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

Irish legal system, there are no restrictions on the freedom to dispose of property upon death, even if specified family members and persons shall be entitled to a part of the estate.

Section 111 of the Succession Act 1965 provides that *"if the testator leaves a spouse and no children, the spouse shall have a right to one-half of the estate"*, and *"if the testator leaves a spouse and children, the spouse shall have a right to one-third of the estate"*. Regarding the children, Section 117 of the Succession Act 1965 provides that *"where, on application by or on behalf of a child of a testator, the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just"*. The disposition confers also a judicial discretion to provide for a child from a deceased parent's estate.

**3.3.5. Cross-border issues.**

**3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?**

Regulation (EU) No 650/2012 applies to all deaths after 17 August 2015, and will be binding on all 27 EU member states, except for Denmark, the UK and Ireland which has somewhat undermined the overall purpose of the regulation. In Ireland is the Succession Regulation 650/2012 also not applicable. For this reason it is not possible to answer the following questions.

**3.3.5.2. Are there any problems with the scope of application?**

Ireland does not apply this Regulation.

**3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country had experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?**

Ireland does not apply this Regulation.

**3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?**

Ireland does not apply this Regulation.

**3.3.5.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?**

Ireland does not apply this Regulation.

**3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?**

Ireland does not apply this Regulation.

**3.3.5.7. Are there any national rules on international jurisdiction and applicable (besides the Succession Regulation) concerning the succession in your country?**

International law arises from a variety of sources, such as customary international law, treaties, and international decisions of judicial bodies. For international law to have legal effect in Ireland, it must be brought into force by an Act of the Oireachtas. Article 29 of the Constitution acknowledges that the State accepts the generally recognized principles of international law in its relations with other states. Concerning succession law matters, Irish private international law provides that the *lex domicilii* determines the succession of moveable property. The succession of immoveable property, on the other hand, is determined by the law of the country where the property is situated. However, an Irish national with property in other Member States can specify in their Will that Irish law is to apply to their entire estate, meaning that all Member States will apply Irish law to the national assets as opposed to national law.

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## Italy

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### 1. Social perspective

#### **1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without *affectio maritalis*).**

When considering the evolution of the family in Italy in the last decades, it must be kept in mind some typical trends concerning both its formation and its dissolution.

The first element that we have to consider is the sharp decline in the birth rate. Another essential factor concerns the extension of the stay of younger people in their families. Series of consequences derive out of these well established trends, including: the rise of the age of marriage and the increase of the number of unmarried people. The number of young adults living alone is growing; the number of cohabitations also increases, both the stable, and the premarital ones.

New elements of complexity considering the family are represented by the growing number of transnational families and the new forms of socially recognized affective and personal relationships, such as the same sex relationships.

Another new characteristic of the family we must consider is the conjugal instability. It determines the increase of the number of separations and divorces. As further consequence, it encourages the formation of unipersonal families and the single-parent families, as well as the reconstructed families, characterized by permeable boundaries and commuting of the children.

The typical model of family in Italy is still the nuclear one, but its concrete declination is now varied and complex.

According with the structure, we can classify families as follows: unipersonal families, couple families, nuclear families and complex families.

– The unipersonal family is characterized by the improper denomination of “family”: it is constituted, indeed, by a single member. It is a growing reality, as the effect of the evolution of contemporary society. It affects subjects with disparate personal situations. Its diffusion is linked to the lengthening of lifetime: many people, after the death of the spouse, start living alone. A single-member family can be constituted also by young subjects who leave their families because of work or for needs of independence, and start living in accordance with a model of single life. Another option can relate to people previously taking part in emotional relationships of family life or marriage, but ended up alone because of the crisis of that relationship.

– The couple family includes different types of cohabitations: both those constituted by elders, and those formed by young people without children; unmarried couples for necessity or for choice, and couples who experience a period of life in common before marriage.

– The nuclear family is composed of husband, wife and one or more children who cohabit and generally share economic resource. It still remains numerically the most significant family form in Italy, despite its gradual decrease. Within this family form, several typologies can be distinguished. In addition to the couple of parents who are married with minor or non-emancipated children, we can find the so-called “long” nuclear families, formed by parents with young adults already independent from an economic perspective, who however opt for life in a family, or who decide to come back to live in a family after a failed marriage or cohabitation. Another type of family included in this family form is the one not founded on the marriage. It is characterized by the strong emphasis placed on self-fulfilment, and equal relations between partners. In this kind of family, the couple life is the main issue. The partners can find their own realization even if they do not become parents. This type of cohabitation represents an ever-expanding mode in recent decades. In the last two years the frame is more complicated, since the couple can choose a recognized “de facto” partnerships (“*convivenze di fatto riconosciute*”) as an alternative to the previous not recognized cohabitations. It is therefore hard to identify the cultural perspective that can lead to choice of a recognized partnership, instead of an unrecognized cohabitation or a marriage union.

Even single-parent families, or “incomplete” families, represent a kind of nuclear family. They are made up of a single parent with his children. Unless in case of premature death of the other spouse, they are the result of the dissolution of a conjugal relationship.

Other kinds of nuclear families are the reconstructed families and the recomposed ones. The reconstituted families are formed of two adults, married or cohabiting. At least one of them has one or more children, who were born out of a marriage or a cohabitation previously established, and that now live in the new family. The recomposed families are those in which adults, married or cohabiting, generate new children living with them, together with children from previous relationships.

– The complex family is less widespread than in the past. Nonetheless, it is a ductile model that suits well to the new social needs. Complex families can be considered both in multiple form, and in extended form. In the first case we have households of different generations within the same family line, while in the second one a pre-existent household coexists with possible ascenders and collaterals. Examples of this family form can be: the cohabitation of young spouses with the family unit of one of the spouses, while they are waiting to be able to own their independent home; divorced persons that re-join the parents' family; or finally, widowed parents who permanently move to live into the family unit of one of their sons.

In addition to the familiar forms we have referred to, we must mention two models in progressive growth in Italy: families in which one or both spouses are foreigners and those made up of people of the same sex. The first model is placed in a recent immigration context. It regards situations of unipersonal families of young adults, as well as atypical familiar forms of cohabitation between people with a common foreign nationality. Other particular family situation can be the union of foreigners who married before their migration in Italy; in other cases, marriage can be the consequence of the reunification that followed the migration process. We have finally couple families and nuclear ones whose marriage, or cohabitation, is based on the encounter of subjects of different nationalities. In the latter case the couple mostly originated as the result of a migratory shift and can be properly defined as a “mixed couple”.

The second model concerns couples made up of subjects of the same sex. Although it represents a familiar model rooted and accepted in the Italian society (in 2011 62.8% of Italians believed already that cohabiting homosexual couples should have the same rights of a married couple), they have found legal regulation only recently, with the Act No 76 of May 20, 2016. Homosexual couples can now establish a civil union, with rights and duties substantially coinciding with marriage (article 1, paragraphs 1-35 of Act No 76 of May 20, 2016), or can opt for a recognized cohabitation (article 1, paragraphs 36-65) or for an unrecognized one.

## 1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.

In 2017 191,287 marriages were celebrated in Italy. In 2016 they were 203,258. This significant decrease (11,971 marriages less) constitutes a tendency element, even if the last years are characterized by a rather fluctuating trend. 2016 had an increase of 8,881 marriages, compared to 2015, the year in which 194,377 marriages were celebrated: 4,612 more than in 2014 (189,765). However, in the period 2008-2014 marriages have decreased with a rate of 10,000 per year.

The propensity for the first wedding increases: 429 for 1,000 men and 474 for 1,000 women in 2015. However, the age of the first marriage is delayed: the celibate spouses are on average 35 years old and unmarried brides are 32 years old (both are almost two years older than in 2008). The second (or subsequent) weddings also increase: 33,579 in 2015, almost 3,000 more if compared to the previous year, with a growth of + 9%. The impact of second weddings now reaches 17% on the total of marriages.

The aging of the population in Italy is now a matter of fact. On 1 January 2018, the Italian resident population was 60 million 484 thousand units. The average age was 45.2 years old. Only 13.4% of the population was 15 years old or younger. 64.1% was between 15 and 64, and 22.6% was 65 years old or more. In the 15-64 year-old group, married and unmarried are almost equal (respectively 49.0% and 47.7% of the total population); on the contrary married women still prevail (55.0%) on the unmarried ones (almost 39%). Younger people tend to delay the marriage age: in the 25-34 year-old group, 81% of men, and 65% of women are not married yet. This trend is the result of complex social dynamics. Younger people in Italy tend to live in the household for a very long time. That has direct effects on nuptiality, in progressive decline: between 1991 and 2016 the prime-nuptial rate decreased for men from 658.0 to 449.6 (per 1,000 residents), while for females from 670.7 to 496.9 (per 1,000 residents).

The reduction of nuptiality and the postponement of marriage, prevailing trends in the last 40 years in Italy, led to a huge drop of the condition of married among young adults.

The peak is in the 25-34 year-old group: in the percentage of married couples increased from 69.5% to 34.3%; at the same time unmarried persons grow over 30% (from 48.1% to 80.6% for bachelors, and from 29.2% to 64.9% for maidens).

Considering the whole Italian population, irrespective of the age, married persons decreased progressively, over the same period of time, by more than 3 %: from 51.5% to 48.2% for bachelors, and from 49.5% to 46.3% for maidens. Obviously in correspondence of this decline, we have the increase of unmarried persons, whose proportion grow from 45.4% to 46.9% or bachelors, and from 37.6% to 38.6% for maidens.

The decline in nuptiality is a determining factor for the evolution of new forms of family. It determined the increase of those who choose to have a family without being married.

The unmarried relationships, from 1993-1994 to 2015-2016, increased from 67,000 to about 748,000. Single persons older than 16 who live with a partner, all over the country, are almost 60% of the total, while 20% of single persons live alone.

The decrease and the postponement of nuptiality, partially offset by the growth of partnerships and cohabitations, led between 1991 and 2018 to a noticeable decline of married couples, especially in the range of age 25-34 (from 51.5% to 19.1% for men, from 69.5% to 34.3% for women). The bachelors grow from 48.1% to 80.6% and the maidens from 29.2% to 64.9%. In the 45-54 year-old group almost a quarter never married, while almost 18% of women are unmarried.

On 1 January 2018, resident citizens who established a civil union in Italy, or who transcribed a previous marriage or a civil union celebrated abroad, amounted to approximately 13,300: 0.02% of the whole resident population. The low number can be explained considering that the civil unions have been introduced in Italy very recently, with the Act No. 76 of May 20, 2016 on "Regulation of civil unions between persons of the same sex and discipline of cohabitation".

Statistical data about civil unions established by a Civil State Official are available only starting from 2017; they are distinguished by gender of partners (both males or both females): 68.3% of civilly

united are male; 56.8% of them live in the northern regions of the country, 31.5% in the centre and 11.7% in the south. Higher number of civilly united persons is notable in the regions of Lombardy (25.4%), Latium (20.0%) and Piedmont (10.0%). These three regions alone collect more than one half of the total of 13,300 civilly united citizens. Civil unions are more widespread in larger cities: in the three main cities of these three regions (Milan, Rome and Turin) live 16% of the Italian population, but around 25% of civilly united citizens live in these cities. Considering the age distribution of the civilly united subjects, we can argue that it is a mature population that opts for this formal relationship: on average 49.5 years old males, and 45.9 years old females.

In Milan, Rome and Turin civilly united persons are evenly distributed: on January 1, 2017, men on average are 53.1 years old and women 49.6 years old. Civilly united persons are on average older than married persons. From July 2016 to December 31, 2017, 6,712 civil unions were established in Italy (2,336 in the second half of 2016 and 4,376 in 2017).

Civil unions, in the first 18 months of application of the law, mainly concerned couples of men (1,720 unions in 2016 and 2,962 in 2017, respectively equal to 73.6% and 67.7% of the total); couples of women civilly united amounted to 616 in 2016 and 1,414 in 2017 (respectively 26.4% e 32.3% of the total).

### **1.3. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.**

The comparison of data on the divorce between 1991 and 2018 confirms the profound changes caused by the evolution of family behavior: divorced persons increase at all age. They quadrupled since 1991 (from around 376,000 to over than 1,672,000). The percentage of divorced people grows above all in the 55-64 year-old group, growing from 0.8% to 5.3% for men, and from 1.0% to 6.4% for women.

With regard to marital instability, 2015 marks a high increase of the number of divorces: 82,469 cases, 57% more than in 2014. In 2015 two important regulatory changes in matters of separation and dissolution of marriage rose the percentage of divorces. The first one is the DL 132/2014, converted into law with amendments by the Act No. 162 of November 10, 2014, which provides the simplification of consensual separation and divorce procedures, allowing the stipulation of out-of-court agreements, with negotiation agreement assisted by lawyers (4268 agreements in 2016: 2319 for separations, 1946 for divorces, 3 for changes in the conditions), or directly at the civil registry offices. The second is represented by the Act No. 55 of 6 May 2015, which reduced from three years to six months (in the case of consensual separation) or one year (in case of judicial separation) the period that must compulsorily elapse between the formal beginning of separation and the pronounce of divorce. This legislative change had an effect of “cadence”, leading to anticipate at 2015 a large part of divorces scheduled in the following years (the ones whose separations formally started in the period 2013-2015). Therefore 2015 can be considered a non-tendential peak in the time series of divorces of the last years. It would not be correct to read the increase of divorces in terms of a sharp increase of the propensity to dissolve conjugal unions in 2015; at the same time, the comparison with data of the following years – if quantitatively minor – could not provide significant elements with respect to the identification of a downward trend in the propensity to divorce.

Persons who are no longer civilly united after the dissolution of the civil union or because of the partner’s death are still numerically low, respectively less than 50 and less than 150 units, since civil unions were introduced in Italy quite recently, by Act No. 76 of May 20, 2016 on the “Regulation of civil unions between persons of the same sex and discipline of cohabitation”.

**1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).**

The frequency of marriages with at least one foreign spouse is higher in areas where foreign communities are stable and rooted, i.e. in the North and in the Centre of Italy.

In that part of the country, almost 20% of marriages have at least one foreign spouse, while in the south and in the islands percentages are lower, respectively 7.0% and 6.7% of the total of marriages. Marriages celebrated in 2015 in which at least one of the spouses has a foreign citizenship are about 24,000, amounting to 12.4% of the marriages celebrated that year. In the previous year the number was almost the same, about 200 units less, while in 2013 mixed marriages were roughly 18,000.

Keeping 2013 as the reference year, mixed marriages (in which one spouse is Italian, and the other is a foreigner) represent the highest number of marriages with at least one foreign spouse (70%). In mixed couples, the most frequent spouse combination is an Italian groom and a foreign bride. This combination is 7.4% of the marriages celebrated all over the country (14,383); the percentage is higher in Northern Italy (around 10%). Italian women who chose a foreign partner are 3,890, 2.0% of the total brides. Italian men differ from women in relation to the frequency of marriages with foreigners as well as regard to the citizenship of the spouses.

Italian men who joined in 2013 a marriage with a foreign citizen have as a wife a Romanian woman (19.2%), a Ukrainian (11.0%) or a Brazilian (6.2%). Overall one foreign bride in two is a citizen of an Eastern European country. Italian women who married a foreigner, on the other hand, have mostly chosen men from Morocco (13.7%), Albania (9.2%) and Tunisia (6.3%). Overall almost 30% of foreigners married to an Italian woman are citizens of an African country, while 20% are citizens of North-Western Europe or from the United States.

Marriages celebrated in 2013 in which both spouses are foreign are 7.807 and represent a minority (3.8%). They are quite less if we consider only the ones in which at least one of the two spouses is resident in Italy (4,587). Because of art and landscapes, Italy is in fact a preferential place for wedding celebrations of foreigners who come from countries with advanced development.

Among the marriages in which both spouses are foreign residents, the most common are those between Romanians (20.8%), followed by those of Nigerians (9.6%) and those of Chinese (8.2%). Some communities of immigrants, on the other hand, get married less frequently in Italy. This is the case of Moroccan and Albanian citizens. The reasons of these different behaviours are attributable to the characteristics of the different communities and the migratory projects of the couples. While sometimes immigrant citizens get married in their countries of origin before moving abroad, other times they decide to marry after their reunification, in the foreign country where one of them has settled.

The growth of the instability of marriages between spouses of different citizenship is a relatively recent phenomenon, due to the increase of mixed marriages. In 2015, the separation of mixed couples reached a maximum of 8.657 (9.4% of all separations). In seven cases out of ten (67.7%), the type of mixed couple that decide to separate is the one with an Italian husband and a foreign wife (or a wife who has acquired Italian citizenship after the marriage). The proportion is justified due to the fact that higher propensity of Italian men to marry foreign women. The divorces of mixed couples, although increased in absolute value (7,160 in 2015), shows a tendency to decrease in relative terms. In 2015, they were 8.7% of the total number of divorces while they were 9.5% the previous year.



## 2. Family law.

### 2.1. General.

#### 2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?

Family rights are recognized in the Constitution (Article 29 of the Italian Constitution). This is the highest ranking of regulation of the family (Articles 30 and 31 of the Constitution).

The fundamental discipline concerning the family is contained in the Italian Civil Code, promulgated in 1942, which dedicates to the family the first book, entitled “Of the people and of the family”, Titles V, VI, VII, VIII, IX, IX-bis, X, XI, XII, XIII, XIV.

The original text of the main part of the articles of the Civil Code that regulate the family has been modified in the last decades. The most incisive reform was introduced by the Act No. 151 May 19, 1975. The issue, over the years, has undergone many changes. In particular, we must mention:

- Act No. 431 of June 5, 1967, which integrated the rules of the Civil Code regarding adoption and foster care; the regulation was subsequently reformed with the Act No. 184 of May 4, 1983 and with Act No. 149 of March 28, 2001;
- Act No. 898 of December 1, 1970, which introduced the divorce; the regulation was subsequently amended in 1987 (Act No. 74 of March 6, 1987);
- Act No. 194 of May 22, 1978, on the voluntary interruption of pregnancy;
- Act No. 121 of March 25, 1985, which enacted the 1984 Concordat with the Holy See, that amended the previous Concordat of 1929;
- Act No. 40 of February 19, 2004, on assisted procreation;
- Act No. 54 of February 8, 2006, on shared custody;
- Act No. 219 of December 10, 2012 and Legislative Decree No. 54/2014, concerning recognition of natural children;
- Act No. 162 of November 10, 2014, which allowed the couples who consensually want to separate or to divorce to choose the assisted negotiation with lawyers, or the conclusion of an agreement before the Mayor;
- Act No. 55 of May 6, 2015, which reduced the required judicial separation to one year (or, in case, six months) before divorcing;
- Act No. 76 of May 20, 2016, which introduced civil unions between persons of the same sex and regulated cohabitation.

#### 2.1.2. Provide a short description of the main historical developments in FL in your country.

The first regulation of the family in the post-unified Italian state may be found in the code Civil Code of 1865. The family therein outlined is still an extended family. Heritage and family work are identified as purposes of the union of life. The Civil Code of 1942, still in force nowadays, regulates the family by taking up the discipline of the relations of the spouses in its original formulation of the previous code, without highlighting a conscious awareness of the evolution of the family occurred in the first half of the twentieth century. The Civil Code of 1942 focuses more on the economic subjects, and places the family at the centre of economic interests. Relations between the family members are based on an authoritarian hierarchy: the husband is the head of the family, the wife is subject to a marital power, the children are subject to parental authority, exercised only by the father.

The perspective totally changed with the entry into force of the Italian Constitution in 1948. It no longer configured human relations on the basis of hierarchies, but on the respect of dignity of the person. The centrality of the individual became the essential value of the order. The family was defined by the Constitution as a social formation in which the rights of all its elements were

recognized and guaranteed. The family was thus identified as a natural society founded on the equality and the moral and legal dignity of the spouses (article 29 of the Italian Constitution). Family freedom results, according with the Constitution, an essential element: freedom to form a family, freedom of the family and freedom in the family. The “rights of the family” was recognized by the Constitution and the marriage had to be based on a principle of equality of spouses. However, more than 25 years were required for these constitutional principles to lead to the reform of 1975 (Act No. 151 May 19, 1975), that amended the Civil Code.

Before 1975 single laws were approved, such as the 1967 adoption law (Act No. 431 of June 5, 1967) and the divorce law of the 1970 (Act No. 898 of December 1, 1970). These significantly affected family law, however without an organic reorganization of the subject.

The reform of 1975 reformulated some articles of the Civil Code. Article 143 of the Civil Code stated the equality of spouses; article 144 of the Civil Code stated that spouses must agree on the family orientation; article 159 of the Civil Code introduced the legal regime of the legal community of assets. The old conception of the power of the husband was thus overturned and the personal determinations of the children were emphasized. The traditional idea of a predominant husband-father was thus overcome, and the personal determinations of the offspring were emphasized.

Among the limits of the 1975 reform, we must consider that the model to which constantly the legislator refer is the legitimate family. Namely, even if the legitimate son is affirmed equal to the natural one, the distinction persists, and only very recently it would be overcome on the legislative plan (see Legislative Decree 154/2013 on the equality of natural sons to legitimate sons).

After the 1975 family law reform, single laws were approved either to regulate new aspects of family law, or to redefine subjects already regulated. Among these are the: Act No. 194 of 22 May 1978, containing rules for the social protection of motherhood and on the voluntary interruption of pregnancy; Act No. 184 of 4 May 1983, on adoption and custody of minors; Act No. 74 of 6 March 1987, on the regulation of cases of dissolution of marriage, which has envisaged the reduction of the time between separation and divorce (from five to three years); Act No. 40 of 9 February 2004 on medically assisted procreation, Act No. 54 of 8 February 2006, on separation of the parents and the shared custody of the children; Act No. 219 of 10 December 2012, and Legislative Decree 54/2014, containing provisions concerning the recognition of natural children. Particularly relevant the Decree 132/2014, converted with amendments into law with the Act No. 162 of 10 November 2014. It concerns urgent measures of de-judicialisation and other measures for the reduction of the backlog of civil procedure. This law has allowed to the couple who consensually wants to separate or to divorce to choose between two new options, as an alternative to the judge: assisted negotiation with lawyers (who will transmit the agreement to the Public Prosecutor of the Republic to authorize it, in the presence of minors, or for a formal check, in the absence of minors), or the conclusion of an agreement before the mayor (only in case that the agreement does not contain pacts dealing with property or other rights in rem). This law was followed almost immediately by the Act No. 55 of 6 May 2015, containing provisions on separation and divorce: instead of three years required previously, in case of judicial separation, the law established that it is required one year to obtain divorce, a term that is reduced to six months in case of consensual separations (that regardless to the presence, or not, of minors).

Act No 76 of 20 May 2016 had a huge impact on family matters concerning: “Regulation of civil unions between persons of the same sex and discipline of cohabitation”. This provision ordered the recognition of homosexual couples who choose to constitute a civil union, with rights and duties substantially coinciding with marriage (article 1, paragraphs 1-35 of Act No. 76 of 20 May 2016). The same provision also established that subjects, both of opposite and same sex, could opt for a recognized partnership (article 1, paragraphs 36-65).

### **2.1.3. What are the general principles of Family Law in your country?**

The general principles of Family Law, that stem from the Italian Constitution are: the solidarity between the spouses as well as within the family, the equality between the spouses regarding the

rights and the duties arising out of the marriage, the mutual obligation of fidelity, the mutual obligation of moral and material assistance, the collaboration in the interest of the family and in the interest of the cohabitation, the obligation to contribute to the needs of the family (with respect to their substances and their professional ability or with respect to their ability in the context of the housework home), the freedom to marry and, lastly, the right-duty to the upbringing of children.

According to Act No. 76 of 20 May 2016, rights and duties arising out of marriage shall apply in civil unions between persons of the same sex; in this case, reference is to be made to mutual obligation of moral and material assistance as well as to mutual obligation of cohabitation.

The property regime, in the absence of a different agreement, consists of the legal community of assets.

According to Act No. 76 of 20 May 2016, the registered partnerships are characterized by the assistance between cohabitants in case of illness, by the mutual right of visit, by the possibility of making decisions on behalf of the cohabitant (in cases in which he/she is in a state of incapability of understanding and willing in the context of the health) and by the existence of other rights listed in the article 1, paragraph 38, et seq.

**2.1.4. Define “family” and “family member” in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

Article 29 of the Italian Constitution “acknowledges the rights of the family as a natural society founded on marriage. Marriage is ordered on the moral and juridical equality of the spouses, with the limits established by the law in order to guarantee the family unity”. Pursuant to article 2 of the Italian Constitution, are acknowledged “the inviolable rights of man both as an individual and in social formations where his personality takes place”; moreover, by virtue of the same provision, the fulfilment, by each person, of the mandatory duties of political, economic and social solidarity is required. Accordingly, “social formations” not based on marriage find an adequate protection. The “family” is also “that family” founded on the civil union or registered partnership, as recognized by the Act No. 76 of 20 May 2016. As a result, the “members of the family” are the spouses, the children, the brothers, the sisters, the relatives, the relatives in law and, lastly, the partners (in both cases of civil unions and of registered partnerships). According to the Italian legal system, there is not a single concept of family, since there are different notions that have different implications relevant for family law, successions law, tax law, etc. The status of spouse, the status of partner, the status of son, the status of brother (or the status of sister) and the status of relative take on particular importance in the field of successions law, where the rights of the spouse and the rights of the partner (in this case, however, reference is to be made only to civil unions, with the exclusion of the registered partners), etc. are specifically indicated.

**2.1.5. Family formations.**

Family formations, according to the Italian legal system, are currently linked to marriages, civil unions, registered partnerships and unregistered partnerships.

**2.1.5.1. Define the “spouse” in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

The spouse is the person who has contracted marriage with another person of a different sex. The marriage act determines the conjugal relationship. The marriage can be contracted according to what is established in articles 84-89 of the Civil Code, in the absence of impediments such as:

- age (minors of age cannot contract marriage, but the Court, at the request of the interested party, having ascertained his psychophysical maturity and the validity of the reasons given, etc., can grant authorization for serious reasons, to those aged sixteen years (article 84 of the Civil Code).
  - Interdiction due to mental illness (article 85 of the Civil Code).
  - Freedom of marital status (article 86 of the Civil Code).
  - Kinship, affinity and adoption (article 87 of the Civil Code).
  - Crime (article 88 of the Civil Code).
  - Temporary ban on new weddings (article 89 of the Civil Code).
- This definition of spouse can be considered valid for other areas of the legal system (successions, etc.).

**2.1.5.2. What types of relationships/unions between persons are recognised in Family Law of your country? In particular, formal (registered) and informal (de facto) unions, heterosexual and same-sex unions, unions with and without affectio maritalis. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

The relationships acknowledged, according to the Italian legal system, are those related to marriages, civil unions, registered partnerships and unregistered partnerships.

The marriage is the act, by means of which the man and the woman express their consent before the registrar of civil status and commit themselves to realize a communion of life and affections, coupled with a stable coexistence founded on reciprocal assistance and respect. The marriage is marked by typicality and no conditions or terms can be applied.

The civil union is defined as a specific social formation, for which a declaration of two adults of the same sex, in front of the registrar of civil status (and at the presence of two witnesses) is required. The registrar of civil status will record the documents in the civil status archive. With the celebration of the union, the parties acquire the status of “civilly united”.

The registered partnership (heterosexual or homosexual) is the relationship established between two adult persons, permanently united by an emotional link as well as by a mutual moral and material assistance. The registered partnership must be proven by means of a personal declaration. To this end, there are specific requirements to be met, such as the proof of cohabitation – cohabitation agreement.

There is not a specific legal reference of unregistered partnerships within legislative texts. Forms of cohabitation without the *marital affectio* are protected, as social formations, by the provision contained within article 2 of the Italian Constitution.

There is no single definition for every form of cohabitation listed above.

**2.1.6. What legal effects are attached to different family formations referred to in question 2.5.?**

With marriage the spouses acquire the same rights and assume the same obligations. From the marriage comes the mutual obligation of fidelity, of material and moral assistance, of cooperation in the interest of the family and of cohabitation. Both spouses are required, according to their resources, to contribute to the family’s needs. The celebration of marriage is preceded by a chronological sequence of actions (publications, reading of the articles of the Italian Civil Code, the presence of witnesses, etc.). The agreement cannot be subject to terms and conditions.

The civil union must be recorded at the civil register office. Publications and separation procedures are not required.

With the civil union the partner is called “Civilly United” (“Unito Civile”). With the constitution of a civil union between same sex partners, they acquire the same rights and obligations. From the civil

union comes the mutual obligation of moral and material assistance, of cohabitation and of contribution to the common needs.

There is no duty of marital fidelity. By a declaration to the registrar of civil status, parties may agree to assume, for the entire duration of the civil union, a common surname, choosing among their surnames. The parties may precede or postpone their surnames to the common surname, only if they are different, with express declaration to the public register officer.

The civil union property regime, in the absence of property conventions, is made up of community property state.

The existence of a cause of impediments for the constitution of the civil union (a previous valid marriage or a previous valid civil union; a prohibition for mental infirmity of one of the parties, the existence of a family link, condemns for murder or attempted murder against the spouse or the subject civilly united with the other party) entails the cancellation of the civil union itself.

In order to ensure the effectiveness of civil unions' protection and the fulfilment of obligations under the civil unions, the provisions set out for marriage and all the other provisions containing the words "spouse" must be applied to each of the civil union parties, including rules on succession (indignity, rights of heirs, legitimate succession). It is not applied the provisions of Act No. 184 of 5 May 1983, on adoption.

The registered partnership, a "recognized" cohabitation *de facto* (*convivenza di fatto "riconosciuta"*) between heterosexual or homosexual persons is established without any formal requirements and is characterized by bond of affection and mutual moral and material assistance. The parties of the registered partnership have the same rights as the spouse in cases provided for penitentiary regulations. Parties of the registered partnership are granted with reciprocal visitation rights in case of illness or hospitalization, right to assistance, access to personal information, the decisions in case of incapacity of discernment, the decision for organ donation in case of death, the right of taking over rent contracts, dwelling rights for a limited period of time, the right to compensation in case of death of the partner resulting from unlawful acts of third persons. The partner that works permanently in the company of the other party is entitled to share the profits of the company and the increases.

The unregistered partnership (*convivenza di fatto "non riconosciuta"*) between heterosexual or homosexual persons identifies a union that is not formalized. It has a general recognition in Article 2 of the Italian Constitution, that recognizes and guarantees the inviolable rights of the person as an individual, and in social groups where he expresses his personality, requiring at the same time the fulfilment of the mandatory duties of political, economic and social solidarity.

**2.1.7. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/de facto family formations? Explain briefly.**

There are currently no proposals for reform.

**2.3. Property relations.**

**2.2.1. List different family property regimes in your country.**

Within the Italian Civil Code (article 143, paragraph 3, of the Civil Code) there is the presence of the so called "duty to contribute", which is considered to be the primary and inderogable property regime. Its function is to realize the principle of equality between the spouses (also from an economic point of view) that derives from marriage. The duty to contribute is applied within any other property regime, of a secondary nature, towards which the choice has fallen; therefore, in the hypotheses of the patrimonial regimes deriving from the "comunione legale" ("legal community of assets") as well as from the entrance into typical and atypical matrimonial agreements. On this point, it should be noted that the "matrimonial agreements" provided for by the Civil Code are the

“comunione convenzionale”, which constitutes an integration of the legal community (articles 210 et seq. of the Civil Code), the “separazione dei beni”, which represents an exception to the regime of legal community (articles 215 et seq.) and the “fondo patrimoniale”, a fund made up of assets destined for the needs of the family (article 167 of the Civil Code). In relation to the “atypical matrimonial agreements”, it is necessary to note that their making is possible provided that the inderogability of the rights and duties arising from marriage is not prejudiced (article 160 of the Civil Code).

**2.2.2. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?**

The legal property regime is the so called “legal community”, namely the community of assets acquired by spouses after marriage. The Civil Code contains a general list of assets that are the subject of legal community (article 177 of the Civil Code); moreover, the Civil Code specifies the assets that, in particular situations – business operation (article 178 of the Civil Code) and peculiar events of the personal property of the spouse (article 179 of the Civil Code) – may be part of the legal community. Precisely, pursuant to article 177, paragraph 1, of the Civil Code, entitled “object of community”, fall within the community “the purchases made by the two spouses together or separately during the marriage, excluding those relating to personal assets, the fruits of the property of each of the spouses, received and not consummated at the dissolution of the community” (article 177, paragraph 1, letter *b*, of the Civil Code), “the proceeds of the separate activity of each spouse if, at the dissolution of the community, they have not been consummated” (article 177, paragraph 1, letter *c*, of the Civil Code), “companies managed by both spouses and established after marriage” (article 177, paragraph 1, letter *d*, of the Civil Code). Finally, according to the same article, “In the case of companies belonging to one of the spouses prior to marriage but managed by both, the community only concerns profits and increases” (article 177, paragraph 2, of the Civil Code). In addition, in accordance with the provisions of article 178 of the Civil Code – “Assets for the business of the company” – “Assets destined for the business of one of the spouses established after the marriage and the increases of the formerly established enterprise are considered to be the object of the community, only if they exist at the time of the dissolution of the community”.

Pursuant to article 179 of the Civil Code “Personal property” are not the object of community and are personal property of the spouse: “the assets of which, before marriage, the spouse was the owner or with respect to which he was the holder of a real right of enjoyment” (article 179 , paragraph 1, letter *a*, of the Civil Code); “assets acquired after marriage as a result of donation or succession, when in the deed of liberality or in the will it is not specified that they are attributed to the community” (article 179, paragraph 1, letter *b*, of the Civil Code); “the personal property of each spouse and their accessories” (article 179, paragraph 1, letter *c*, of the Civil Code); “the assets that serve the exercise of the profession of the spouse, except those intended for the management of a company forming part of the community” (article 179, paragraph 1, letter *d*, of the Civil Code); “the assets obtained by way of compensation for damages as well as the pension relating to the partial or total loss of work capacity” (article 179, paragraph 1, letter *e*, of the Civil Code); “the assets acquired with the price of the transfer of the personal assets listed above or with their exchange, provided this is expressly declared at the time of purchase” (article 179, paragraph 1, letter *f*, of the Civil Code).

According to the following paragraph of the same article: “The purchase of real estate, or movable property listed in article 2683, made after marriage, is excluded from the community, pursuant to letters *c*, *d*) and *f*) of the previous paragraph, when this exclusion results from the deed of purchase if the other spouse has also been part of it” (article 179, paragraph 2, of the Civil Code).

**2.2.3. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a “new regime just for them”?**

Yes, it is permissible to conclude agreements relating to property regimes deriving from legal community as well as agreements relating to property regimes deriving from other matrimonial agreements (typical or atypical already listed and defined in point 2.2.1.), also in the case of civil unions and the registered partnerships between persons of different sex. This opportunity is provided for by article 1, paragraph 13, of the Act No. 76 of 20 May 2016.

**2.2.4. Explain briefly the rules on the administration of family property and compare if there are difference for different property regimes.**

As part of the regulation of the administration of the assets of the legal community, the acts of ordinary administration as well as the representation in court in relation to the same are up to both spouses (article 180, paragraph 1, of the Civil Code); on the other hand, acts of extraordinary administration must be performed jointly (article 180, paragraph 2, of the Civil Code). In this regard, it is necessary to clarify that the act concerning the joint administration can be carried out by only one of the spouses, provided that there has been the prior consent of the other spouse (article 182, paragraph 1, of the Civil Code). In this context, in the event of refusal of consent by the other spouse and the simultaneous need to complete the act, the judge, pursuant to article 181 of the Civil Code, can authorize the fulfillment itself. In case of patrimonial regimes deriving from the choice of marriage agreements, we observe the following: in cases of “comunione convenzionale” (article 210, paragraph 3, of the Civil Code) and “fondo patrimoniale” (article 168, paragraph 3, of the Civil Code), it is not permitted to derogate from rules on the administration of assets belonging to the legal community that must, therefore, be respected. This conclusion must also be reached in the circumstance of atypical marriage agreements, as article 160 of the Civil Code requires the inderogability of the rights and duties arising from the marriage. On the other hand, in relation to the property regime deriving from the separation of assets, the administration of the assets acquired after marriage is up to of the spouse who is the owner of the asset, according to articles 215 and 217, paragraph 1, of the Civil Code. There are no further property regimes; therefore, it is not possible to find any difference.

**2.2.5. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

No, there is no specific register for agreements concerning property regimes. The agreements should be noted in the margin of the marriage act (article 162, paragraph 3, of the Civil Code). The annotation (which concerns all types of assets) aims at informing third parties about the chosen regime and, therefore, the exclusion of legal community. Furthermore, article 2647 of the Civil Code provides for the transcription of the matrimonial agreement in the real estate registers, when the matrimonial agreement concerns real estate assets and with the sole function of advertising, not implying the possibility of being opposed to third parties.

**2.2.6. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

The rights of third parties are guaranteed by the fact that the same rights are knowable by means of the aforementioned article 162, paragraph 3, of the Civil Code, which provides for the annotation

(point 2.2.5.). The following are considered debts weighing on the legal community of assets (“*comunione legale dei beni*”), pursuant to article 186 of the Civil Code (“Obligations weighing on the assets of the community”): all weights and burdens bearing on the assets at the time of purchase (article 186, paragraph 1, letter *a*, of the Civil Code), all the burdens of the administration (article 186, paragraph 1, letter *b*, of the Civil Code); the expenses for the maintenance of the family, for the education and for the upbringing of the children as well as any obligation contracted by the spouses, even separately, in the interest of the family (article 186, paragraph 1, letter *c*, of the Civil Code); any obligation contracted jointly by the spouses (article 186, paragraph 1, letter *d*, of the Civil Code). Pursuant to article 187 of the Civil Code (“Obligations contracted by spouses before marriage”), debts relating to obligations, contracted by one of the spouses prior to marriage, are not considered debts bearing on the legal community of assets, without prejudice to the provisions of article 189 of the Civil Code. By virtue of article 188 of the Civil Code (“Obligations deriving from gifts or inheritances”), debts relating to obligations “from which the donations and the successions achieved by spouses during marriage and not attributed to community are burdened” are not considered as debts bearing on the legal community of assets, except for the provisions of article 189 of the Civil Code. According to what established by article 189 (“Obligations contracted separately by the spouses”), the debts related to “obligations contracted, after marriage, by one of the spouses for the accomplishment of acts exceeding the ordinary administration without the necessary consent of the other” are considered debts bearing on the legal community of assets, “up to the value corresponding to the share of assets of the obligated spouse” and “when creditors cannot be satisfied with personal assets” (article 189, paragraph 1, of the Civil Code). In compliance with article 189, paragraph 2, of the Civil Code, “The particular creditors of one of the spouses, even if the credit arose before the marriage, can be satisfied in a subsidiary manner on the assets of the community, up to the value corresponding to the share of assets of the obligated spouse. To them, if unsecured, the creditors of community are preferred”. Lastly, article 190 of the Civil Code (“Subsidiary liability of personal assets”) states that “Creditors may act on a subsidiary basis on the personal property of each spouse, to the extent of half the claim, when the assets of the community are not sufficient to satisfy the debts bearing on the legal community”.

### **2.2.7. Describe allocation and division of property in case of divorce, separation or dissolution of the union.**

The separation (“*separazione personale dei coniugi*”), the divorce, the dissolution of the civil union and the dissolution of the registered partnership entail the dissolution of the “*comunione legale dei beni*”, namely the dissolution of the “legal community of assets” (article 191, paragraph 1, of the Civil Code) and, consequently, the dissolution of the “*comunione convenzionale*”, since the latter is an integration of the legal community of assets. The divorce, the dissolution of the civil union and the dissolution of the registered partnership (but not the separation) imply the termination of the “*fondo patrimoniale*” (article 171, paragraph 1, of the Civil Code). With regard to the “*fondo patrimoniale*”, reference should be made to article 171, paragraph 2, according to which “If there are minor children the fund lasts until the age of majority of the last child”; the same paragraph continues, stating that “in this case the judge can dictate, on the request of those who have an interest, rules for the administration of the fund”. In addition, in accordance with the following paragraph, “Considering the economic conditions of parents and children and any other circumstances, the judge can also attribute to the children, in enjoyment or property, a portion of the assets of the fund” (article 171, paragraph 3, of the Civil Code). Lastly, article 171 of the Civil Code ends by stating that “If there are no children, the provisions on the dissolution of the legal community shall apply” (article 171, paragraph 3, of the Civil Code). The dissolution of the legal community does not automatically involve the division of the assets, but it entails the inapplicability, in the future, of the rules governing the legal regime. The dissolution implies the distribution of the assets by the spouses (or their heirs), by dividing, pursuant to article 194, paragraph 1, of the Civil Code, in equal parts, assets and liabilities, upon prior repayments and refunds (in compliance with article 192 of the Civil Code) as



well as upon prior removal of personal movable assets (article 195 of the Civil Code) or upon prior their cash value (article 196 of the Civil Code).

In any case, following the dissolution of the marriage, the judge issues a decision, by virtue of Act No. 898 of December 1, 1970, with reference to the assignment of the house to the economically weaker spouse or, in the presence of children, to the spouse to whom the child custody has been entrusted or with whom they cohabit beyond the age of majority (article 6, paragraph 6); in addition, in relation to the maintenance allowance due to the same spouse by the other (article 5, paragraph 6). The payment of the latter can generally take place periodically; alternatively, pursuant to article 5, paragraph 7, as a lump sum payment, upon agreement of the parties and if considered fair by the judge. It is believed that, by virtue of this last provision, the transfer of a real estate property might be the subject of the obligation arising out of an agreement between the spouses<sup>1</sup>. As established by article 1, paragraph 25, of the Act No. 76 of 20 May 2016, the aforementioned articles apply, insofar as they are compatible, also in the cases of the dissolution of the civil union and of the dissolution of the registered partnership.

In case of separation, the provision relating to the maintenance allowance is adopted in compliance with article 156, paragraph 1, of the Civil Code, when the provision is in favor of the weaker spouse; as established by article 337-ter, paragraph 4, of the Civil Code, if the provision is in favor of the child or children cohabiting, minors or adults who are not economically self-sufficient. The assignment of the house, on the other hand, takes place pursuant to article 337-sexies, to the economically weaker spouse, provided that there is a child or children cohabiting, minors or adults who are not economically self-sufficient.

**2.2.8. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?**

No, there are no special rules or limitations regarding the property regimes between spouses or partners in reference to their culture, tradition, religion or other characteristics. No, the dowry is neither provided nor regulated within the Italian legislation.

**2.3. Cross-border issues.**

**2.3.1. Is your country participating in the enhanced cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?**

Italy participates in enhanced cooperation (Council Decision EU 2016/954 of 9 June 2016) with regard to the two Regulations: 1103/2016 and 1104/2016. Enhanced cooperation in the area of jurisdiction, recognition and enforcement of decisions on matrimonial property regimes for international couples, focusing both on matrimonial property regimes and on property consequences of registered partnerships, aims to develop judicial cooperation in the civil field. Cross-border implications are considered on the basis of the principle of recognition of mutual judgments, and are directed to ensure the compatibility of the applicable rules of the Member States in case of conflict of laws. This enhanced cooperation will promote the EU's objectives, protecting the interests and strengthen the integration process.

Competences, rights and obligations of the Member States not participating in the enhanced cooperation are, however, respected. The Courts of the non-participating Member States will continue to apply their internal rules for determining the jurisdiction and the applicable law, when they are sitting in a case of recognition and enforcement of decisions on matrimonial property

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<sup>1</sup> Corte di Cassazione, 3.12.2015, No. 2462.

regimes for international couples, in relation to both matrimonial property regimes, and property consequences of registered partnerships.

**2.3.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as “marriage”, “matrimonial property agreement”, “partnership property agreement” etc.?**

Yes.

**2.3.3. Are you expecting any problems with the application of the rules on jurisdiction?**

Yes.

**2.3.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

Currently article 32 *bis* of Act No. 218 of May 31, 1995 (as amended by Legislative Decree No 7/2017) provides that the same-sex marriage concluded abroad by Italian citizens produces in Italy the effects of a civil union regulated by the Italian law.

Problems are likely to arise for unions established after the entry into force of the EU regulations 2016/1103 and 2016/1104, regarding the application of European regulations. Italy joined the enhanced cooperation procedure. Member States that did not join the cooperation will probably need to stipulate agreements or to implement connection rules. It will be required to develop judicial cooperation in cross-border implications, according with the principle of mutual recognition of judgments, ensuring compatibility among the rules applicable in the Member States and strengthening the integration process (Cons.11 Dec. 2016/954/EU).

**2.3.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

Considering that Italy joined the enhanced cooperation procedure, after the entry into force of the EU regulations 2016/1103 and 2016/1104 the matrimonial property regimes and the property consequences of civil unions will be regulated in accordance with these provisions.

That does not prejudice the competence of Member State authorities to treat issues relating to the property regime between spouses, as well as do not affect the notion of marriage and of civil union, that are still regulated by the internal legislation.

**2.3.6. Are there any national rules on international jurisdiction and applicable (besides the Regulations) concerning the succession in your country?**

We can refer to the law on trusts (Hague Convention on the Law Applicable to Trusts and on their Recognition, of July 1, 1985), to the Act No. 218 of 31 May 1995, that reforms the Italian system of private international law, to the Act No. 55, of 14 February 2006, on successions and “*patto di famiglia*”, to the Act No. 112, of 22 June 2016, with provisions on assistance for persons with severe disabilities without family support, called “law on after us” (“*legge sul dopo di noi*”).

### 3. Succession law.

#### 3.1. General.

##### 3.1.1. What are the main legal sources of the Succession Law (SL) in your country? What are the additional legal sources of SL?

The main legal source of the Italian succession law is the Italian Civil Code.<sup>2</sup> Succession is regulated in the second book of the Civil Code at articles 456 et seq. and is entrenched by the Italian Constitution at article 42, paragraph 4, too.<sup>3</sup> There are also additional legal sources.

The succession rights of the spouse in case of a divorce are regulated in article 9 *bis* lit. d of the Act No. 898 of 12 December 1970. Article 6 of the Act No. 392 of 27 July 1978 provides in case of death the assignation of the tenancy contract to the survived spouse and the relatives who lived together with the tenant. The *Corte Costituzionale* (Italian Constitutional Court) established that a co-habitant partner is entitled to continue the tenancy contract.<sup>4</sup> This was then confirmed by the Italian legislator with the Act that introduced and regulated the *unioni civili* (*i.e.* the registered civil partnerships) and *convivenze* (co-habitation relationships) (Act No. 76 of May 20, 2016).

Not only the substantial law is dealing with the inheritance law. The Italian Code of Civil Procedure also contains some provisions about the succession or applicable in case of death (articles 22, 110 et seq., 299 et seq., 747 et seq.).

Articles 46-50 of the Act No. 218 of 31 May 1995, contain then the private international law provisions, which are applied in case of a cross-border succession. However, these provisions only find application, when the Regulation (EU) No. 650 of 2 July 2012, doesn't apply. With the Act No. 161 of October 30, 2014 the Italian legislator implemented the European Regulation assigning the competence to issue the European Succession Certificate to public notaries (see article 32).

In some parts of the Italian territory, *i.e.* the provinces of Bolzano, Trento, Trieste and Gorizia as well as in some parts of the provinces of Udine and Belluno a special regime, contained in the Royal Decree No. 499 of 28 March 1929, is applied, providing an internal certificate of succession, which shall be issued by the judge (see articles 13 et seq.).

Furthermore, Italy ratified the Basel Convention on the Establishment of a Scheme of Registration of Wills (Act No. 307, 25 May 1981), the Hague Trust Convention (Act No. 364 of 16 October 1989) as well as the Washington Convention providing a Uniform Law on the Form of an International Will (Act No. 387 of 29 November 1990).

The following legal sources should also be taken into account:

- the *Legge notarile* (Law on Notaries, Act No. 89 of February 16, 1913);
- the *T.U. sulle successioni e donazioni* (Legislative Decree No. 346 of October 31, 1990), concerning inheritance tax;
- the *Legge Dopo di Noi* (Act No. 112 of June 22, 2016), providing protection measures for disabled people without an adequate family support or whose family can no longer support them.<sup>5</sup>

The digital inheritance is now regulated by article 2 *terdecies* of the Codice della Privacy (Legislative Decree No. 196 of 30 June 2003), introduced by the Act No. 101 of 10 August 2018).<sup>6</sup>

<sup>2</sup> For an English translation, see: Beltramo, M., Longo, G. E., Merryman, J. H., 1969.

<sup>3</sup> Alpa, G., Zeno-Zencovich, V., 2007, 72.

<sup>4</sup> Bargelli, E., Breccia, U., Italy, in <https://www.eui.eu> (9.5.2019), 9.

<sup>5</sup> De Marco, E., Dibari, P., Scalera, F., 2017, 963 et seq.

<sup>6</sup> Resta, G., 2018, 201 et seq.

### 3.1.2. Provide a short description of the main historical developments in SL in your country.

The law of succession contained in the Italian Civil Code of 1942 is based on its predecessor of the Civil Code of 1865, which was largely modelled on the French Civil Code of 1804.<sup>7</sup>

Since 1942 the Italian law of succession has been altered by some reforms. An important impact on the law of succession had *e.g.* the approval of the Italian Constitution 1948, which regulates the law of inheritance in a specific provision, entrenching it (article 42, paragraph 4).<sup>8</sup>

In the 70s, two relevant transformations concerned the succession law of the spouse. Firstly, the Italian legislator regulated the succession rights competing to the divorced spouse (Act No. 898 of 12 December 1970). After that, with the *Riforma del Diritto di Famiglia* 1975 (Family Reform 1975, Act No. 151 of 19 May 1975) the succession rights of the survived spouse were increased. With the same reform most of the residual differences between children born to parents married to each other and children born out of wedlock were abolished. The aim of the Family Reform 1975 was to meet the compliance of the Civil Code with the principles of equality of spouses and of equality of children born to married parents and children born out of wedlock, posed by the Italian Constitution (see articles 29, paragraph 2 and 30, paragraph 3).<sup>9</sup>

In 2005 and 2006, other important changes occurred: *a)* the modification of the articles 561 and 563 of the Civil Code (with a decrease of the real effects of the action for reduction competing to the force heirs) (Act No. 80 of 14 May 2005); *b)* the introduction of a new article 2645 *ter* of the Civil Code allowing the transcription in public registers of the *atti di destinazione*, public deeds whereby some goods (immovable or registered movable) are destined to fulfill protection-worthy interests according to article 1322, paragraph 2, of the Civil Code (Act No. 51 of 23 February 2006);<sup>10</sup> *c)* the insertion of the *patto di famiglia* (articles 768 *bis* et seq. of the Civil Code, introduced by the Act No. 55 of 14 February 2006: see also points 3.1.3., 3.1.5. and 3.3.2.); *d)* the introduction of a new provision, providing that the parents who lost the parental authority (or responsibility) according to article 330 of the Civil Code are unworthy to succeed (see article 463, No. 3 *bis* of the Civil Code, introduced by the Act No. 137 of 8 July 2005).

In 2012-2013, with the *Riforma della filiazione* (Act No. 219 of 10 December 2012 and Legislative Decree No. 154 of 28 December 2013), the last differences between children born to married parents and children born out of wedlock in the field of succession law were abolished. Furthermore, a new provision was introduced in the Civil Code, recognizing the possibility for the children to exclude from the inheritance (*i.e.* to disinherit) their parents, if they lost the parental responsibility (article 448 *bis* of the Civil Code).

In 2016 (Act No. 76 of 20 May 2016), the Italian legislator extended to the same sex registered civil partner (partner of an *unione civile*) the same succession rights competing to the spouse (see article 1, paragraphs 20, 21) (see also points 3.2.1. and 3.3.4.). Furthermore, he attributed some special succession rights to the *conviventi*, co-habitants which fulfill some requisites posing by the law (article 1, paragraph 36), *i.e.* continuation of the tenancy contract and a right to live in the house of the deceased for a limited period of time: see article 1, paragraphs 42, 43 and 44).<sup>11</sup>

Recently, the *Legge Dopo di noi* (Act No. 112 of 22 June 2016) foresaw some protection measures for people with disabilities without a family support or whose family can no longer support them.<sup>12</sup> In 2018, article 463 *bis*, regulating some cases of suspension of the succession rights, were introduced in the Civil Code, by the Act No. 4 of 11 January 2018. Furthermore, a new provision, regulating the

<sup>7</sup> For the historical development, see Braun, A., 2015, 72 et seq.

<sup>8</sup> Alpa, G., Zeno-Zencovich, V., 2007, 72.

<sup>9</sup> Alpa, G., Zeno-Zencovich, V., 2007, 72 et seq.

<sup>10</sup> Mazzocchi, F., 2006, 21 et seq.; Berlinguer, A., 2009, 216 et seq.

<sup>11</sup> Cipriani, N., 2017, 2421 et seq.

<sup>12</sup> De Marco, E., Dibari, Scalera, 2017, 963 et seq.

digital succession, was introduced in the *Codice della Privacy* (Italian Privacy Code), by the Act No. 101 of 10 August 2018 (article 2 *terdecies* of the *Codice della Privacy*).<sup>13</sup>

### 3.1.3. What are the general principles of succession in your country?

The Italian legal system is based on the principle of the universality of inheritance (however, there are some special rules concerning the succession to specific rights).

There're two types of succession in Italy: the legitimate succession (articles 565 et seq. of the Civil Code) as succession of relatives (see articles 565 et seq. of the Civil Code; the possibility of succession by representation is foreseen by articles 467 et seq. of the Civil Code), and the testamentary one (articles 587 et seq. of the Civil Code). The rules on the legitimate succession only apply, if there is no will or if the testator didn't regulate his/her entire estate. However, the disposition autonomy is limited in favour of the forced heirs, which necessarily have to get a part of the estate (articles 536 et seq. of the Civil Code: see point 3.3.4).<sup>14</sup>

Succession agreements are not allowed (article 458 of the Civil Code). An exception is the *patto di famiglia* (articles 768 bis et seq. of the Civil Code: see also points 3.1.2., 3.1.5 and 3.3.2). Reciprocal and joint wills are prohibited as well (article 589 of the Civil Code).

The testator can appoint a substitute heir in case that the instituted heir cannot or will not accept the estate (articles 688 et seq. of the Civil Code). However, only an ordinary substitution is possible. On the contrary, the fiduciary one is not allowed. An exception is the so called *fedecommesso assistenziale*, regulated in article 692 of the Civil Code, which permits to appoint as heir an interdict child, descendent, spouse or a minor in a condition of habitual mental infirmity, with the duty to conserve the property and, on his death, to transmit it in favor of the person or the institution, that have taken care of the instituted heir.<sup>15</sup>

In Italy, the acceptance of inheritance is needed to acquire the quality of heir (see articles 470 et seq. of the Civil Code), while the acquisition of the legacy arises *ex lege*, *i.e.* without need of acceptance (however, the possibility to renounce is provided: see article 649, paragraph 1, of the Civil Code).

### 3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.

The Italian legal system does not know a general instrument, like a certificate of succession, certifying the quality of heir.

In the praxis the so called *atto di notorietà* (Deed of Notoriety), a public deed issued by a public notary, certifying that a certain fact – *i.e.* the quality of heir – is known in a certain context, is used to demonstrate the quality of heir. Although, the *atto di notorietà* is not intended to found a presumption and it doesn't have a probative value. On the contrary, its value is based on the sanctions foreseen for those who declare the false to a public official. Additionally, the Italian law protects the one who contracted with the apparent heir (article 534 of the Civil Code).

A certificate of succession (*certificato di eredità*) only exists in the districts covered by the *libro fondiario*: see point 3.1.1.). The one who is identified as heir in the certificate (issued by the judge in a proceeding of voluntary jurisdiction) is presumed to be such.

In the cross-border successions there's also the possibility to issue the European Certificate of Succession, which can be used as a proof of the quality of heir. In Italy, this certificate is issued by a public notary (see point 3.1.1.). In case of a controversy, the interested person can bring the case to the court (sitting as a united bench) at the notary's residence place, which decides in a proceeding of a voluntary jurisdiction (see article 32 of the Act No. 161 of 30 October 2014).

<sup>13</sup> Resta, G., 2018, 201 et seq.

<sup>14</sup> Alpa, G., Zeno-Zencovich, V., 2007, 73 et seq.

<sup>15</sup> Berlinguer, A., 209 et seq.

By immovable property and rights *in rem* the acceptance shall be transcribed (see articles 2648, 2660 et seq. of the Civil Code). In order to proceed to the transcription, the acceptance of the estate (“contained in a public” deed “or in a private writing with an authenticated or judicially verified signature”) has to be submitted. In case of a tacit acceptance (article 476 of the Civil Code) the “transcription can be requested on the basis of” the “act implying tacit acceptance”, if “it is evidenced by a judgment, a public” deed “or a private writing with an authenticated or judicially verified signature”. “The transcription of the acquisition of a legacy is done on the basis of an authenticated abstract of the will” (see article 2648 of the Civil Code).

If his succession right is disputed, the heir also has the possibility to judicially “request recognition of his hereditary status against whomever possesses all or part of the heritable property under claim of heirship or without the claim of any kind” and obtain restitution of the inheritance assets (petition of heirship or estate petition: articles 533 et seq. of the Civil Code). In order to prove his/her right, the heir has to demonstrate the existence of a will in his favour or his relationship with the deceased as well as the lack of other persons with the right to succeed.

**3.1.5. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?**

In Italy, the inheritance can be legitimate (article 565 of the Civil Code) or testamentary (article 587 of the Civil Code). On the contrary, the succession cannot be regulated by a contract. In fact, there’s a prohibition of succession agreements. Article 458 of the Civil Code provides that “any agreement by which one disposes of his own succession” or “disposes of rights that can belong to him by a succession not yet opened, or renounced such rights is void”.<sup>16</sup> This rule knows only one exception, the so called *patto di famiglia* (articles 768 bis et seq of the Civil Code: see points 3.1.2., 3.1.3., 3.1.5. and 3.3.2.).

According to the Italian Constitution “the law establishes the regulations and limits of legitimate and testamentary inheritance” (article 42, paragraph 4). The article 457 of the Civil Code provides that the inheritance is distributed in accordance with the legal provisions only if there’s no will or the deceased left a will without regulating his entire inheritance. Therefore, a cumulative application of the two legal titles is possible.<sup>17</sup>

The legitimate succession has subsidiary and dispositive nature. At the same time, testamentary succession knows some limitations by the law. In fact, in accordance with article 457 of the Civil Code, the deceased cannot overrule the rights assured by the law to his spouse or registered partner and to some of his relations, the forced heirs (article 536 of the Civil Code). If the deceased overrules the rights recognized to these subjects, they can bring the action of reduction, in order to get their reserved portion (see points 3.3.4.).<sup>18</sup>

**3.1.6. What happens with the estate of inheritance if the deceased has no heirs?**

According to article 586 of the Civil Code, “in the absence of others eligible to succeed” (*i.e.* spouse, registered partner and relatives up to the sixth degree: article 572, paragraph 2, of the Civil Code), “the inheritance devolves on the State”. The State acquires the inheritance “by operation of law without need of acceptance”. On the contrary, he cannot renounce the inheritance. The State “is not responsible for hereditary debts and legacies beyond the value of the property acquired” (article 586, paragraph 2, of the Civil Code).<sup>19</sup>

<sup>16</sup> Berlinguer, A., 2009, 204.

<sup>17</sup> Alpa, G., Zeno-Zencovich, V., 2007, 73.

<sup>18</sup> Alpa, G., Zeno-Zencovich, V., 2007, 73 et seq.

<sup>19</sup> See Braun, A., 2015, 87.

The possibility for the State to succeed is also recognized by article 42, paragraph 4, of the Italian Constitution, as it permits to the ordinary legislator to establish “rights of the State in matters of inheritance” (including the imposition of taxes on the succession).

**3.1.7. Are there special rules or limitations concerning succession with reference to the deceased’s (or heir’s) culture, tradition, religion or other characteristics?**

The Italian legal system doesn’t know discrimination rules based on the abovementioned criteria (culture, tradition, religion and sex).

However, there’re special rules only applying to children and subjects with disabilities. For them, the acceptance with the benefit of inventory is mandatory. Furthermore, for subject with disabilities there’s a possibility to set up the *fedecommesso assistenziale* (see point 3.1.3.). Recently, the *Legge Dopo di noi* introduced some additional protection measures for these people, in order to implement constitutional principles (as, e.g. the one of equality contained in article 3, paragraph 2, of the Italian Constitution). Tax benefits e.g. apply, if assets or rights are transferred in a trust, a fund or through a destination act (i.e. an *atto di destinazione*: see point 3.1.2.) in favour of them.

**3.2. Intestate succession.**

**3.2.1. Are men and woman equal in succession? Are domestic and foreign nationals equal in succession? Are decedent’s children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?**

Article 462 of the Italian Civil Code establishes that all person alive or *en ventre sa mere* at the moment when the succession begins are capable of inheriting. According to article 462, paragraph 3, of the Civil Code, children who were not yet conceived at the start of succession can nevertheless benefit from a Will if one of their parents was alive at the time of the testator’s death.

Having regard to those provisions, any person can succeed if he has capacity of inheriting. There are no different succession rights between men and woman, domestic and foreign nationals, children born in wedlock and children born out of wedlock and adopted children. In relation to the children born out of wedlock, article 573 of the Civil Code states that the provisions concerning intestate succession by children born out of wedlock apply when filiation has been acknowledged or judicially declared, without prejudice to cases where the children born out of wedlock have the right to a life annuity whose amount is determined in proportion to the size of the inheritance.

Article 1, paragraph 21, of Act No. 76 of May 20, 2016 (see point 3.2.1.) recognizes to the same sex registered civil partner (partner of a so called *unione civile*) the same succession rights competing to the spouse. In particular, to the same sex registered civil partner are applicable the following provisions of the Civil Code:

- articles from 463 to 466;
- articles from 536 to 564;
- articles from 565 to 586;
- articles from 737 to 751;
- articles from 768 *bis* to 768 *octies*.

Furthermore, article 1, paragraph 42, 43 and 44, of Act No. 76 of 20 May 2016, doesn’t recognize the same succession rights competing to the spouse to the so called *conviventi di fatto*, i.e. adults permanently united by couple’s emotional link and mutual assistance, not bound by relationships, affinity or adoption, by marriage or by a civil union (so called *unione civile*). The so called *conviventi di*

*fatto* have some special succession rights, as for example the right to continuation of the tenancy contract and a right to live/stay in the decreased house for a limited period of time.

### **3.2.2. Are legal persons capable of inheriting? If yes, on which basis?**

Currently, according to the Italian legal system, legal persons (both approved and not approved establishments) are capable of inheriting only by a will. Except in the case of acquisition of property by State, where the inheritance devolves automatically on the State in the absence of other eligible to succeed, without need of acceptance (article 586 of the Civil Code; see also points 3.1.6 and 3.2.4).

### **3.2.3. Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.**

Yes, the institute of unworthiness of succession is present in Italian legal system. Pursuant to article 463 of the Italian Civil Code, some people are excluded from the succession by reason of their unfitness. They are people:

- who voluntarily killed or attempted to kill the person whose succession is involved, or his spouse, a descendant, or an ascendant of that person;
- who committed against one of those people mentioned above, an offense for which the law provides for application of the rules relating to the murder;
- who denounced one of these persons for offenses punishable by life imprisonment or imprisonment for a period not less than three years and the complaint has been declared libelous in a criminal proceedings; or has testified against those persons charged of the mentioned offenses, if the witness was declared false in a criminal proceedings;
- who, having lost parental responsibility (so called “responsabilità genitoriale”) over the person whose succession is involved, has not been reinstated in the parental responsibility at the time of succession’s opening;
- who induced, by duress or fraud, the person whose succession is involved, to make, revoke or change the Will;
- who suppressed, concealed or altered the testament by which the succession would be governed;
- who formed a false testament or consciously used it.

According to the article 466 of the Civil Code, the future deceased may release a person from his condition of unfitness.

Lastly, article 463 *bis* of the Civil Code, introduced by the Act No. 4 of 11 January 2018 (see point 3.1.2.), regulates some cases of suspension of succession rights.

### **3.2.4. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?**

Pursuant to article 565 of the Italian Civil Code, in intestate succession the inheritance devolves on the spouse, descendants, ascendants, collaterals, natural relatives and the State, in the order and according to the rules established in the articles 566 et seq. of the Civil Code:

- the children, also the adopted children, succeed to the father and mother in equal shares;
- the father and mother in equal shares, or the surviving parent, succeed to one who dies without leaving descendants or brothers or sisters or descendants from them;
- the ascendants in the paternal line succeed to one half and the ascendants in the maternal line to the other half in the case of one who dies without leaving descendants or parents or brothers or sisters or their descendants. However, if the ascendants are not of equal degree, the inheritance devolves on the nearest without distinction by line;



– brothers and sisters succeed in equal shares to one who dies without leaving descendants, parents or other ascendants. However, brothers and sisters of the half blood receive half the share of those of the whole blood.

When with the parents or only one of them, there are brothers or sisters of the whole blood of the decedent, all are admitted to succession *per capita*. In this case the parents (or one of them) receive one half of the share. If there are brothers and sisters of the half blood, each receives one half of the share received by each brother and sister of the whole blood or by parents, subject in every case to the share of one half in favour of the latter. At last, if neither parent can or wishes to succeed and there are other ascendants, the share that would belong to one parent in the absence of the other devolves in the manner specified in article 569 of the Civil Code, on such ascendants.

When one dies without leaving descendants, parents, other ascendants, brothers or sisters or their descendants, succession opens in favour of the close relative or relatives, without distinction according to line, but not beyond relatives of the sixth degree.

Particular rules are applicable in case of succession from spouse and concurrence of spouse with children, ascendants, brothers and sisters:

- when children are in concurrence with the spouse, the spouse has the right to one half of the inheritance if there is only one child in the succession and to one third in other cases;
- when ascendants, brothers or sisters, even of the half blood, or both the one and the other, are in concurrence with the spouse, the spouse has the right to two thirds of the inheritance;
- only when one dies without leaving children, ascendants, brothers or sisters, the spouse has right to all inheritance.

Succession's rights of the spouse also extends to putative spouse, when the person whose inheritance is involved is not bound by a valid marriage at the moment of death, and to separated spouse, when his/her fault is excluded by the final judgment of separation.

At last, in the absence of others eligible to succeed, the inheritance devolves on the State. The State's acquisition is by operation of law without need of acceptance and cannot be renounced (see point 3.1.6.).

### 3.2.5. Are the heirs liable for deceased's debts and under which conditions?

Accepting an inheritance implies responsibility for the decedent's debts. Heirs, therefore, can run the risk of paying off from their own pockets any debts they inherit. The heirs are liable for deceased's debts, in proportion to the value of their respective portions of the inheritance. Conversely, legatees are not liable for these debts. Likewise, if the inheritance devolves on the State, the State is not responsible for hereditary debts and legacies beyond the value of the property acquired.

In Italy, the heirs have the possibility to accept an inheritance in the form of a pure and simple acceptance or a reserved acceptance (so called *accettazione con beneficio d'inventario*). In any case once accepted, the qualification of heir is irrevocable.

Pure and simple acceptance can be express or tacit. The express acceptance of inheritance takes place when the heir declares his willingness to accept the status of heir, by means of a notarial or a private deed. Tacit acceptance takes place when someone acts in such a way that his acceptance to inherit assets can be implied. In either case, acceptance shall be manifested within ten years from the succession's opening. The heir pure and simple has unlimited personal liability for the deceased's debts, and is therefore liable even if the amount of the debts exceeds the value of the assets inherited. However, if the succession has been accepted under benefit of inventory, the heir is liable for the deceased's debts only up to the value of the assets inherited.

Reserved acceptance has to be carried out through a declaration made to a notary or, alternatively, to the clerk of the Court of the district in which the succession was opened. If the succession has been accepted under benefit of inventory, a report must be also drafted describing and stating the value of all property forming the assets and all liabilities, within the deadlines of three months from the opening of succession, if the heir has possession of goods, or from the acceptance, if the heir has no possession of goods.

The effect of benefit of inventory consists in keeping the patrimony of the deceased distinct from that of the heir. Consequently, in accordance with article 490 of the Italian Civile Code, the heir retains all the rights and obligations that he had against the deceased in the inheritance, including those that are extinguished by the death, and he is not bound to payment of inherited debts and legacies beyond the value of the property received. In addition, the creditors of the inheritance and the legatees have preference in the heritable patrimony over the creditors of the heir.

Pursuant to articles 471, 472 and 473 of the Civil Code, the acceptance must be made with benefit of inventory when the inheritance is devolved to minors, emancipated minors, people under a legal incapacity and legal persons, associations and foundations (except companies).

### **3.2.6. What is the manner of renouncing the succession rights?**

The Italian Civil Code confers a choice of whether or not to accept an inheritance, on the ground that the acceptance of the inheritance can imply becoming responsible for the decedent's debts. Pursuant to article 519 of the Civil Code the renunciation of the inheritance shall be made by a declaration received by a notary or by clerk of the Court of the district in which the succession was opened and inserted in the register of successions. A renunciation made subject to a condition or a term or only in part is void.

One who renounces an inheritance is considered as if he never had been called. The renouncer can, however, retain a gift or demand a legacy made to him to the extent of the disposable portion referred to in article 556 of the Civil Code, unless the legacy is a legacy in place of forced share or against forced share. Those called to the inheritance who have taken or concealed property belonging to the inheritance forfeit the power to renounce it and are considered heirs pure and simple, notwithstanding their renunciation.

The renunciation of the inheritance can be attacked only if it is the result of duress or fraud and within the deadlines of five years from the day on which the duress ceases or the fraud is discovered. So long as the right to accept the inheritance is not prescribed as to those called who have renounced it, they can always accept it, if it has not already been acquired by others than those called, without prejudice to the interests acquired by third person in the heritable property.

The renunciation of the inheritance has different effects in intestate succession and in testamentary succession:

- in intestate succession the share of one who renounces accrues to those who would have shared with the renouncer, subject to the right of representation (article 467 of the Civil Code) and subject to concurrence of parents or ascendants with brothers and sisters;
- in testamentary succession, if the testator has not provided for a substitution and if the right of representation is not exercised, the share of renouncer accrues to the co-heirs according to article 674 of the Civil Code, or else it devolves according to article 677 of the Civil Code on those who would take by intestate succession.

In any event, if someone renounces an inheritance, without fraud, with damage to his creditors, they can have themselves authorized to accept the inheritance in the name and place of the renouncer, for the sole purpose of satisfaction from the heritable property to the extent of their claims.

## **3.3. Disposition of property upon death.**

### **3.3.1. Testate succession.**

#### **3.3.1.1. Explain the conditions for testate succession.**

According to the Italian legal system, a will can only be drawn up in ways expressly regulated by the Civil Code. The Italian system is characterized by a rigorous formalism, necessary to guarantee the origin of the document (understood as a deed) by the testator, in order to ensure the authenticity of

the origin of the declaration by the *de cuius*. In this context of strict testamentary formalism, other forms of the will, that we could define as “atypical” (oral will or digital will), have no place.

### 3.3.1.2. Who has the testamentary capacity?

Article 591 of the Civil Code establishes that anyone who is not is not declared incapacitated by law can dispose by will, and it is therefore implicit that anyone who is incapacitated is denied the right to dispose by will.

Paragraph II of the said article contains an exhaustive list of those who lack testamentary capacity. The first two refer to legal incapacity, the third to natural incapacity and are as follows:

1. Minors below the age of eighteen (article 2 of the Civil Code)
2. Those who are disqualified by law. Anyone who has been declared by a judge’s sentence to be mentally incapable of looking after his or her own interests. The disqualification is effective (article 411 of the Civil Code) from the date of publication of the sentence (not from the date when the judgement become final).
3. Those who, though not disqualified, are proven to have been for any reason, even temporarily, in a state of natural incapacity (i.e. of unsound mind) at the moment when they made their will.

### 3.3.1.3. What are the conditions and permissible contents of the Will?

Article 587 of the Civil Code defines the will as a revocable deed by which one disposes, from the time of their death, of all or part of his/her estate.

A will is, therefore, above all a document of a patrimonial nature, in which the testator determines the destiny of his/her estate. This is provided for by means of the nomination of heirs or legatees or through testamentary obligation.

Heir is the one to whom is devoted the universality of the assets of the testator or a share of them, as it establishes the article 588, paragraph 1, of the Civil Code, pursuant to which “*Testamentary provisions, whatever may be the expression or denomination used by the testator, are by universal title and attribute the status of the heir, if they comprehend the totality or a share of the property of the testator*”. Legatee, on the other hand, is a particular successor in title, to whom the goods are assigned in a determined way.

The dispositions with patrimonial content, other than the nomination of heirs or legatees - such as the recognition of a debt- are valid within the limits of which they would be as unilateral deed *inter vivos*.

Can be counted among the provisions with patrimonial content or indirectly patrimonial content:

– the article 733 of the Civil Code which provides that the testator can establish specific rules for the formation of share (designation of third arbiter or the third party responsible for drawing up the draft division between the co-heirs);

– article 463 of the Civil Code on the subject of the rehabilitation of the unworthy.

The testator with the will can also provide the disposition with regard to the ordinary substitution. The testator in fact can substitute another person for the instituted heir in case the latter cannot or will not accept the estate (articles 688 et seq. of the Civil Code). The fiduciary substitution is not allowed. An exception is the so called *fedecommesso assistenziale*, regulated in article 692 of the Civil Code, which permits to institute as heir an interdict child, descendent, spouse or a minor in a condition of habitual mental infirmity, with the duty to conserve the property and, on his death, to transmit it in favor of the person or the institution, that have taken care of the instituted heir (see point 3.1.3.).

Italian law also allows for the will to cover non-patrimonial matters (recognition of children born out of wedlock – article 254, paragraph 1, of the Civil Code, decisions regarding the moral rights of an author, etc.). These dispositions constitute the so-called non-patrimonial content of the will, extraneous to the document’s primary function. A will is valid even when the content is entirely non-patrimonial (article 587, paragraph 2, of Civil Code).

Among the provisions with an atypical content, here, the wills of the testator with which decides the destiny of social profiles and online accounts, can be mentioned: who can have access and who does not; who can ask for cancellation and so on. The “last virtual wishes” must be communicated to the information Society Service Manager. This possibility – new frontier of the right of the succession – is regulated by the Italian Code of the Privacy, in article 2-*terdecies*, introduced by Legislative Decree No. 101 of 10 August 2018.

**3.3.1.4. Describe the characteristics of Will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a Will?**

The will is always revocable and is not binding on the person who makes it. Revocability is an essential feature of testamentary freedom, which is a cornerstone of the Italian hereditary system.

Testamentary freedom is also at the basis of other features of the will.

The will is unilateral (the testator’s will shall not be bound by agreements and consensus) and unipersonal (produced by one person only). Joint or reciprocal wills are inadmissible.

Wills are usually categorized as ‘ordinary’ or ‘special’.

Ordinary wills:

- a) The simplest form of will is holographic: it is a deed, which is wholly written, dated and signed by the testator’s hand (article 602 of the Civil Code).
- b) The public will (article 603 of the Civil Code) is drawn up by a notary on the basis of declarations made by the testator in the presence of two witnesses, read aloud by the notary and then signed by him/her, by the testator and by the witnesses. A copy of the will is held in the notary’s archives.
- c) The Italian Civil Code also allows for the drawing up of a secret will (article 604 of the Civil Code), also when written by mechanical means or by a third party, which is signed by the testator and delivered in a sealed envelope to the notary in the presence of two witnesses. The notary writes on the outside of the envelope everything which takes place before him, adds the date and his/her signature together with those of the testator and witnesses. The secret will, if it is withdrawn, retains its validity if it has the formal requisites of the holographic will. In the absence of such requisites, its withdrawal amounts to annulment.

Special wills: these are wills to be used in exceptional cases, when it is impossible to draw up an ordinary will. Special wills are characterized by an extreme simplification of the formalities; however, such wills are valid for only three months after the cessation of the exceptional conditions which justified the drawing up of a special will.

It is possible to draw up a special will when the following conditions apply:

– Illness, calamity and injury: if the testator is in a place afflicted by a contagious disease or in the event of a natural disaster or injury, the will is valid if received by a notary, Justice of the Peace, mayor, or a religious official in the presence of two witnesses no younger than 16 years of age.

The will is to be written by the person who receives it and must be signed by the testator and witnesses.

– On board ship: during a voyage by ship a will can be received by the ship’s captain.

The captain’s will can in turn be received by his/her immediate subordinate. When a will is received on board ship, two originals must be drawn up in the presence of two witnesses and must be signed by the testator, by the recipient and by the two witnesses.

The will is kept with the ship’s papers, logbook or crew list.

The originals must be handed over to the local maritime authority as soon as the ship docks.

– On board an aircraft: the will is received by the captain in the presence of one or, when possible, two witnesses. The rest of the procedure is the same as the one followed on board ship.

– Wills made by military personnel: wills made by military personnel and armed forces staff can be received by an officer or military chaplain, by a Red Cross official or an officer of the Italian

Association of the Order of Malta, in the presence of two witnesses. The abovementioned will must be signed by the testator, by the recipient and by the two witnesses.

The will must then be handed over, as soon as possible, to the headquarters, who will, in turn, send it to the Ministry in question, who will then ensure it is deposited in the notarial archives in the last place of residence.

**3.3.1.5. Is there a (public) register of Wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

In case of a public will, or a holographic will held in safekeeping by a notary, the will shall remain with the notary's deeds awaiting publication.

If someone has left a public will, or holographic will deposited with a notary, but it is not known with which notary, an application, accompanied by an extract of the death certificate, can be made to the local Council of Notaries, who will then forward the application to all the notaries in that area.

It is also advisable to make the same application to the Notarial Archives, which conserve all the deeds and wills deposited by notaries who are no longer practicing.

It is also possible to consult the General Register of wills, which has its headquarters in the Central Office of the Notarial Archives in Rome. The General Register of wills can clarify whether a deceased person has made a will, in Italy or abroad. Through the said register application can be made to the competent authority in any foreign country signed up to the European Convention on State Immunity (Basel, 1972) for the release of a certificate of succession for the deceased person.

Thus far, in addition to Italy, the following countries have ratified the Basel Accords: Belgium, Cyprus, Estonia, France, Lithuania, Luxemburg, the Netherlands, Portugal, Spain, Turkey and Ukraine.

Interested parties can apply to the General Register of wills, for proof of any records in the name of the deceased person and for information regarding the local notarial archive where the deeds are deposited, in the event that the notary is no longer practicing.

The following deeds may be found in the General Register of wills: 1) public wills; 2) secret wills; 3) special wills; 4) holographic wills held in safekeeping by a notary; 5) statement of publication of holographic wills not covered by point 5; 6) withdrawal of secret and holographic wills held in safekeeping by a notary; the revocation as well as the revocation of a revocation of the dispositions because of death, on condition that they are done with a new will.

By consulting the General Register of wills, it is impossible to know whether the deceased has drawn up a holographic will which has not been formally deposited with a notary and not yet published, and which, for example, is still held in safekeeping by a notary or another person.

**3.3.2. Succession agreement (*negotia mortis causa*). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.**

In the Italian legal system, as a general rule, the will is the only way of disposing of one's estate after death. In fact, this area is governed by the principle of a ban on future succession agreements, as per article 458 of the Civil Code which has its *raison d'être* in safeguarding the principles of the revocability of the dispositions of wills (articles 589 and 679 of the Civil Code) and the personality of testamentary volition.

Accordingly, any contracts or agreements which arrange for one's own succession are null and void. It is not possible to stipulate an agreement whereby a living person agrees his/her own succession with the consent of potential heirs (institutive succession agreements). Moreover, those agreements whereby inheritance rights are pre-arranged or renounced while the donor is still alive (testamentary succession agreements or succession renunciation agreements) are null and void. Potential heirs, therefore, cannot avail themselves of or renounce rights which might apply to them in relation to someone who has not yet died.

The only exemption from the ban on succession agreements is the “Patto di Famiglia” (which was introduced into the Civil Code by means of Act No. 55 of 16 February 2006), a contract by means of which an entrepreneur can transfer all or part of his/her company, or a shareholder can transfer all or part of his/her shares, to one or more descendants. With the “Patto di Famiglia”, the legislator has provided the entrepreneur with a means by which he/she can plan inheritance across generations, by transferring free of charge his/her company (individual or collective) to specific descendants, thus ensuring that it cannot be disputed by other family members or forced heirs. (See points 3.1.2. and 3.1.5.).

In Italian system, therefore, any deals or transactions other than the will which derive from the death of one of the parties are null and void; this does not include those agreements made *inter vivos* in which the death is purely incidental element in the transaction. In particular, the post-mortem mandate, characterized by an order laid down by the mandator to carry out a certain activity after the death of the said mandator, is regarded as valid (the so-called *mandatum post mortem exequendum*) when the parties stipulate an ordinary contract of mandate, which comes into effect only after the death of the mandator.

### **3.3.3. Are conditions for validity of Wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

The requirements for ensuring the validity of a will are governed by specific articles of the Civil Code which cover inheritance, especially article 601 of Civil Code et seq. which focus specifically on the various typologies of will.

### **3.3.4. Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

The law protects certain categories of family members (forced heirs), guaranteeing to them a fixed proportion of the inheritance even if this goes counter to the wishes of the deceased. These forced heirs are the spouse and their children and grandchildren and, in the absence of the above, the ascendants (parents, grandparents and so on).

The testator, therefore, may only dispose of the part of the assets which is not assigned to the forced heirs. Depending on the existence or otherwise of these heirs at the moment of death, the law determines the share to be reserved for them, taking into account also the deceased's debts and any gifts given by him/her when alive, and therefore also the inheritance quota that the testator can dispose of as he/she deems fit.

There is therefore a limitation on the freedom to make a will: if a forced heir is denied, in whole or in part, his/her quota, because of dispositions in a will or because of gifts given by the testator when alive, said heir can sue for the whole amount of the quota (claw-back action), within a 10-year limitation period.

In 2016 (article 1, paragraph 21, of Act No. 76 of 20 May 2016), the Italian legislator recognized to the same sex registered civil partner (partner of a so called “Unione Civile”) the same succession rights competing to the spouse (See points 3.1.2 and 3.2.1).

### 3.3.5. Cross-border issues.

#### 3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?

There are no known Italian Court decisions concerning the Succession Regulation (EU) No. 650 of July 2, 2012. The Fondazione Italiana del Notariato and the Consiglio Nazionale del Notariato prepared a practical guide regarding the European Succession Certificate<sup>20</sup>.

#### 3.3.5.2. Are there any problems with the scope of application? Are there any problems concerning the application?

There are some questions concerning the application of the Regulation.

1. The first question is whether an acceptance of the estate is needed in order to issue the European Succession Certificate, when the Italian law applies, or not. According to the Guide mentioned in point 3.3.5. this is necessary only if the applicant applies for the certificate as a heir (see point 2.4. of the Guide). In fact, a person called to the inheritance can also apply for the Certificate, *e.g.* in order to exercise the rights in article 460 of the Civil Code.

2. Furthermore, it has been asked, if the legatee *per damnationem* can also apply for the Certificate. The above-mentioned Guide admits this possibility (despite the letter of article 63 of the European Regulation) (see point 2.6. of the Guide).

3. According to the above-mentioned Guide, the European Succession Certificate can be partial. However, also in this case the Certificate must necessarily contain some elements, *i.e.* the issuing authority, details concerning the deceased and the applicant, the aim of the Certificate, information as to whether the succession is testate or intestate, law applicable to the succession and elements on the basis of which that law has been determined (see point 2.14. of the Guide).

4. Another question arises as to whether the European Succession Certificate can be issued in case of an internal, *i.e.* national succession too. This tends to be denied.

5. Additionally, it is not clear, how articles 69, paragraph 5, and 1, paragraph 2, letters *k* and *l* of the Regulation should be interpreted. Some authors believe that a registration of the European Succession Certificate is needed only if *a)* the estate contains immovable goods situated in Italy and *b)* the Certificate contains an acceptance of the estate.<sup>21</sup> It is debated, if the Certificate replaces the documents usually needed for the transcription. According to some scholars this should be admitted.<sup>22</sup>

6. In the territories, where the *libro fondiario* applies, the European Succession Certificate could replace the internal Certification (*certificato di eredità*) in order to provide for the registration in the land register. This possibility has been denied. However, this statement should be re-evaluated in the light of a CJEU decision of 21 June 2018, *Oberle* (C-218/16), ECLI:EU:C:2018:485.

7. Another problem concerns the interpretation of article 1, paragraph 2, letter d. In fact it is discussed, if information concerning the matrimonial property regime is covered by the presumption in article 69, paragraph 2, of the Regulation. The Italian literature tries to give a positive solution to the question.<sup>23</sup> A confirmation seems to arise from a CJEU decision of 1 March 2018, *Mahnkopf* (C-558/16), ECLI:EU:C:2018:138.

8. Lastly, part of the literature believes that the Regulation abolished the need of a differentiation between the *titulus* and *modus acquirendi*.<sup>24</sup> Traditionally, the *titulus* has been

<sup>20</sup> See AA.VV., Il Certificato Successorio Europeo – CSE. Prime proposte operative consultabili alla pagina [https://docs.wixstatic.com/ugd/a5bb44\\_be2c2bb409e04529af04ce110b073a55.pdf](https://docs.wixstatic.com/ugd/a5bb44_be2c2bb409e04529af04ce110b073a55.pdf) (10.5.2019).

<sup>21</sup> Bianca, C. M., 2015, 8.

<sup>22</sup> Padovini, F., 2013, 739 et seq.

<sup>23</sup> Damascelli, D., 2017, 74 et seq.

<sup>24</sup> Achille, D., 2018, 699. *Contra* Ballarino, T., 2013, 1116 et seq.

regulated by the *law successionis* and the *modus by the lex rei sitae*. On the contrary and in spite of article 1, paragraph 2, letter *k*, the Regulation seems to apply also to the *modus acquirendi*. The solution is consistent with the CJEU decision of 12 October 2017, *Kubicka* (C-218/16), EU:C:2017:755.

**3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country had experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?**

There are no known court decisions concerning the application of the rules on jurisdiction. Some indication can be found in the abovementioned Guide (see in particular point 1.4 of the Guide).

**3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?**

It is *e.g.* discussed if the Regulation applies also to the *modus acquirendi* (see point 3.3.5.2.). No additional problems arising in practice have been reported.

**3.3.5.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?**

There are no information available. Public policy could be invoked *e.g.* if the applicable law would lead to discrimination based on religion or sex. Succession contracts, joint and reciprocal wills and trusts as well as the rights recognized to the forced heirs could be considered also as part of the public policy. However, under the Regulation this seems not to be possible anymore.<sup>25</sup>

**3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?**

The Act No. 161 of 30 October 2014 (see article 32), assigns the competence to issue the European Succession Certificate to public notaries (without prejudice to the provisions contained in the Royal Decree No. 499 of 28 March 1929, which are applied in some parts of the Italian territory, *i.e.* the provinces of Bolzano, Trento, Trieste and Gorizia, as well as in some parts of the provinces of Udine and Belluno, and provide an internal certificate of succession, which shall be issued by the judge (though, also in these territories the European Succession Certificate has to be issued by public notaries). In case of a controversy, the interested person can bring the case to the court (sitting as a united bench) at the notary's residence place, which decides in a proceeding of a voluntary jurisdiction.

**3.3.5.7. Are there any national rules on international jurisdiction and applicable (besides the Succession Regulation) concerning the succession in your country?**

Yes, articles 46-50 Act No. 218 of 31 May 1995 contain the private international law provisions, which apply (*rectius*, traditionally applied) in case of a cross-border succession. However, these provisions shall apply only if they are not incompatible with the Succession Regulation (EU) No. 650 of 2 July 2012.

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<sup>25</sup> Cubeddu-Wiedemann, M. G., Wiedemann, A., 33 et seq.



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## Latvia

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### 1. Social perspective.

#### **1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without *affectio maritalis*).**

Latvian society tends to be conservative and traditional by recognizing on a Constitutional level exclusively the marriage between the man and the woman. From the beginning of the XXI century, with regards to the needs of different families with or without children, unregistered cohabitation started being considered as a social issue (see the “State Family Policy” of 2004<sup>1</sup>).

Recently a process of evolution started with the publication of the action plan “State Family Policy Guidelines for 2011-2017”. This action plan acknowledges the unregistered cohabitation issue by stating that “it is important to note that in the contemporary society the cohabitation of unregistered women and men as a phenomenon is socially widely accepted”.<sup>2</sup>

Nowadays family formations are various. A range of forms is noticeable, especially married couples with children, single mothers with children, married couples without children, cohabiting couples with children, cohabiting couples without children and single fathers with children.

Also if unregistered cohabitation and unmarried couples tend to be accepted by society and the discrimination against children based on their parents’ marital status is prohibited, those family formations are still not legally recognized and regulated.

Same-sex couples are legally forbidden by the article 35 of the Latvian Civil Code (“Marriage between persons of the same sex is prohibited”). Same-sex relationships are not well perceived either.<sup>3</sup>

<sup>1</sup> Konceptija „Par atbalstu ģimenēm ar bērniem (Valsts ģimenes politika)”, 2004, <http://polsis.mk.gov.lv/LoadAtt/file36511.doc> (20.5.2019).

<sup>2</sup> Ģimenes valsts politikas pamatnostādnes 2011. - 2017.gadam, [http://www.lm.gov.lv/upload/berns\\_gimene/lmpamn\\_200111\\_gvp.pdf](http://www.lm.gov.lv/upload/berns_gimene/lmpamn_200111_gvp.pdf) (20.5.2019).

<sup>3</sup> The Ombudsman of the Republic of Latvia letter No.1-8/4. of 26 January 2012. Available at: [http://www.tiesibsargs.lv/uploads/content/legacy/ombudsmans\\_annual\\_report\\_year\\_2011\\_1483444660.pdf](http://www.tiesibsargs.lv/uploads/content/legacy/ombudsmans_annual_report_year_2011_1483444660.pdf) (20.5.2019).

**1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.**

**Marriages:** There were 13,150 marriages in Latvia during year 2017, 1.1% more than 2016 (13,002), but still less than 2015 (13,617), with an increase from 9,290 of year 2010. Data show also that the number of marriages per 1,000 of population increased from 4.4 in 2010 to 6.8 in 2017. The most popular months for marriage celebration during the last decades were July and August. Majority of the couples (1,981) were approximately 25/29 years. Majority of the marriages (4,499) were celebrated in Riga. In 2017, the average duration of marriage was 13.6. In majority of the concluded marriages the spouses were single prior to marriage (9,237 males and 9,244 females). In more than 3,500 one of the spouses was divorced (3,686 males and 3,527 females) and in more than 370 was widowed (227 males and 379 females). Data show that the average age of marriage was 36.3 for males and 33.8 for females. There are no data for 2018.

II) Civil partnerships: In Latvia law does not permit civil partnerships.

**1.3. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.**

I) Divorces: In 2017 there were 5,943 divorces in Latvia. That is less for 6,061 in comparison to year 2016, but with an increase of 21% in comparison to data of year 2010. Data indicate to a floating trend on number of divorces from 2010 – when a divorce by notary was introduced in Latvia, with a peak of 8,302 dissolutions in 2011, and a bottom of 5,151 in 2015. During 2017, divorce rate for 1,000 inhabitants was 3.1, while divorce rate for 1,000 marriages was 432, with a total divorce rate of 0.46. Data indicate that in majority of divorces (1,001) the average age of ex spouses was 40/49. Alike the place of marriage celebration, majority of divorces took place in Riga. There are no data for divorces in 2018.

II) Civil partnerships' dissolutions: Latvian law does not permit civil partnerships.

**1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).**

I) Cross-border marriages and cross-border divorces: In 2017 in Latvia more than 95 % of the concluded marriages involved Latvian citizens, whereas more than 4.5% involved a Latvian citizen married to a foreigner. In detail, 1,008 Latvian grooms married Russian brides, 105 married Belarusian brides, 83 Ukrainians bride, 99 poles brides and 226 brides from other nationality. As for brides, 905 Latvian married a Russian groom, 79 a Belarusian groom, 86 a Ukrainian one, 104 a pole one, and 394 groom of other countries. There are no data for cross-border marriages for year 2018. There are no data at all for cross-border divorces.

II) Cross-border civil partnerships: Latvian law does not allow civil partnerships.



## 2. Family law.

### 2.1. General.

#### 2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?

Latvia forms part of the legal system of continental Europe. The main sources of Latvian law are written sources. The legal order of marriage is regulated by the National civil law, under the section dedicated to “Family Law” (art. 28 and following) and by the Constitution of the Republic of Latvia.

Part One of Civil Law is related to “Family Law”, Chapter 1, on Marriage, contains detailed rules for marriage including betrothal, impediments to entering into marriage, its celebration, the annulment and the termination of marriage, personal rights of spouses, as well as the property rights of spouses. Article 110 of the Constitution of the Republic of Latvia stipulates that the State protects and supports marriage, a union between a man and a woman, the family, the rights of parents and the rights of the child.

However, in the context of divorce proceedings between spouses who do not live in that Member State, or who are of different nationalities, the procedure for determining the applicable law is laid down in Regulation (EU) Council No. 1259/2010 of 20 December 2010 on the implementation of enhanced cooperation in the field of law applicable to divorce and legal separation (Rome III Regulation).

Homosexuality is legal in Latvia but same-sex families do not have the same legal protections as couples of the opposite sex.

Unregistered cohabiting partnerships, civil unions between persons of the same sex, and *de facto* cohabiting partnerships between persons of opposite or same sex are not regulated.<sup>4</sup>

#### 2.1.2. Provide a short description of the main historical developments in FL in your country.

Latvia declared its independence from the Soviet Union in 1991 (the year of the Soviet Union’s dissolution). Prior to most former Soviet states Latvia has adapted to democracy and free markets. In situation of difficulties of the 21st Century financial crisis, Latvian economic decline leveled off quickly indicating the strength of its institutions and leadership. The State ranks very high on the Human Development Index. The United Nations Development Programme’s measure of human well-being, based on factors such as life expectancy, literacy, education and standard of living.

The Family law of the old Russian Empire prevailed until 1921, when the Marriage law of Latvia was passed, drawn up primarily according to the tenets of the Lutheran Church.

At the same time, because church and state were officially separated, state registers were created so that marriages could be performed by civil rather than religious ceremonies.

During the Soviet era, there was a reform of family law, motivated in large part by the desire to remove power that had been held by religious institutions. This reform was also driven by the need to establish a new social order for the sake of the new political order.

Men and women were made equal by the law, and women were given the right to vote. Children born to married and unmarried parents were likewise made equal, with no further discrimination against bastard children. *De facto* marriage, which has come to be considered casually as “living together” or cohabiting, was recognized as a valid relationship and family model, and divorce was made easier to obtain, with the elimination of need the fault.

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<sup>4</sup> National Report: Latvia Dr. Inese Lībiņa- Egner, January 2015.

Some of these reforms were undone during the mid of 20th century Stalinist era. *De facto* marriages were abolished, because removing the need to be formally married had reduced the amount of power the state had in governing family units.

In 1992, after independence, Latvia adopted its first post Soviet family legislation as a section of its new Civil Code, largely reaffirming and clarifying much of the previous law but stripping away socialist contexts and the presumption of Soviet institution. In the Soviet legal theory, it was very important to treat family law as a body of law, separate from the Civil Code.

Right after the beginning of the post Soviet era, Latvia has incorporated family law into its Civil Code. It was a conscious, deliberate, and very meaningful gesture, indicating the difference in the legal and philosophical framework of the newly established State of Latvia.

Latvian law introduced 10 possible grounds for divorce: adultery; domestic violence; “ill-intentioned” absence for more than one year; mental illness or long-lasting contagious disease; evidence of poor moral character; infertility or impotence; aversion to sex; a separation of more than three years; marital breakdown and mutual agreement.

Marital breakdown has historically been the most common reason for divorce. The three-year separation ground was originally introduced in order to allow divorce of couples who had been separated by the events of World War I. Search for a missing person was at a time difficult and ineffective in comparison to modern times. Scarce availability of data, no indication where the missing person may be, along with no real search mechanisms and tools. Enabling a divorce of a missing spouse hence allowed people to move on with their lives.

Since divorce laws had not yet been liberalized in most countries, introduction of this ground for divorce made Latvia temporarily become the Reno of western Europe. Latvian divorce based on the three-year separation was one of the simplest to obtain, especially because it did not require the spouse being divorced to appear in a court or be contacted at all.

In the 21st century, 34,4 percent of new Latvian marriages end in divorce. Following a divorce, a woman has to wait 300 days to remarry, unless she is remarrying her ex-husband. Exceptions are made if the woman gives birth before the 300 days are over; if, after four months, a doctor certifies that she is not pregnant; or if the court that granted her permission to remarry. The purpose of the waiting period was initially to ensure that a child conceived by the woman’s first husband was not born in wedlock to another man.<sup>5</sup>

### 2.1.3. What are the general principles of FL in your country?

As said in Latvia’s civil law, at sub-chapter 2, art. 32, marriage prior to the attaining of eighteen years of age is prohibited. Exception is in the case provided for in Section 33: a person who has attained sixteen years of age may marry with the consent of his or her parents or guardians if he or she marries a person of age of majority.

According to art. 69, a court or notary may dissolve a marriage in the cases provided. A marriage may be dissolved if the marriage is broken.

The marriage is dissolved as of the day when the court judgment concerning the dissolution of the marriage comes into legal effect.

According to art. 71, a marriage shall be deemed to have broken down if the spouses no longer cohabit and there is no longer any prospect that the spouses shall renew cohabitation.

Art. 72 provides that a marriage is presumed to have broken down if the spouses have lived apart for at least three years.

In the sub-chapter 3, titled “Personal Rights of Spouses”, at art. 84 and following, marriage creates a duty on the part of a husband and a wife to be faithful to each other, to live together, to take care of each other and to jointly ensure the welfare of their family.

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<sup>5</sup> Scherpe M. J., 2016.

Both spouses have equal rights in regards to the organization of family life. In event of differences of opinion, spouses shall endeavor to reach an agreement. Spouses may apply to the court for the resolution of disputes.

Main point is also the art 110 of the Constitution of the Republic of Latvia, providing that *“The State shall protect and support marriage – a union between a man and a woman – the family, the rights of parents and rights of the child. The State shall provide special support to disabled children, children left without parental care or who have suffered from violence”*, and thus decided that the union of unmarried people cannot be equated to marriage.

Since Latvian national laws and other legislative acts do not contain a general legal order on informal relationships, there is also no general definition of informal relationship. However, in previously mentioned cases when the court has had to assess whether there is an actual cohabitation between the parties, the focus was mostly on whether the persons had lived in a common household, how long they had cohabited, whether there had been common expenses (common budget), and whether they had shared psychological and emotional links. In certain cases, it was also taken into account as to whether children had been born in the course of the cohabitation.

The Court has taken the preconditions for establishing an actual cohabitation from the Latvian Civil Law, which states that *“Marriage creates a duty on the part of a husband and a wife to be faithful to each other, to live together, to take care of each other and to jointly ensure the welfare of their family”*. The Court suggested that out of this provision derives the obligation to live together in a single family dwelling and to conduct a *de facto* cohabitation. Accordingly, the Court assessed the existence of a common life and a common household, indicating that since partnership in Latvia is not defined, there are no other preconditions for detecting the existence of such relationship.

**2.1.4. Define “family” and “family member” in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

According to art. 84 of Latvia civil law, the “members of the family” are the spouses, the children, the brothers, the sisters, the relatives, the relatives in law and, lastly, the partners (in both cases of civil unions and of registered partnerships).

In Latvian legal system, there’s not a single concept of family, since there are different notions that have different implications relevant for family law, successions law, tax law<sup>6</sup>, etc.

**2.1.5. Family formations.**

According to Latvian national legislation family formations are only those who derive from the formal marriage of an opposite sex couple.<sup>7</sup>

**2.1.5.1 Define the “spouse” in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

There is not a definition of “spouse” in Latvian national legal system but, as the Constitution of the Latvian Republic states in Article 110,<sup>8</sup> *“marriage (is) a union between a man and a woman”*.

Marriage requirements are disciplined in the Latvian Civil code from articles 32 to 38,<sup>9</sup> which are called *“Impediments to Entering into Marriage”*. Marriage can be contracted if none of the following impediments is present in the couple:

<sup>6</sup> [https://www.euro-family.eu/atlas\\_scheda-lv](https://www.euro-family.eu/atlas_scheda-lv) (20.5.2019).

<sup>7</sup> National Report: LATVIA, Dr. Inese Lībiņa-Egner, January 2015, p.1.

<sup>8</sup> Constitution of the Republic of Latvia: Law of the Republic of Latvia. Latvijas Vēstnesis, 1 July 1993, no.43.

- Age (prior to the attaining of eighteen years of age, marriage is prohibited, except if the person who has attained sixteen years of age may marry with the consent of his or her parents or guardians, in case he or she marries a person of age of majority Articles 32 and 33)
- Person who has been found by a court to lack capacity to act, due to mental illness or mental deficiency (Article 34).
- Freedom of marital status (Article 38).
- Kinship, same sex, adoption (except the cases where the legal relationship established by adoption is finished) and trustee before the termination of the relations of guardianship or trusteeship (Articles 35 and 38).

This single definition is valid for the entire Latvian legal system.

**2.1.5.2 What types of relationships/unions between persons are recognised in FL of your country? In particular, formal (registered) and informal (de facto) unions, heterosexual and same-sex unions, unions with and without affectio maritalis. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

So far the Latvian legal system recognizes only the relationship that comes from the traditional marriage between a man and woman, as expressly stated in Article 110 of the Constitution: *“The State shall protect and support marriage – a union between a man and a woman – the family, the rights of parents and rights of the child. The State shall provide special support to disabled children, children left without parental care or who have suffered from violence”*.

Aside from the Constitutional definition of family deriving from marriage, there are no official regulations or laws about formal (registered) and informal (*de facto*) unions. Until today, same sex unions are forbidden, as stated in article 35 of the Latvian Civil Code.<sup>10</sup>

Only in recent years, the Latvian Criminal Procedure Law, the Latvian Administrative Violation Code and the Latvian Civil Procedure Law have started to extend the definition of “family”. In fact, in 2009 the Latvian Criminal Procedure Law<sup>11</sup> has introduced the term *“immediate family” (tuvinieki)* thus referring to *“a person with whom the relevant natural person is living together and with whom he or she has a common (joint) household.”* With this introduction the borders for a wider prospective of family have been opened by stating that these people must have the same rights in criminal procedure law as people living in a legal marriage.

Then, in 2013, the Latvian Civil Procedure Law<sup>12</sup> has established the principle of “provisional protection” against domestic violence, regardless of whether the offended people have ever been married or lived together thus including also people between whom there are or have been close personal or intimate relationships.

Finally, in 2014, the Latvian Criminal Procedure Law has allowed the refusal to testify to the person with whom the accused is living and with whom he or she has a joint (single) household. The right of testify refusal is also stated in the Latvian Administrative Violations Code<sup>13</sup> which recognizes a more severe punishment if an injury occurs to a person which is part of an unregistered spousal relationship (*neregistrētas laulāto attiecības*) with the offender.

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<sup>9</sup> Civil Law. First part. Family rights. Law of the Republic of Latvia. "Ziņotājs", 10 June 1993 no.32 to 38.

<sup>10</sup> The Ombudsman of the Republic of Latvia letter No.1-8/4. of 26 January 2012. Available at: [tiesibsargs.lv/par-mums/konsultativas-padomes/par-partnerattiecibu-tiesisko-regulejumu/](http://tiesibsargs.lv/par-mums/konsultativas-padomes/par-partnerattiecibu-tiesisko-regulejumu/) (20.5.2019).

<sup>11</sup> Criminal Procedure Law: Law of the Republic of Latvia. Latvijas Vēstnesis, 11 May 2005, no. 74, at S. 12, Part 5.

<sup>12</sup> Civil Procedure Law: Law of the Republic of Latvia. Latvijas Vēstnesis, 3 November 1998, no.2326/330, at S. 450.

<sup>13</sup> Latvian Administrative Violations Code: Law of the Republic of Latvia. "Ziņotājs", 20 December 1998, no.51, at Para. 3 S. 264.

Still there is no complete and recognized regulation or law about formal (registered) and informal (*de facto*) unions, heterosexual and same-sex unions, unions with and without *affectio maritalis*, but only a sporadic tolerance in some legal areas of this “atypical” family formations.

**2.1.6. What legal effects are attached to different family formations referred to in question 2.5.?**

Latvian legal system does not recognize any kind of different family formation, except the traditional family based on the marriage of a man and a woman. The only legal effects are those that derive from the opposite-sex marriage.

From marriage, the spouses have the duty to be faithful to each other, to live together, to take care of each other and to jointly ensure the welfare of their family (art. 84 of Latvian Civil Code). Both man and woman have the same rights in regards to the organization of family life (art. 85 of Latvian Civil Code) and to act, for financial matters, on behalf of each other (art. 87 of Latvian Civil Code).

**2.1.7. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/de facto family formations? Explain briefly.**

Although there is no proper regulation on formal/registered or informal/*de facto* family formations to date, there has not been developed a concrete proposal to solve this issue.

**2.2. Property relations.**

**2.2.1. List different family property regimes in your country.**

In the Latvian Law, the legal property system is represented by the community property.<sup>14</sup>

The second property regime is represented by the separation of assets, which must be defined by the spouses through a specific agreement.<sup>15</sup>

Moreover, when the couple gets married, the spouses buy a property with common funds and this property will be in common. When the property of assets is uncertain, this will also be a common goods.

One could say that after marriage celebration the automatic patrimonial regime is the common regime. There is the exception though, when there is an intention of the spouses to separate their assets.<sup>16</sup>

**2.2.2. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?**

Properties excluded from the community of assets of the spouses are:<sup>17</sup>

- property owned by a spouse before the marriage, or property the spouses have, by contract, designated as separate property;

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<sup>14</sup> Article 89 Civil Code.

<sup>15</sup> Galgano, F., VIII ed., XXXIV.

<sup>16</sup> [www.coupleseurope.eu/it/latvia/topics/2-C-%C3%A8-un-regime-patrimoniale-legale-del-matrimonio-ed-in-caso-affermativo-cosa-prevede](http://www.coupleseurope.eu/it/latvia/topics/2-C-%C3%A8-un-regime-patrimoniale-legale-del-matrimonio-ed-in-caso-affermativo-cosa-prevede) (20.5.2019).

<sup>17</sup> [www.coupleseurope.eu/en/latvia/topics/2-is-there-a-statutory-matrimonial-property-regime-and-if-so-what-does-it-provide](http://www.coupleseurope.eu/en/latvia/topics/2-is-there-a-statutory-matrimonial-property-regime-and-if-so-what-does-it-provide) (20.5.2019).

- articles, which are suitable only for the personal use of one spouse, or are required for his or her independent work;
- property, which was acquired *gratis* during the marriage by one of the spouses;
- income from the separate property of a spouse that is not assigned to the needs of the family and joint household finances;
- property that replaces the property referred to in the previous Paragraphs.<sup>18</sup>

**2.2.3. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a “new regime just for them”?**

No, it is not. Under Latvian Law there is no possibility to choose other type of property regime going beyond those provided by Law.

**2.2.4. Explain briefly the rules on the administration of family property and compare if there are difference for different property regimes.**

Spouses manage together the goods of the community of assets. Spouses may conclude an agreement to manage separately their common property. In that case the consent from other spouse is necessary. The consent is necessary for the real estate properties. For the movable property the consent is supposed. There are some exceptions which occur when the consent isn't supposed when the third parties are aware of the absence of consent or the property is just of the spouses.

**2.2.5. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

Yes, it is. Under Latvian law it is possible to create an agreement to choose the regime of separation of goods or of common goods.<sup>19</sup>

There is a Land register for the real estate and the register of enterprises in whose serviced administrative territory one spouse's place of residence is registered.<sup>20</sup>

The agreement can be stipulated before or after the wedding celebration. In the later scenario, the agreement is valid from the moment of the subscription. For the effects *vis-à-vis* third parties it is fundamental to perform a registration on the respective regional department of the Register of Enterprises in whose serviced administrative territory one spouse's place of residence is registered. This regulation is inderogable.<sup>21</sup>

The register must contain the details concerning the spouses, the choice for the properties regime, the property of each spouse the responsibility of the spouses for the obligations, restriction on the common property and information about third party. The register is public and all people can consult it and get access to information contained therein.<sup>22</sup>

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<sup>18</sup> Article 91 Civil Code.

<sup>19</sup> Article 89 ss. Civil Code.

<sup>20</sup> Atkin, B., 2010.

<sup>21</sup> Article 116 Civil Code.

<sup>22</sup> [www.coupleseurope.eu/en/latvia/topics/4-can-or-must-the-matrimonial-property-regime-be-registered](http://www.coupleseurope.eu/en/latvia/topics/4-can-or-must-the-matrimonial-property-regime-be-registered) (20.5.2019).

**2.2.6. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

The property of each partner can't be used for the debts create from other partners. When the third party forecloses on the individual property of innocent spouse he can ask the release of her property<sup>23</sup>. When for the each debts is used the property of other partner he can ask the division of the property or the release of her part of property.

The spouses are responsible for their common property. If that property is not sufficient for the satisfaction of their creditor, in an obligation relating to family needs, creditor can get satisfaction with the individual property of each of the spouses.<sup>24</sup>

**2.2.7. Describe allocation and division of property in case of divorce, separation or dissolution of the union.**

In case of separation or divorce each spouse shall maintain his/her properties of his/her personal assets. We must differentiate between the hypothesis of choose, that is between the commons of assets and the separation of assets. In the first hypothesis, once creditors are satisfied, the spouses will divide the property in equal parts. In case of separation of assets each spouse maintains his/her property<sup>25</sup>.

**2.2.8. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?**

Yes, in Latvian regulations there is the dowry. In particular, it is disciplined on the 111 and 112 article of Civil Code. When the dowry is over 700 euro it is necessary to write the settlement agreement. The dowry was reintroduced in 1990 after the collapse of the Soviet Union.<sup>26</sup>

**2.3. Cross-border issues.**

**2.3.1. Is your country participating in the enhanced cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?**

The attitude of Latvia towards the regulations adopted under the enhanced cooperation umbrella is diverse. Latvia adopted the Rome III Regulation no. 1259/2010<sup>27</sup> at its birth, but it does not take part in the enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and the property consequences of registered partnerships.

The main obstacle to acceptance of the Property regulations set in Latvia is in the fear that same-sex marriages would affect automatic recognition on their ground, irrespective of the fact that in national system marriage is strictly confined to opposite-sex couples. Though the regulations do not

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<sup>23</sup> Article 100 Civil Code.

<sup>24</sup> Article 96 Civil Code.

<sup>25</sup> <http://www.coupleurope.eu/en/latvia/topics/5-what-are-the-consequences-of-divorce-separation> (20.5.2019).

<sup>26</sup> Nobles, R., Schiff, D., 2016, 284.

<sup>27</sup> Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III Regulation), OJ 2010 L 343/10.

touch upon national family law, the CJEU practice in recent *Coman Hamilton* judgement<sup>28</sup> clarified that national concept of a “spouse” lost its full effect in cross-border case where “euroautonomous” interpretation of a “spouse” takes ground.<sup>29</sup>

It is not likely it would join.

**2.3.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as “marriage”, “matrimonial property agreement”, “partnership property agreement” etc.?**

Latvia is not participating in enhanced cooperation concerning these Regulations.

**2.3.3. Are you expecting any problems with the application of the rules on jurisdiction?**

Latvia is not participating in enhanced cooperation concerning these Regulations.

**2.3.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

Latvia is not participating in enhanced cooperation concerning these Regulations.

**2.3.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

Latvia is not participating in enhanced cooperation concerning these Regulations.

**2.3.6. Are there any national rules on international jurisdiction and applicable (besides the Regulations) concerning the matrimonial property regime in your country?**

Yes, there are national rules on jurisdiction and applicable law. Latvian private international law rules are not prescribed by a separate private international law act. International Civil Procedure is contained in Part of F of the 1998 Civil Procedure Act (ss 636–716). However, there are no rules on international jurisdiction whatsoever, as international jurisdiction of Latvian courts derives from the domestic rules on territorial jurisdiction.

Applicable law rules are contained in the introductory Part of the 1937 Latvian Civil Code (arts 7–25). Applicable law rules relating to matrimonial property regimes and other legal relations between spouses are prescribed by Art 13 of the Civil Code. The main connecting factors, *lex loci domicilii* and *lex rei sitae* are rather traditional. The rule at first directs towards the application of Latvian substantive law for both personal and property relations of the spouses having their domicile in Latvia. Despite a foreign domicile of the spouses, the Latvian law uses the criterion of situs and accords to the application of Latvian law if the property of the spouses is located in Latvia.<sup>30</sup>

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<sup>28</sup> Case C-673/16, 5<sup>th</sup> June 2018. ECLI:EU:C:2018:385

<sup>29</sup> Cross-border matrimonial rights in the EU: how the notion of the supranational citizen alters the conflict of family laws, TEPSA Briefs – January 2019. <http://www.tepsa.eu/wp-content/uploads/2019/01/Maria-Breskaya-Brief-Final-1.pdf> (20.5.2019).

<sup>30</sup> Hyun Suk, K., Rudevskas, B., 2017, 2262-63.



### 3. Succession law

#### 3.1. General.

##### 3.1.1. What are the main legal sources of Succession Law (SL) in your country? What are the additional legal sources of SL?

The main legal source of inheritance law in Latvia is civil law: Civillikums, Second Part, Successory Law, 22 February 1937, n. 42 and subsequent amendments.

The notarial law is an additional legal source: Notariāta likums, 9 July 1993, n. 48 and subsequent amendments.

##### 3.1.2. Provide a short description of the main historical developments in SL in your country.

The succession mechanism is based on the principles and institutions of Roman law. Based on these principles, substantially the inheritance is acquired only through acceptance. As in Roman law, the offer of inheritance does not mean acceptance of the same but only an invitation to inherit that may or may not be accepted (*aditio hereditatis*).<sup>31</sup>

During the drafting of the civil law the question arose whether the purchase of the inheritance should follow the principle of Roman law or the Germanic one, according to which an automatic transfer of the inheritance to the heir takes place without the need for a will on the part of these.

Finally, the choice of the Romanist principle was chosen by making the acquisition of the inheritance depend on an act of will of the heir.

##### 3.1.3. What are the general principles of succession in your country?

Death of an individual is followed by opening of the succession with respect to all of assets. In the absence of a will or inheritance contract, the succession will be regulated by law.

In the absence of will or inheritance contract the next heirs of the *de cuius* will inherit.

Civil law reserves a portion of the assets to the close relatives of the deceased in the case of a will or inheritance contract.

Persons who have become unworthy of the subject of their inheritance cannot receive inheritance from the same unless they are expressly rehabilitated.<sup>32</sup>

##### 3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.

The succession procedure begins at the time of the death of the subject whose inheritance is at stake.

The proceeding closes with the merger of the estate with the estate of the heir and the payment of the hereditary creditors.

The competence of the authorities involved in inheritance proceedings is determined on the basis of the place where the movable and immovable property is located.

The event of death must be recorded within 6 working days from the date of death or ascertainment of the same. To this end, a special death certificate is issued by the health institution or by a doctor.

No taxation applies to this registration.

<sup>31</sup> Novitsky, I. B., Peretersky, I. S., 2013, 257.

<sup>32</sup> Bulavs, P., Solovjakovs, J., Šermukšnis, I., Virko, 2007, <https://www.tm.gov.lv/lv/nozarespolitika/petijum> (20.5.2019).

The obligation to notify the competent office of the event of death is incumbent on the spouse, on other family members, on any person present at the time of death or informed thereof.<sup>33</sup>

**3.1.5. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?**

Hereditary succession can be regulated by law, by a will, or by an inheritance contract.

In particular, pursuant to article 389 of the civil law, the basis of the hereditary call is the law or the will of the person whose succession it is.

The subject of his inheritance can express his will in a will or in a succession contract.

In case of conflict:

- the succession contract prevails over the will;
- the succession contract and the will prevail over the rules relating to the succession *ex lege*.

It is possible the cumulative application of the legal titles related to the succession of a subject. In fact, the disciplines deriving from the succession contract, from the will and from the law can coexist<sup>34</sup>.

**3.1.6. What happens with the estate of inheritance if the decedent has no heirs?**

According to article 416 of Civil Code, when there are no heirs, or they have not been traced, or they are unable to prove their inheritance rights, after the opening of the succession the inheritance is purchased by the state.

The State will be responsible for the hereditary debts limited to the value of the assets that make up the acquired inheritance, but not beyond that value.<sup>35</sup>

**3.1.7. Are there special rules or limitations concerning succession with reference to the deceased's (or heir's) culture, tradition, religion or other characteristics?**

No, Latvian civil law does not provide for inheritance restrictions on the culture, tradition, religions or other characteristics of the deceased or heir or legatee.

**3.2. Intestate succession.**

**3.2.1. Are men and women equal in succession? Are domestic and foreign nationals equal in succession? Are decedent's children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?**

Yes, men and women are treated equally by Latvian inheritance law. In fact, the succession law does not make distinctions based on sex. Civil law does not distinguish between persons involved in inheritance proceedings on the basis of citizenship. The children of the deceased are treated equally by civil law. Under Article 400 Civil Code, children who come from parents who are not married inherit in the same way children born in marriage. The adopted children and the children born within the marriage are treated equally by the succession law. The inheritance law expressly provides for participation in the succession of adopted children. Pursuant to Article 401 Civil Code Adopted and his

<sup>33</sup> <https://www.tm.gov.lv/lv/pakalpojumi/nozares-pakalpojumi-1/mirsanas-fakta-registracija> (20.5.2019).

<sup>34</sup> Gencs, Z., 2012.

<sup>35</sup> Gencs, Z., 2012.

descendants inherit from the adopter and his relatives. According to Article 386 Civil Code, a conceived child can inherit if at the time of the opening of the succession it is conceived, although not yet born.<sup>36</sup>

Cohabitant partners do not receive the same treatment as married spouses. The succession law does not explicitly refer to cohabitant partners. The Republic of Latvia does not recognize any form of union between same-sex couples.

In terms of successions, civil law makes no reference to the rights of homosexual couples.

### 3.2.2. Are legal persons capable of inheriting? If yes, on which basis?

Yes, legal persons are able to inherit. Pursuant to Article 385 Civil Code, anyone able to acquire a property right is also able to acquire an inheritance right.<sup>37</sup>

### 3.2.3. Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.

Yes, the institute of unworthiness of succession is present in the system.

According to Article 824 Civil Code, heir is considered unworthy and therefore loses the inheritance, if:

- 1) person which has intentionally caused the death of a descendant of the person whose inheritance it is or the nearest heir in front of him in succession, or has intentionally caused damage to the health of the person whose inheritance it is;
- 2) person that through violence or fraud has encouraged or prevented the person whose inheritance is to modify or revoke the acts of last will;
- 3) person who with malicious intent concealed the acts containing the last wishes of the person whose inheritance it is;
- 4) person whoever falsely drafted the last instructions of someone's will;
- 5) person which has refused the duty foreseen by acts of last will to assume the position of guardian or the duty to raise someone;
- 6) person who does not fulfill the duty required by acts of last will to organize the burial.

If the person responsible for one of these actions is forgiven he will not lose the inheritance.<sup>38</sup>

### 3.2.4. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?

Yes, there are different classes of heirs *ex lege*. There is a priority in the succession between the different ones. Pursuant to article 403 Civil Code, the heirs receive a proportion of inheritance in relation to a specific order based on the type of kinship and the proximity of their degrees.

According to article 404 Civil Code, we distinguish four classes of legal heirs who inherit according to the following order:

- 1) in the first class all descendants of the *de cuius*;
- 2) in the second class, they inherit the nephews *ex filio*, the brothers and sisters of the *de cuius* and the nephews *ex frate* of the deceased;
- 3) in the third class, they inherit the brothers and sisters acquired and their children;
- 4) in the fourth degree, they inherit the closest relative and their children.

The heirs of the next class take over from the heirs of the previous class when they are absent.<sup>39</sup>

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<sup>36</sup> Gencs Z., 2012.

<sup>37</sup> Gencs Z., 2012.

<sup>38</sup> Gencs Z., 2012.

### 3.2.5. Are the heirs liable for deceased's debts and under which conditions?

Yes, the heirs are responsible for the debts of the deceased.

Pursuant to Article 706 Civil Code, an heir is required to fulfill all the duties imposed in the will. He is also obliged to fulfill all the duties deriving from the acceptance of the inheritance. According to Article 707 Civil Code, in the case of an heir who accepts the inheritance, if the hereditary patrimony is not sufficient to fulfill all the hereditary debts, then, the heir with his own inheritance will answer the hereditary debts.<sup>40</sup>

Pursuant to Article 708 of the civil law, the heir can avoid answering hereditary debts by accepting the inheritance with the benefit of the inventory.<sup>41</sup>

### 3.2.6. What is the manner of renouncing the succession rights?

Under Article 689 Civil Code, no one is forced to accept an inheritance. It is therefore always possible to forgo the inheritance. Only the heirs by succession contract cannot renounce the inheritance if this right has not been expressly provided for in the succession contract. The renunciation of inheritance must be expressed definitively and without conditions. According to Article 766 Civil Code, it is possible to put in place an agreement with which the successor renounces the inheritance, while the person whose inheritance he is dealing with is alive. This agreement must be in writing.

Under Article 775 Civil Code, anyone with the legal capacity to dispose of his property can validly renounce an inheritance. According to article 776 of the civil law, the renunciation of the inheritance can be expressed or tacit. According to article 781 of the civil law, the one who accepted the inheritance cannot renounce it.<sup>42</sup>

## 3.3. Disposition of property upon death.

### 3.3.1. Testate succession.

#### 3.3.1.1. Explain the conditions for testate succession.

The succession is governed by the will when at the opening of the succession there is a validly drawn will, where the subject of the succession is treating his succession in whole or in part. The discipline contained within the will prevails over the regulatory framework.<sup>43</sup>

#### 3.3.1.2. Who has the testamentary capacity?

Pursuant to Article 420 of the Civil Law any person who is not a minor can make a will. Children under the age of 16 may make a will. Those who are under trust because of their dissolute lifestyle or spendthrift can make a will.

According to Article 421 of the Civil Law, those who are unable to write or speak understandably and therefore are unable to clearly express their testamentary capacity cannot make a will. Mentally ill people who are in a condition of mental illness are unable to make a will.<sup>44</sup>

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<sup>39</sup> Gencs Z., 2012.

<sup>40</sup> Zīle, K., 2015; Zīle K., 2016.

<sup>41</sup> Gencs Z., 2012.

<sup>42</sup> Gencs Z., 2012.

<sup>43</sup> Bulavs, P., Solovjakovs, J., Šermukšnis, I., Virko, 2007, <https://www.tm.gov.lv/lv/nozarespolitika/petijum> (20.5.2019).

<sup>44</sup> Gencs, Z., 2012.

### 3.3.1.3. What are the conditions and permissible contents of the will?

According to Article 422 of the civil law, the testator can freely determine the content of his will and therefore he can dispose of his property for the time of his death. However the testator cannot dispose of the part that the law reserves to certain subjects.<sup>45</sup> The will can contain institutions of heirs, legacies, charitable provisions.

### 3.3.1.4. Describe the characteristics of will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a will?

According to Article 432 of the civil law, the public will and the private will are recognized. According to Article 433 of the civil law, the public will can be received either by a notary, by a court or by a consul of the Republic of Latvia in a foreign state.<sup>46</sup>

### 3.3.1.5. Is there a (public) register of wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.

The Notary, the Official of the Court or the Consul of the Republic of Latvia in a foreign State once they have received the public will must pass it on to the register of the last will.

### 3.3.2. Succession agreement (*negotia mortis causa*). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.

Yes, there is an alternative way to the will governed by articles 639 and following of the civil law. Through the succession contract the deceased has during his lifetime transferred the rights relating to his future inheritance or part of it. By means of the succession contract, two parties can transfer to each other rights relating to their future inheritance. However, an inheritance contract through which the subject of the inheritance is promised to appoint an heir is not considered admissible. A succession contract must be certified by a notary. If the succession contract concerns real estate assets, the contract must be recorded in the land register.<sup>47</sup>

### 3.3.3. Are conditions for validity of wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?

The general rules of civil law concerning contracts are particularly applicable to inheritance contracts.

### 3.3.4. Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?

Yes, the successors' interests of certain family members are protected independently of any testamentary dispositions or inheritance contracts. According to article 423 of the civil law, the subjects to which the law guarantees a part of the patrimony are:

- the spouse and / or the descendants;

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<sup>45</sup> Gencs, Z., 2012.

<sup>46</sup> Gencs, Z., 2012.

<sup>47</sup> Bulavs, P., Solovjakovs, J., Šermukšnis, I., Virko, 2007, <https://www.tm.gov.lv/lv/nozarespolitika/petijum> (20.5.2019).

- in the event that there is no spouse and / or descendants, the parents.

### 3.3.5. Cross-border issues.

#### 3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?

The EU Regulation n. 650/2012 applies in the Republic of Latvia. The Notary is the public authority responsible for issuing the European succession certificate. The competent authority to assign executive power to a foreign provision is the District Court.

#### 3.3.5.2. Are there any problems with the scope of application?

At present there are no problems with the purpose of the application.

#### 3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country have experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?

The succession is governed by the law of the place where the movable and immovable property (*lex rei sitae*) is situated according to article 18 of the civil law. Following the opening of inheritances of a cross-border nature, requests in the jurisdictional sphere are governed by EU Regulation no. 650/2012.

In particular, the subject matter concerns the competence, the applicable law, the recognition and execution of judicial decisions, the acceptance and execution of public acts concerning succession and the creation of a European succession certificate.

Unlike other European Union regulations that allow the determination of only the applicable law (Rome I, Rome II, Rome III), the succession regulation covers the rules of both the applicable law and jurisdiction and the recognition and execution of judgments issued in the European Union.<sup>48</sup>

#### 3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?

At present there are no problems in determining the applicable law. The applicable law should be determined by Chapter III of the succession regulation. It is possible that the competent court may apply the law of another Member State or the law of a third country although these rules are designed as far as possible to allow the court and other competent authorities to deal with the succession.

The Succession regulation provides for the partial autonomy of the testator, allowing the person to choose the law applicable to the succession provided that the law chosen is the law of the country of nationality of the deceased. If the choice of the law applicable to the succession was not taken by the testator or if the choice is not clear or if it is invalidated, the basic rule is to apply the law of the country of the last habitual residence of the deceased.

At the same time, in very rare cases, the possibility of applying the law of a more closely connected country is not excluded.<sup>49</sup>

<sup>48</sup> <https://www.tm.gov.lv/lv/cits/eiropas-parlamenta-un-padomes-2012-gada-4-julija-regula-es-nr-650-2012-par-jurisdikciju-piemerojamie> (20.5.2019).

<sup>49</sup> [www.tm.gov.lv/lv/cits/eiropas-parlamenta-un-padomes-2012-gada-4-julija-regula-es-nr-650-2012-par-jurisdikciju-piemerojamie](http://www.tm.gov.lv/lv/cits/eiropas-parlamenta-un-padomes-2012-gada-4-julija-regula-es-nr-650-2012-par-jurisdikciju-piemerojamie) (20.5.2019).

**3.3.5.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?**

At present, with regard to recognition or execution, no problems are revealed and no public policies referred to by the parties or by the court regarding recognition and enforcement are found.

**3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?**

At present, decisions regarding the operation of the succession certificate are not found. If the requirements are fulfilled, the succession regulation applies to the inheritance of deceased persons starting from 17 August 2015.<sup>50</sup>

**3.3.5.7. Are there any national rules on international jurisdiction and applicable (besides the Succession Regulation) concerning the succession in your country?**

Yes, there are national rules on international jurisdiction. The succession is governed by the law of the place where the movable and immovable property (*lex rei sitae*) is situated according to Article 18 of the Civil Law. The testator can choose the law with which to discipline his succession.

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<sup>50</sup> [www.tm.gov.lv/lv/cits/eiropas-parlamenta-un-padomes-2012-gada-4-julija-regula-es-nr-650-2012-par-jurisdikciju-piemerojamie](http://www.tm.gov.lv/lv/cits/eiropas-parlamenta-un-padomes-2012-gada-4-julija-regula-es-nr-650-2012-par-jurisdikciju-piemerojamie) (20.5.2019).

# Lithuania

Agne Limante and Tomas Chochrin

Agne Limante (1.;2.)

Tomas Chochrin (3.)

## 1. Social perspective.

### 1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without *affectio maritalis*).

As of 1 January 2019, around 2.8 million permanent residents lived in Lithuania. In 2005–2017, the resident population declined by 546.3 thousand<sup>1</sup>, or 16.3 per cent.<sup>2</sup> The biggest part of decrease in number is linked to migration to EU or EEA countries since many persons left to work to the UK, Ireland, Norway, Germany or other EU countries.

A bit more than 67 per cent of residents of Lithuania live in cities and towns, and a bit less than 33 per cent – in rural areas. Women account for almost 54 per cent of the total resident population.<sup>3</sup> At the beginning of 2018, the number of children (aged 0–14) amounted to 421.4 thousand, or 15 per cent of the total number of resident population, people aged 15–64 – 1 million 835.7 thousand, or 65.4 per cent, elderly resident population (aged 65 and older) – 551.8 thousand, or 19.6 per cent. Compared at the beginning 2005, the number of children (aged 0–14) decreased by 152.2 thousand (26.5 per cent), the number of population aged 15–64 – by 414.8 thousand (18.4 per cent), but the number of elderly people increased by 20.7 thousand (3.9 per cent)<sup>4</sup>.

At the beginning of 2018, 1 million 171.4 thousand (50.8 per cent) persons aged 18 and older were married. Married men accounted for 53.4 per cent of the total number of men aged 18 and older, married women – for 48.7 per cent respectively. Moreover, 10.1 per cent of persons aged 18 and older were divorced, each eleventh – widowed. The number of divorced women was 1.8 times, that of widowed women – 7 times higher than that of men.<sup>5</sup>

The basis of Lithuanian nation is the nuclear family. In 2017, the average household size was 2.18 persons (2.20 in the city, 2.15 in the countryside). One household had 1.71 adults and 0.47 dependent children. Nearly 39 percent all households were single person households. Families with children accounted for 30 percent of all households: 33% in the city, 25% in the countryside.

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<sup>1</sup> In 2005–2017, due to negative net international migration, the population declined by 392.6 thousand (71.9 per cent of the total decline), due to the natural decrease – by 153.7 thousand (28.1 per cent of the total decline).

<sup>2</sup> Official Statistics. Demographic Yearbook 2017. Available at: <https://osp.stat.gov.lt/services-portlet/pub-edition-file?id=30420> (20.5.2019).

<sup>3</sup> Official Statistics. Demographic Yearbook 2017. Available at: <https://osp.stat.gov.lt/services-portlet/pub-edition-file?id=30420> (20.5.2019).

<sup>4</sup> Official Statistics. Demographic Yearbook 2017. Available at: <https://osp.stat.gov.lt/services-portlet/pub-edition-file?id=30420> (20.5.2019).

<sup>5</sup> Official Statistics. Demographic Yearbook 2017. Available at: <https://osp.stat.gov.lt/services-portlet/pub-edition-file?id=30420> (20.5.2019).



Households, made up of two adults and three or more dependent children, accounted only for 1% in the city and 2% in rural areas<sup>6</sup>.

In EU, Lithuania has one of the highest rates of parents raising children alone. In 2018, recorded proportion of single adult households with children in Lithuania was 26% (at EU level, 15% of households with children were made up of single parents with children)<sup>7</sup>. Births outside marriage accounts for under a third of babies born in Lithuania (27.4%)<sup>8</sup>.

**1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.**

In 2018, 19.5 thousand marriages were registered in Lithuania. The number of marriages, compared to 2017, decreased by 1.7 thousand (8%). Number of marriages per 1 thousand inhabitants decreased from 7.5 (2017) to 7 (2018).<sup>9</sup> In general, during the last 5 years the amount of marriages concluded is decreasing.

The table below represents the statistics during 2014-2018<sup>10</sup>.

Marriages/Year	Urban and rural areas	Urban areas	Rural areas
2018	19,734	13,530	6,204
2017	21,186	14,684	6,502
2016	21,347	14,914	6,433
2015	21,987	15,219	6,768
2014	22,142	15,250	6,892

According to statistics, most of people who concluded marriage in 2018 were between 25 and 35 years old (58 % of all marriages). Women enter into marriage (first marriage), on average, being 27.8 years old, men - 30.2 years old.<sup>11</sup> The number of underage entering into marriage is very small, one could also notice that the number of persons below 25 concluding marriage is decreasing.

	2014	2015	2016	2017	2018
Age	22 142	21 987	21 347	21 186	19 734
Under 15	-	-	-	-	-
15-19	114	112	87	92	75
20-24	2 953	2 702	2 290	2 114	1 711
25-29	8 076	8 014	7 468	7 149	6 586
30-34	4 802	4 875	4 862	5 109	4 862
35-39	2 286	2 325	2 369	2 375	2 308
40-44	1 422	1 379	1 405	1 454	1 326
45-49	894	962	1 040	1 027	984
50-54	683	678	754	744	763

<sup>6</sup> Official Statistics. *Income and living conditions*. 2017. Available at: <https://www.stat.gov.lt/services-portlet/pub-edition-file?id=30782> (20.5.2019).

<sup>7</sup> Eurostat. *Households with children in the EU*. 2018. Available at: <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20180601-1?inheritRedirect=true&redirect=%2Feurostat%2Fnews%2Fwhats-new> (20.5.2019).

<sup>8</sup> Eurostat, 2018. Available at: <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20180416-1> (20.5.2019).

<sup>9</sup> Information of Official Statistics Portal. Available at: <https://osp.stat.gov.lt/informaciniai-pranesimai?articleId=6084565> (20.5.2019).

<sup>10</sup> Information of Official Statistics Portal. Available at: <https://osp.stat.gov.lt/statistiniu-rodikliu-analize?indicator=S3R430#/> (20.5.2019).

<sup>11</sup> Official Statistics. *Demographic Yearbook 2017*. Available at: <https://osp.stat.gov.lt/services-portlet/pub-edition-file?id=30420> (20.5.2019).

55-59	396	447	483	518	533
60-64	241	236	300	293	304
65-69	135	135	159	150	177
70-74	65	58	76	83	57
75 and over	75	64	54	78	48

**1.3. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.**

In 2018, 8.4 thousand divorces were registered in Lithuania. The number of divorces, compared to 2017, decreased by 107 (1%). There were 43.2 divorces per 100 marriages (40.2 in 2017). As in 2017, the number of divorces per 1000 population stood at 3.<sup>12</sup> The table below represents the statistics during 2014-2018<sup>13</sup>.

	2018	2017	2016	2015	2014
Divorces (number)	8,640	8,518	8,879	9,371	9,806
Crude divorce rate (per 1000 population)		3.0	3.1	3.2	3.3

**1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).**

In 2017, 16% of all Lithuanian marriages were mixed. Lithuanian women entered into 2547 mixed marriages, (116 marriages were more than in 2016), and Lithuanian men entered into 944 mixed (23 less than in 2016). Of all marriages with foreign citizens, 47% were concluded with EU citizens.

While women predominantly chose EU citizen as a husband (58%), men were often marrying third country nationals (only 16% foreign spouses came from the EU). In 2017, Lithuanian women mostly entered into mixed marriages with citizens of the following countries: United Kingdom, Germany, Russia, United States, Latvia, Poland, Italy, Belarus, France and Ukraine. Meanwhile, Lithuanian men were mostly marrying citizens of Russia, Belarus, Ukraine, Latvia, Poland, Germany, United States, Australia, Israeli and United Kingdom citizens<sup>14</sup>.

In line with data of 2017, divorce rate in mixed marriages was 23 %<sup>15</sup>.

<sup>12</sup> Information of Official Statistics Portal. Available at: <https://osp.stat.gov.lt/informaciniai-pranesimai?articleId=6084565> (20.5.2019).

<sup>13</sup> Information of Official Statistics Portal. Available at: <https://osp.stat.gov.lt/statistiniu-rodikliu-analize?indicator=S3R430#/> (20.5.2019).

<sup>14</sup> 2017 metų Lietuvos piliečių sudarytų mišrių santuokų statistika. Mišri šeima, 2018. Available online: <http://misriseima.lt/index.php/aktualu/statistika/187-2017-metu-lietuvos-pilieciu-sudarytu-misriu-santuoku-statistika> (20.5.2019).

<sup>15</sup> 2017 metų Lietuvos piliečių sudarytų mišrių santuokų statistika. Mišri šeima, 2018. Available online: <http://misriseima.lt/index.php/aktualu/statistika/187-2017-metu-lietuvos-pilieciu-sudarytu-misriu-santuoku-statistika> (20.5.2019).

## 2. Family law.

### 2.1. General.

#### 2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?

In Lithuania, the two main sources of the family law are the Constitution of the Republic of Lithuania and the Civil Code. While the Constitution sets the main principles, the Civil Code (hereinafter – CC) regulates family law in detail.

As for Constitution, the main article for FL is Article 38. It provides:

*The family shall be the basis of society and the State.*

*Family, motherhood, fatherhood, and childhood shall be under the care and protection of the State.*

*Marriage shall be entered into upon the free consent of man and woman.*

*The State shall register marriages, births, and deaths. The State shall also recognise marriages registered in church.*

*In the family, spouses shall have equal rights.*

*The right and duty of parents is to bring up their children to be honest individuals and loyal citizens, as well as to support them until they come of age.*

*The duty of children is to respect their parents, to care for them in old age, and to preserve their heritage.*

Lithuanian CC is divided into 6 books. The Book Three is dedicated entirely to the family law. The provisions of the Book Three of the CC define the general principles of the legal regulation of family relations and govern the grounds and procedures of entering into marriage, validity and dissolution of marriage, property and non-property personal rights of spouses, establishment of maternity and paternity, mutual rights and responsibilities between children, parents and other family members. It also sets the basic provisions on adoption, guardianship, curatorship and on the procedures of registering acts of civil status.

In addition, certain laws are also relevant for the family law. For example, the recent Law on Strengthening of the Family which came into force in 2018<sup>16</sup>. It is a framework law which lists the institutions competent in the area of family law, delimits their competence and sets duties upon them.

#### 2.1.2. Provide a short description of the main historical developments in FL in your country.

During the Soviet occupation, the Marriage and Family Code of the Soviet Republic of Lithuania was applied to family relations. This code, enacted in 1969, continued to be applied even after the restoration of Lithuania's independence in 1990.

In 2000, the new Civil Code of the Republic of Lithuania (CC) was enacted. It came into force on 1 July of 2001. CC reformed the legal framework and FL became regulated by Book Three of the new CC.

#### 2.1.3. What are the general principles of FL in your country?

The legal regulation of family relations in Lithuania is based on the principles of monogamy, voluntary nature of the marriage, equal rights of spouses, priority protection of the rights and interests of children, raising children in family, complementarity of motherhood and fatherhood, maternity protection, and other principles applicable to civil relations (Article 3.3 CC).

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<sup>16</sup> Adopted on 19 October 2017, in force since 1 March 2018. Available in English at: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/1ecf93a4163811e88a05839ea3846d8e?jfwid=tb078i909> (20.5.2019).

Legal regulation of family relationship covers relationship between spouses (partners), as well as relationship between parents and children.

**2.1.4. Define “family” and “family member” in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

The Constitution of Lithuania does not contain any legal definition of ‘family’ or ‘family member’. Such definitions are neither provided in the CC. As noted in legal doctrine, the drafters of the CC did not include the definition of ‘family’ in the code as this would inevitably have led to intensive debates, which would have postponed or blocked the adoption of the code.<sup>17</sup> Other laws also avoid defining the concept of ‘family’.

This allows for various interpretations and causes many discussions as to the notion of family and family member. The leading political forces in Lithuania as well as considerable part of legal doctrine often still seem to follow the classical, conservative interpretation of the concept of family<sup>18</sup>.

However, one could notice some changes in attitudes. In this regard, a recent Constitution Court ruling should be mentioned. On 11 January 2019, the Constitutional Court of the Republic of Lithuania ruled on recognition of same sex marriage concluded abroad for the purpose of residence rights (Ruling No. KT3-N1/2019). This case in its factual situation reminds the famous CJEU *Coman* case. Similar to *Coman*, in Lithuanian case the third country national - spouse of Lithuanian same-sex national (marriage concluded abroad) - asked the Migration Department to issue a residence permit in Lithuania on the basis of family reunification. When the case reached the Constitutional Court, it, inter alia, gave some interpretation as to the concept of family and family members.

When interpreting the provisions of Article 38 of the Constitution, the Constitutional Court recalled that the constitutional concept of the ‘family’ cannot be derived solely from the institute of marriage enshrined in Article 38(3) of the Constitution.<sup>19</sup> Marriage is one of the foundations for the development of family relationships, however that does not mean that no other family than that formed by marriage is protected and allowed under the Constitution.

The Constitutional Court noted that, unlike the constitutional concept of marriage, the constitutional concept of the family is gender-neutral. In accordance with the Article 38(1) and (2) of the Constitution, interpreted together with the principle of equality of persons and the prohibition of discrimination (Article 29 of the Constitution), the Constitution protects all families meeting the constitutional concept of family. This concept, according to the Court, is based on permanent or long-term nature of relations of family members, founded on mutual responsibilities, understanding, emotional attachment, help, and similar relationships as well as voluntary determination to assume certain rights and responsibilities.

**2.1.5. Family formations.**

**2.1.5.1. Define the “spouse” in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

<sup>17</sup> Mikelėnas, V., 2009, 26.

<sup>18</sup> See Sagatys, G., 2010, 119. Available online (in English): <https://www.mruni.eu/upload/iblock/2ee/11sagatys.pdf> (20.5.2019). This is an article on the concept of family written by the Supreme Court judge. In the beginning, the article analyses the constitutional background of the concept of family and presents an overview of the ongoing political debate concerning this concept. Later, it turns to Lithuanian legal doctrine, legislative acts (there were some changes since the time when the paper was written) and the case law. The paper focuses on the definition of ‘family’ and ‘family members’.

<sup>19</sup> This was earlier noted in the Constitutional Court ruling of 28 September 2011.

Under Article 3.7 CC, a man and a woman who have registered a marriage in the manner prescribed by law are spouses. This definition is valid for the entire legal system.

The precondition for marriage is the different sexes of the couple. Same-sex marriages are constitutionally banned<sup>20</sup>.

Under Article 3.14 of the CC, marriage may be contracted by persons who by or on the date of contracting a marriage have attained the age of 18. In specific cases, however, at the request of a person who intends to marry before the age of 18, the court may reduce the required age for marriage, but by no more than two years. The court might allow, however, marriage of those younger than 16 in the case of pregnancy.

Marriage may only be contracted on the basis of free will. Any threat, coercion, deceit or any other lack of free will provide the grounds on which the marriage may be declared null and void (Article 3.13 CC).

The law does not allow marriages between close relatives. To be more precise, the law prohibits marriages between parents/adoptive parents and their children, grandparents and grandchildren, between biological and adopted brothers and sisters, between cousins, uncles/aunts and nephews (Article 3.17 CC).

In case the conditions for the formation of a valid marriage (different sexes, free will, monogamy, age requirement, legal capacity, requirement that spouses are not close relatives) have been violated, or the marriage was concluded as marriage of convenience, the marriage may be declared void as of the moment of its conclusion. The same consequences are foreseen if marriage was concluded with lack of free will or on the basis of mistake, or one of the spouses have not informed the other that he/she is infected with sexually transmitted disease or HIV (Articles 3.37-3.48 CC).

**2.1.5.2. What types of relationships/unions between persons are recognised in FL of your country? In particular, formal (registered) and informal (*de facto*) unions, heterosexual and same-sex unions, unions with and without *affectio maritalis*. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

The law of Lithuania recognizes two types of formal relationships between couples: marriage and registered partnership. Both are regulated in the CC. However, partnerships may not be registered due to lack of implementing laws.

The precondition for family relationships in Lithuania is the different sexes of the couple. As noted above, so far, same-sex relationships in Lithuania gained no legal recognition – same-sex marriages remain constitutionally banned, partnerships between same-sex couples also may not be registered (prohibited by CC).

In the absence of partnership, property relations between a couple who is not married is not expressly governed by the provisions of the CC on family law. Nevertheless, cohabitation without any registration formalities gained recognition in the case law, especially as related property relations (see section 2.2.7).

**2.1.8. What legal effects are attached to different family formations referred to in question 2.1.5.?**

A marriage creates legal effects both on personal as well as on property level.

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<sup>20</sup> See Article 38 of the Constitution cited above, stating that “*Marriage shall be concluded upon the free mutual consent of man and woman.*” In addition, under Article 3.7 of the Civil Code, marriage is a voluntary agreement between a man and a woman to create legal family. Article 3.12 expressly prohibits marriage of persons of the same sex.

The spouses should be loyal to each other and respect each other, as well as to support each other morally and materially and, taking into account their capabilities, to contribute to the common needs of the family or other spouse. If, for objective reasons, one spouse is unable to contribute enough to the needs of the family as a whole, the other spouse should do so taking into account its ability (Article 3.27 CC).

The spouses must maintain and educate their minor children, take care of their education, health, ensure child's right to personal life, integrity and freedom of the child, as well as child's property, social and other rights provided for in national and international law (Article 3.30 CC).

**2.1.9. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/*de facto* family formations? Explain briefly.**

As noted above, the CC recognizes two types of formal relationships between couples: marriage and registered partnership. For partnerships to be available, implementing law should be adopted. This, however, was not done since 2001 (when CC came into force). There were several attempts (last one in 2017) to submit proposal for such implementing law, nevertheless, political support was low and all such initiatives failed.

The reasons are conservative views towards the concept of the family and unwillingness to open doors to same-sex partnerships.

**2.2. Property relations.**

**2.2.1. List different family property regimes in your country.**

Under Article 3.81 CC, the property of the spouses could either be regulated under the statutory or under the contractual legal regime. In Lithuanian law, there is also understanding of 'family property' which falls under the special regime which cannot be changed by the agreement of the parties.

In accordance with Article 3.84 CC, family property (whether owned by one or by both spouses) includes

- the house/apartment where family lives and
- movable property intended for the use in the household including furniture;
- family property also includes the right to use the family dwelling.

In respect of assets which fall under the family property regime, certain restrictions apply (see section 2.2.4).

**2.2.2. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?**

The statutory legal regime is applied in cases where no marriage agreement was concluded between the spouses. In such a case the principle of common joint ownership is applied (equal parts).

Under Article 3.88 CC, common joint ownership of the spouses applies to the following property:

- property acquired after the marriage in the name of one or both of the spouses;
- income and fruits received from the property personally owned by one of spouses;
- income received from the joint activity of the spouses, as well as income received from the activity of one of the spouses (except for the funds required for that spouse's professional occupation);
- the company and the income received from it or from other type of business provided that the spouses started such business activities after the marriage. Where the business was

owned by one of the spouses before the marriage, the common joint ownership includes the income received from such business as well as increase of its value;

- income received from the employment or intellectual activities, dividends, pensions, benefits or other payments received by both spouses or one of them after the marriage (except for payments received for specific purposes such as damages for moral or corporal injury, allowances or other benefits paid specifically to only one of the spouses, etc.).

In case of statutory property regime, the following is considered to be personal property of a spouse (Article 3.89 CC):

- property acquired separately by each spouse before the marriage;
- property received by a spouse by succession or as a gift during the marriage (unless the will or donation agreement indicates that the property is given to common joint ownership of the spouses);
- a spouse's personal belongings (footwear, clothing, instruments required for the spouse's professional occupation);
- the rights to intellectual or industrial property, excluding the income received from those rights;
- funds and items required for the personal business of one of the spouses, excluding those used in the business conducted jointly by both spouses;
- damages and compensation payments received by one of the spouses for non-pecuniary damage or personal injury, benefits received for specific purposes and other benefits related specifically to only one of the spouses, non-transferrable rights;
- property that was acquired with personal funds or proceeds from the sale of a personal property with the express intention of the spouse to acquire it as a personal property.

It should be noted, however, that in accordance with Article 3.90 CC, the court may declare a personal property of one of the spouses to be common joint ownership of the spouses if it is established that during the marriage the property was fundamentally improved with the joint funds of the spouses or with the funds of or due to the work of the other spouse (capital investments, reconstruction, etc.). Moreover, where a spouse used both his/ her personal funds and the funds owned jointly with the other spouse to acquire a property for his/ her own personal needs, the court may also declare such property to be joint property where the value of the joint funds used exceeded the value of the personal funds of the spouse used for acquisition. In this regard, the Supreme Court has recognised that the value of assets, especially of real estate, may fluctuate. The courts have to take into account only the change in the value of the property which is determined by its improvement itself, and not for other reasons (such as changes in the market price), and such an assessment must be made taking into account the value of the property that was before improvement and its change after the improvements were made.<sup>21</sup>

**2.2.3. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a “new regime just for them”?**

The spouses are entitled to conclude a marriage agreement. The marriage agreement might be concluded before the marriage or any time after the marriage. With such an agreement signed, contractual legal regime is created.

The contractual legal regime of marital property is regulated by Articles 3.101 – 3.108 CC.

In the marriage agreement spouses may stipulate that:

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<sup>21</sup> Supreme Court, Ruling of 8 May 2015, No. 3K-3-259-378/2015.

- the property acquired both before and during the marriage shall be the personal property of each spouse;
- personal property acquired by a spouse before the marriage shall become common joint ownership of the spouses after the marriage;
- property acquired during the marriage shall be owned on the basis of common divided (partial) ownership. In such cases rules on common divided (partial) property shall be applied (Articles 4.72-4.85 CC).

The spouses may select that one of the listed matrimonial legal regimes shall be applied to their entire property or only to its certain part or to specified items only. Matrimonial legal regime could be set both in respect of their existing and future property.

In addition, a marriage agreement may contain the rights and duties related to the management of property, mutual maintenance, participation in the provision for family needs and covering expenses, the procedure for dividing property in case of divorce, as well as other matters related to the spouses' mutual property relations. The marriage agreement may not, however, limit application of imperative norms, ignore the requirement of fair dealing, good morals, public order or be concluded in order to avoid liabilities<sup>22</sup>.

**2.2.4. Explain briefly the rules on the administration of family property and compare if there are difference for different property regimes.**

Under the statutory matrimonial property regime, co-owned property of spouses is managed and disposed of jointly and in agreement between spouses. Consents of both spouses are needed, as an example, to take a loan, to mortgage the property, to sell real estate owned by the family.

In case of marriage agreement, such an agreement may contain the rights and duties related to the management of property.

In addition, as noted above, the understanding of 'family property' exists in Lithuanian law. In respect of assets which fall under the family property regime, certain restrictions apply. For example, the spouse who is the owner of the real estate considered to be a family property, may transfer it, mortgage it or otherwise encumber the rights to it only with the written consent of the other spouse. Where the spouses have minor children, for such transactions permission of the court should be acquired. Moreover, there are limitations for the creditors' claims against the family property (Article 3.85 CC).

**2.2.5. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

Notary approval is required for the marriage agreement and it should be registered in the special State register – "Register of Marriage Agreements"<sup>23</sup>.

Notary approved marriage agreement may only be used against third parties if such agreement and its amendments have been registered in the Register of Marriage Agreements. This means that, without registration, the spouses cannot rely on their rights provided for in the agreement against the creditors or other third parties. This rule does not apply however, if third parties were aware of the marriage agreement or its changes at the time of the transaction.

Marriage agreements concluded in a foreign country may also be registered in the Register of Marriage Agreements. This possibility is available to persons whose marriage agreement contains a Lithuanian personal identification code of at least one of the parties to this agreement.

<sup>22</sup> See e.g. Supreme Court, Ruling of 13 June 2018, No. 3K-3-229-378/2018.

<sup>23</sup> See: [http://info.registrucentras.lt/faq/vedybu\\_registras](http://info.registrucentras.lt/faq/vedybu_registras) (20.5.2019).



**2.2.6. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

In case of community debts, creditors may claim them from spouses' property under common joint ownership. If the property under common joint ownership is not sufficient to fulfil claims of creditors, their claims may then be satisfied from the personal property of the spouses.

The following are considered to be community obligations and they are covered from the joint property of the spouses (Article 3.109 CC):

- (1) obligations relating to the constraints on the property acquired by the spouses to their common joint ownership (whether such constraints arose before or after the acquisition of the property);
- (2) obligations relating to the cost of management of joint property;
- 3) obligations related to maintenance of the family household;
- 4) obligations linked to the reimbursement of court costs if the case was related to spouses' joint property or family interests;
- (5) obligations arising from transactions concluded by one of the spouses with the consent of the other spouse (or subsequent approval), as well as obligations arising from transactions for which the consent of the other spouse was not required if they were made in the interests of the family;
- 6) solidary obligations (joint and several liability) of spouses.

The joint and several liability of the spouses does not arise if one spouse takes a loan or purchases the goods by leasing without the consent of the other spouse, where this is not necessary to meet the needs of the family (Article 3.109 CC).

In case a spouse has obligations that arose prior to the marriage, such obligations may not be met from the joint property of the spouses, unless firstly the joint property is divided and then recovery is made from such spouse's part (Article 3.110 CC).

Moreover, if the spouses in the marriage agreement provided that the property acquired before and after the marriage will be acquired personally by one or the other spouse (no common joint ownership), personal liability occurs to each of them for their own obligations. The spouses are however jointly and severally for their joint obligations and obligations for the interest of the family.

**2.2.7. Describe allocation and division of property in case of divorce, separation or dissolution of the union.**

In Lithuania, a marriage is terminated by the court adopting a divorce judgement (there are no out-of-court divorces). In addition to divorce, the law also provides for separation (Article 3.73-3.80). This possibility, however, is still not very popular. Similar to divorce, separation should be approved by the court.

In case of divorce, it is assumed that the spouses have equal shares in the property under common joint ownership. Therefore, property is divided in equal parts. If the value of the property awarded to the spouse exceeds his/her share, that spouse is asked pay compensation to the other spouse.

Taking into account the interests of minor children, the state of health of one spouse or his/her material situation or other important circumstances, the court may deviate from the principle of equal shares and to award a bigger proportion of the property to one spouse. The court also takes these circumstances into account when deciding how common asset are to be divided (Article 3.123). It should be noted that items intended to meet the needs of minor children, as well as the clothing of the spouses, personal items, their personal non-property rights and property rights linked only to one spouse are not divided and are automatically awarded to that particular spouse (Article 3.120).

In case of cohabitation without any registration formalities, dissolution of the union might also involve division of the property. This need gained recognition in the case law. In the practice of the Supreme Court of Lithuania, it has been repeatedly held that in case of unmarried persons living together (especially if their living together is not episodic but lasts for a longer time) and leading life

similar to that of a married couple<sup>24</sup>, their property relations are seen as ‘joint venture agreement’.<sup>25</sup> Naturally, there is no requirement for such a joint venture agreement between unmarried persons living together to be in writing.

Due to such case law, property and assets acquired by cohabitants may be recognized by court as being their joint ownership. However, this is the fact to be proved before the court. The fact that a party is bound by such unwritten joint venture agreement does not mean that all the assets acquired by any of its parties will be regarded as a joint ownership or that the parties may not acquire a particular asset to personal ownership. This is a considerable difference from property relations in case of marriage.

**2.2.8. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?**

No, there are no special rules or limitations concerning the property regimes between spouses in reference to their culture, tradition, religion or other characteristics.

Dowry is neither provided for nor regulated within Lithuanian law.

**2.3. Cross-border issues.**

**2.3.1. Is your country participating in the enhanced cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?**

Lithuania is not participating in the Regulation 1103/2016 and the Regulation 1104/2016. The main reason for such decision was the fear that recognition of same-sex marriages/partnerships would be needed when applying these Regulations.

This was inferred from the text of the Regulations. In the preamble of the Regulation 1103/2016 (see paragraphs 53-54) is stated that considerations of public interest should allow courts and other competent authorities dealing with matters of matrimonial property regime in the Member States to disregard, in exceptional circumstances, certain provisions of a foreign law where, in a given case, applying such provisions would be manifestly incompatible with the public policy (*ordre public*) of the Member State concerned. *However*, the courts or other competent authorities should *not be able to apply the public policy exception* in order to set aside the law of another State or to refuse to recognise or, as the case may be, accept or enforce a decision, an authentic instrument or a court settlement from another Member State when doing so would be contrary to the Charter of Fundamental Rights of the European Union (‘Charter’), and in particular Article 21 thereof on the *principle of non-discrimination*.

At the moment, there is no clear intention to join these regulations.

**2.3.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as “marriage”, “matrimonial property agreement”, “partnership property agreement” etc.?**

Lithuania is not participating in enhanced cooperation regarding these Regulations.

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<sup>24</sup> This can be proved by all possible evidence, for example, by referring to witnesses (neighbours, relatives, friends, etc.), written evidence (e.g. letters, delivery of receipts, invoices for goods or services addressed to cohabitants' common place of residence, photographs), etc.

<sup>25</sup> Supreme Court, ruling of 28 March 2011, No. 3K-3-134; Supreme Court, ruling of 3 October 2005, No. 3K-3-410, and later cases.

**2.3.3. Are you expecting any problems with the application of the rules on jurisdiction?**

Lithuania is not participating in enhanced cooperation regarding these Regulations.

**2.3.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

Lithuania is not participating in enhanced cooperation regarding these Regulations.

**2.3.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

Lithuania is not participating in enhanced cooperation regarding these Regulations.

**2.3.6. Are there any national rules on international jurisdiction and applicable law (besides the Regulations) concerning the succession in your country?**

Yes, national rules in the CC (Articles 1.60-1.62).

### ***3. Succession law***

#### **3.1. General.**

**3.1.1. What are the main legal sources of Succession Law (SL) in your country? What are the additional legal sources of SL?**

The main source of SL is book V of Lithuanian civil code (CC). In art. 5.1-5.76 it contains most of the material rules of succession law. Book 1 Conflict norms in succession field (art. 1.60-1.62) of the CC has provisions dealing with conflicts of laws in within the framework of SL. Procedural aspects of SL are also covered in the law of notariat. Although Constitution of Republic of Lithuania does not contain express provisions on SL, there are important rulings of Constitutional Court which are covering SL, for example ruling of March 4<sup>th</sup> of 2002. One of the most important sources of SL is the case law of the Supreme Court of Lithuania. Additional sources of SL law are the legal doctrine and recommendations of Chamber of Notaries', which are a non-mandatory source of law.

**3.1.2. Provide a short description of the main historical developments in SL in your country.**

The most important development is enactment of our new CC in (came into force in 1 July of 2001). Before that SL law was governed by old rules of soviet CC of 1964. With new civil code the SL was completely revised and expanded (from 35 articles regulating SL in soviet CC, to 76 articles regulating SL in new CC). For example, in new civil code the degrees of intestate succession were expanded from 2 to 6. Private testaments were introduced, testament registry was established, ways of accepting of inheritance were changed. Also time for acceptance of succession was reduced from 6 to 3 months since the death of bequeather. After the adoption of new CC no significant developments of SL happened.

### 3.1.3. What are the general principles of succession in your country?

The main principles of SL are as follows: *Universal Succession* – universal transition of bequeather’s rights and obligations (*ultra vires hereditatis* and *intra vires hereditatis*). *Freedom of bequeather’s will* – the priority is given to testate succession and freedom to choose successors is to be respected. Ability to null and void a will is very limited (principle of *favor testamenti*). One of the principles is that family members take priority in intestate succession. One of the key principles is so called *private succession* which means that state can only inherit in cases of intestate succession if the bequeather has no heirs.

### 3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.

There are three types of probate proceedings. The most popular type of proceedings is notarial. In this case the heirs file an application the notary of a place of the place of the opening of succession. According to art. 5.3 para 1 of the CC The time of the opening of succession shall be considered the moment of death of the bequeather, and in the event where he is declared deceased, the day when the judgement of the court on the declaring of the bequeather to be deceased becomes *res judicata*, or the day of death indicated in the court judgement. After this period the heirs have a three month period to file an application for inheritance.

Other type of proceedings is when heirs start factually possess the bequeather’s property. According to art. 5.51 para. 1 of the CC a successor shall be deemed to have accepted the inheritance if he has started to possess the estate, treating it like his own property (possesses, uses and disposes it, takes care of, pays taxes, has applied to the court by expressing his intention to accept the inheritance and appoint the administrator of inheritance, etc.). A successor, who has started to possess any part of the inheritance, shall be deemed to have accepted the whole inheritance. As in the case of inheritance by way of notarial application the heir will be liable in full for the debts of the bequeather with his whole property. In order to validate such way of succession the heir must apply to court with a claim to determine a legal fact the heir inherited bequeather’s property by possessing it as his own. The final way to inherit is so called “Acceptance of succession in accordance with an inventory”. In this case, the heir can apply to a bailiff, who would compile the amount of bequeather’s property. In this case a person who has accepted inheritance in accordance with the inventory compiled by the court bailiff *shall be liable for the debts of the testator only with the inherited property*. That is one of the key differences from other probate proceedings. In the event where at least one of the successors has accepted the inheritance in accordance with the inventory, all the other successors shall be deemed to have accepted the inheritance in accordance with the inventory. For the compilation of such inventory, the accepting successor or successors shall apply to the district court of the place of the opening of succession, while the court shall delegate the compilation of the inventory to the court bailiff. The time-limit for the compilation of property inventory shall be determined by the court. The term-limit may not exceed the period of one month. Only in cases where the inherited estate is located in several places, or there is a considerable number of creditors of the bequeather, the time-limit may be extended for a period of not exceeding three months.

### 3.1.5. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?

In Lithuania both intestate and testate succession is recognized. Based on the principle of the bequeather’s free will the testate succession always has priority, unless the will is declared null and void in a competent court. However, there is one exception when there is possible cumulative application of these types of succession – mandatory share of the inheritance. According to art. 5.20 para of the CC the testator’s children (adoptees), spouse, parents (adoptive parents) who were

entitled to maintenance on the day of the testator's death shall inherit irrespective of the content of the will a half of the share that each of them would have been entitled to by operation of law (mandatory share) unless more is bequeathed by the will.

### **3.1.6. What happens with the estate of inheritance if the decedent has no heirs?**

According to art. 5.62 para. 1 subpara. 2 if the decedent has no heirs the last in line for succession is always the state itself. This provision aims to ensure that there is no ownerless property in Lithuania.

### **3.1.7. Are there special rules or limitations concerning succession with reference to the deceased's (or heir's) culture, tradition, religion or other characteristics?**

There was one limitation till May of 2014 which forbade foreigners (not Lithuanian citizens) to own a land which is suited by law for agricultural purposes. Since then this limitation was removed for EU citizens due to EU freedom of movement notion. However, this limitation still exists for non EU citizens. Meaning, that a person without EU citizenship cannot inherit land which is suited for agricultural purposes in Lithuania.

## **3.2. Intestate succession.**

### **3.2.1. Are men and women equal in succession? Are domestic and foreign nationals equal in succession? Are decedent's children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?**

Men and women are equal in succession. Domestic and foreign nationals are mostly equal except one exception mentioned in 3.1.7. answer. Children born in or out of wedlock are equal. A child conceived but not yet born at the time of entry of succession is capable of inheriting, it's one of the exceptions to our capacity for natural persons rules, because general rule is that a person does not have capacity until he or she is born. Spouses are equal. Unfortunately, extra-marital relationships of partners are not recognized in Lithuania, thus meaning that people in such relationship cannot success by way of intestate succession. Same goes for homosexual couples. However, on 11<sup>th</sup> January of 2019 our Constitutional Court gave a ruling which imposed an obligation on the state to legally recognize homosexual couples who married or registered partnership in other countries in which such relationships are legal. This could lead to the conclusion that such a couple should have an ability for intestate succession in Lithuania. But due to the novelty of Constitutional Courts ruling and lack of case law on the matter, it is hard to make a concrete conclusion.

### **3.2.2. Are legal persons capable of inheriting? If yes, on which basis?**

Legal persons are not capable to inherit (except for the state as the last in line successor (look at the 3.1.6.)) in intestate succession. According to art. 5.5 para 2 2. The state or municipalities may also be entitled to inherit *pursuant to a will*.

### **3.2.3. Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.**

According to art. 5.6 para 1 of CC those persons shall be unworthy of inheriting either by operation of law or by a will who by unlawful intentional actions against the bequeather, or against any of his successors, or against the execution of the true intent of the testator expressed in his will, created

legal situation to become successors if it was established within judicial procedure that they: 1) by malicious intent deprived the bequeathed or his successor of their life, or made an attempt on the life of those persons; 2) intentionally created circumstances which hindered the testator until his death in writing, amendment or revocation of the will; 3) by means of deceit, intimidation or coercion made the testator write up, amend or revoke the made will, or forced a successor to renounce succession; 4) concealed, forged or destroyed the will. Parents shall be unworthy of inheriting after the death of their children by operation of law if they were deprived of parental authority in accordance with a court judgement, and this judgement was not extinguished or abolished at the moment of the opening of succession.

**3.2.4. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?**

Yes, there are different classes of heirs *ex lege*, and “upper classes” has the priority to succeed against the “lower classes”. And the shares within a class are always equal, as art. 5.11 para 1 of the CC states: “In intestate succession, the following persons shall be heirs to inheritance in equal shares”. The classes are as follows: 1) first degree descendants: bequeather’s children (including adopted children) and bequeather’s children born after his death; 2) second degree descendants: bequeather’s parents (adoptive parents), grandchildren; 3) third degree descendants: bequeather’s grandparents both on the father’s and mother’s side, bequeather’s great grandchildren; 4) fourth degree descendants: bequeather’s brothers and sisters, great grandparents both on the father’s and mother’s side; 5) fifth degree descendants: children of the bequeather’s brothers and sisters (nephews and nieces), likewise brothers and sisters of the bequeather’s parents (uncles and aunts); 6) sixth degree descendants: children of the bequeather’s parents’ brothers and sisters (cousins). Second degree heirs shall inherit by operation of law only in the absence of the first degree heirs, or in the event of the latter’s non-acceptance or renunciation of succession, likewise in cases where the first degree heirs are deprived of the right to inherit. The third, fourth, fifth and sixth degree heirs shall inherit in the absence of heirs of superior degree or in the event of latter’s renunciation of succession or deprivation of the right to succession.

**3.2.5. Are the heirs liable for deceased’s debts and under which conditions?**

The principle of universal succession determines that general rule is that heir is liable for all debts of bequeather. The only exception is when you inherit by way of acceptance of succession in accordance with an inventory (look at the answer 3.1.4.). In this case a successor who has accepted inheritance in accordance with the inventory compiled by the court bailiff *shall be liable for the debts of the testator only with the inherited property*.

**3.2.6. What is the manner of renouncing the succession rights?**

There are two ways to do it: an express renunciation and a tacit. According to art. 5.60 para 1 of CC an heir by operation of law or successor by a will shall have the right within three months from the day of the opening of succession to renounce inheritance. Renunciation may not be in part or subject to conditions or exceptions. A successor shall renounce inheritance by filing an application with the notary public of the place of the opening of succession. This is an express renunciation.

A tacit one is when an heir does nothing during the 3 month period after bequeather’s death and does not express his will to accept the inheritance. According to art. 5.60 para 2 renunciation of inheritance shall have the same effect as non-acceptance of succession.

### **3.3. Disposition of property upon death.**

#### **3.3.1. Testate succession.**

##### **3.3.1.1. Explain the conditions for testate succession.**

There are a few conditions for testate succession. First one is that the testator has to have full capacity. According to Lithuanian law you gain full capacity since age of 18. There are few exceptions, for example a person can be emancipated by courts order at the age of 16. Then he or she would be held legally fully capable. Also a person can become legally fully capable if he or she enters into a marriage earlier than age of 18. The main condition is that the will is made freely and actually expresses the bequeather's free will. Also the formal requirements of the will, whether public (official) or private one must be met.

##### **3.3.1.2. Who has the testamentary capacity?**

Look at the answer above.

##### **3.3.1.3. What are the conditions and permissible contents of the will?**

A will may only contain transfer of property rights, monetary rights and legal obligations. A testator is free to choose his heirs, or even denounce intestate successors. Non-legal obligations, such as moral, or last wishes of the testator (for example, to burn his body and to spill ashes into the sea) are not permissible content of the will. Also there is a rule in art. 5.26 para 2 which states, that unlawful conditions, or conditions contrary to the usages, or those violating the requirements of good morals shall be null and void.

However, there is a possibility to create a testamentary reservation. According to art. 5.23 para 1 of the CC the testator shall have the right to obligate a testate successor to fulfil a certain obligation (testamentary reservation) for the benefit of one or several persons, while these persons shall acquire the right to demand fulfilment of this obligation. Beneficiaries of the testamentary reservation may be intestate heirs as well as any other persons. The successor authorised by the testator shall have to fulfil the testamentary reservation without exceeding the value of the inheritable property after the claims of the testator's creditors have been satisfied.

##### **3.3.1.4. Describe the characteristics of will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a will?**

There are two main types of a will: official (public) and private. Official wills are such wills which are made in writing in two copies and attested by the notary public or an official of the Consulate of the Republic of Lithuania in the relevant state. Such wills are registered in a will registry.

A private will is a will written up in hand by the testator indicating the first name and surname of the testator, the date (year, month, day) and place where the will was made, expressing the true intent of the testator and signed by him. A private will may be written up in any language. Failure to indicate the date and place of the making of the will shall render it invalid only in those cases where it is impossible to determine the date and place of the making of the will by any other way, or they are not possible to infer from other circumstances. Corrections introduced by the hand of the testator and the deletions explained by him shall not render the will invalid. Such conditions shall be valid which were mistakenly deleted by the hand of the testator who later made an inscription by his hand testifying that those conditions were deleted by mistake. The will shall be valid if there is some word omitted by mistake, or a word contains a spelling mistake; the relevant conditions shall also be valid, providing that their meaning is not obscure. A will which is undeniably unfinished and unsigned

shall be null and void. If a will contains an inscription about the testator's intent to supplement it in the future though he failed to accomplish that, such will shall be valid, providing that it can be executed without the intended supplement.

Testator has a right to depose private will to a notary and it will be held equal to a public will.

As written above, the key role is of the notary in making a will.

**3.3.1.5. Is there a (public) register of wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

As mentioned above, there is a registry of wills in Lithuania. A notary fulfils a function of registering wills into the registry. The main role of the registry is for all of the notaries to have an access to the fact where or not the will was created by the deceased. It is done in order to secure that there isn't a couple of wills of the same person, or to check in which way the inheritance should be distributed – intestate or testate, since a will has always a priority over intestate succession. A registered will by a notary can only be declared null and void by a court if there are legal grounds for doing it.

**3.3.2. Succession agreement (*negotia mortis causa*). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.**

No, other ways of disposing property are not recognized by law.

**3.3.3. Are conditions for validity of wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

Art. 5.16 para 1 has special SL rules for validity of wills. It states that. A will shall be null and void if: 1) made by a legally incapable person; 2) made by a person of limited legal capacity; 3) its content is unlawful and impossible to understand.

Also, para 2 of the same article contains a provision which states, that a will may be acknowledged null and void on other grounds of nullity of transactions. Since a will is held as unilateral legal transaction in Lithuanian civil law, it can be nullified by general grounds of nullity in book I of the CC. Those grounds are as such: infringement on mandatory law, threats, duress, unfair exploitation, mistake, deceit.

**3.3.4. Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

Yes, it is called a right to the mandatory share of the inheritance. According to art. 5.20 para 1 the testator's children (adoptees), spouse, parents (adoptive parents) who were entitled to maintenance on the day of the testator's death shall inherit irrespective of the content of the will a half of the share that each of them would have been entitled to by operation of law (mandatory share) unless more is bequeathed by the will.

**3.3.5. Cross-border issues.**

**3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?**

It is really hard to answer the following questions due to the lack of case law on the application of this Regulation. Since its enactment in 2015 only single case reached the Supreme Court of Lithuania.



### **3.3.5.2. Are there any problems with the scope of application?**

Since we have only one case at the Supreme Court of Lithuania in regards to Regulation, I will try to present briefly issues in front of us. On January 17<sup>th</sup> of 2019 (decision No. e3K-3-90-378/2019) our Supreme Court submitted a request for preliminary ruling to ECJ. The main question is similar to the question in ECJ case WB, C-658/17: where a notary, which performs most of the functions in succession procedure, can be equated to a court within the meaning of a court in the context of Regulation. From this question stems the second one, if a notary can be equated to a court, could notary certificate of succession be equated to court's decision within a meaning of Regulation.

### **3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country had experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?**

It is difficult to answer since there is no case law.

### **3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?**

It is difficult to answer since there is no case law.

### **3.3.5.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?**

As far as I know, there are no such cases where public policy was relied upon in courts.

### **3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?**

According to our law the Certificate of Succession is issued by the notary of the place of opening of succession, but unfortunately we do not have a single case in higher courts dealing with disputes considering the Certificate, thus it is hard to give any experiences on it.

### **3.3.5.7. Are there any national rules on international jurisdiction and applicable (besides the Succession Regulation) concerning the succession in your country?**

There are not special national rules concerning international jurisdiction of succession in Lithuania. Our CC has only specific provisions for applicable material law. For example, we have specific rule on capacity, as art. 1.60 of the CC states that the capacity of making, amending or revoking a will shall be governed by the law of the state of the testator's domicile. Where a person has no domicile or it is impossible to be determined, the capacity of such person to make a will shall be governed by the law of the state where the will is made. Or rules regarding form of a will. According to Art. 1.60 The form of a will, its amendment or revocation shall be governed by the law of the state where these acts are performed. A will as well as its amendment or revocation shall also be valid in regard of the form if the form of the indicated acts is in compliance with the requirements of the law of the state of the testator's domicile, or those of the laws of the state whose citizen the testator was at the time when the relevant acts were performed, or the law of the state of the testator's residence at the time when those acts were performed or at the time of his death. A will in respect of an immovable thing, as well as any amendment or revocation thereof shall be valid if the form of the acts concerned is in compliance with the requirements of the law of the state where the immovable thing is located. Also

there is a set of rules regarding Law applicable to other legal relations of succession. Art. 1.62 para 1 states, that other legal relationships of succession, with the exception of those related with inheritance of immovable things, shall be governed by the law of the state of domicile of the testator at the time of his death. Relations of succession in respect of an immovable thing shall be governed by the law of the state where the immovable thing is located. Para. 2 states, that Where succession opens by the death of a citizen of the Republic of Lithuania, irrespective of the law applicable, his heirs residing in the Republic of Lithuania and in possession of the right to the mandatory share of succession shall inherit this part in accordance with the law of the Republic of Lithuania, except the immovable things. Para 3 states, that where in accordance with the law applicable to relations of succession a property cannot devolve to a foreign state, and where no other heir thereto is known and the property is located in Lithuania, that property shall be devolved to the ownership of the Republic of Lithuania.

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## Luxembourg

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Ramón Herrera de las Heras and David Hiez (1 – 2.3.6).

Alba Paños Pérez and David Hiez (1.4, 2.1.4, 2.1.5.1, 2.1.6, 2.2.7, 2.2.8 - 2.3).

Fátima Pérez Ferrer and David Hiez (2.2.4, 2.2.7, 2.2.8—2.3).

María José Cazorla González and David Hiez (3 – 3.1.5, 3.2.5 and 3.3.3).

María José Cazorla González (3.1.6 -3.3.5.7).

### 1. Social perspective.

**1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without *affectio maritalis*).**

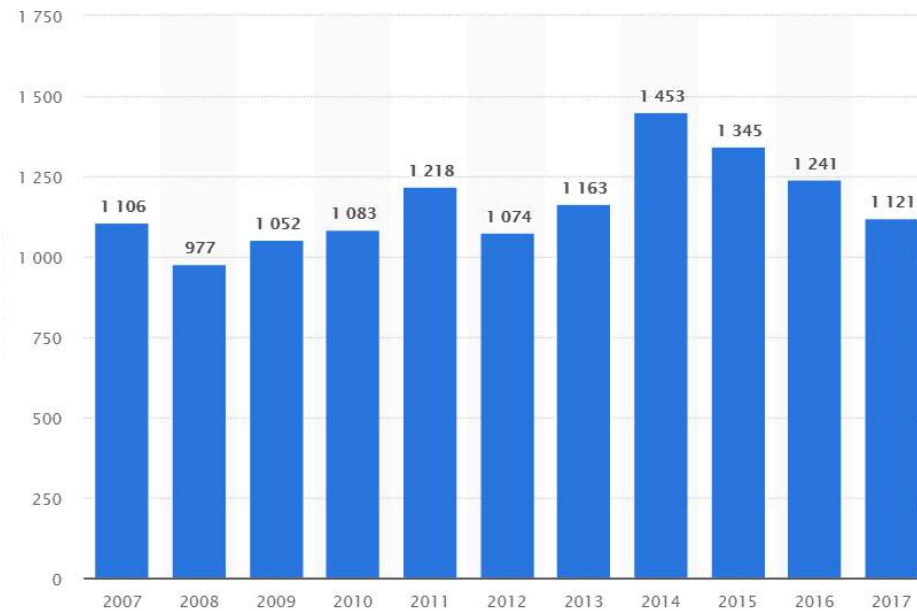
FAMILY TYPES	FAMILY NUMBER	PERCENTAGE (%)
Non-family households	83 726	16.6%
One-person households	69 529	13.8%
Multiple households	14 197	2.8%
Family households	419 554	83.4%
Single-family households	366 152	72.8%
Couples without children	82 188	16.3%
Couples with children	242 244	48.1%
Single fathers	6,658	1.3%
Lone mothers	35,062	7.0%
Multi-family households	53 402	10.6%

**1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.**

married	(55.1 %)
Single people	(27.5 %)
divorced persons	(8.6 %)
widows/widowers	(7.2 %)
people in a registered partnership	(1.6 %)

7% of all marriages performed in the country were between persons of the same sex

**1.3 Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.**



**1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-border elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).**

Luxembourg is a very peculiar case in Western Europe. It experienced a rise in the divorce rate since the mid-seventies which then stabilized during the 2000s with a crude divorce rate (CDR) of about 2.0-2.3 (2012), before rising again recently to 2.6 (2014) (UN Statistics Division, 2017).

So, since the beginning of the 21st century, the number of divorces has fluctuated between 977 (2008) and 1 218 (2011) divorces per year.

The number of divorces per 1 000 inhabitants, that is the crude divorce rate, has been relatively stable, ranging from 2.5 in 2006 to 2.0 in 2008 and 2012.

In Luxembourg, the average age at divorce has increased during the observed period. For women, this age has grown, between 2000 and 2013, from 37.6 to 41.9 and for men, from 40.1 to 44.3. In

fourteen years, the average age at divorce has increased by 4.3 years for women and 4.2 years for men. This growth is linked both to the increase in the average age at marriage and an increase in the duration of marriage before divorce.

As far as nationalities are concerned, marriages between two Luxembourgers have declined from making up 70 percent of the total in 1960 to just 48 percent in 2011. However, mixed nationality marriages have remained more or less stable around 25 percent. On the increase, are marriages between foreign nationals, making up 26 percent in 2010.

The Statistical report recently published also shows that divorces have been on the rise over the past 50 years. While only 153 couples were divorced in the Grand Duchy in 1960, this number has risen to 1,275 in 2011.

This equals a rate of 0.5 per thousand in 1960 and 2.5 per thousand in 2011.

The study also shows that more and more long-term marriages break-up. While the rate for divorce after less than four years of marriage has remained more or less stable since the '60s, and marriages of five to nine years presented the highest divorce rate then as they do now, marriages lasting 15 years or over now make up 40 percent of all divorces, in comparison to just 28 percent in 1960.

## 2. Family law.

### 2.1. General.

#### 2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?

**Luxembourg** does not have a specific **legislation covering family matters**. The source of **law on family** is the **Luxembourg Civil Law**. Litigation related to family issues is mainly governed by the Civil Procedure Code which provides for the actions to be taken in case of divorce or child custody. International sources complete the national ones for the few matters involving specific questions. Case law is not rich, but sometimes very important, notably because the Constitutional Court declared some provisions as being contrary to the Constitution.

#### 2.1.2 Provide a short description of the main historical developments in FL in your country.

The Napoleon Code of 1804 has been substantially amended with regard to family law in the 1970s: Bill of the 13th of April 1979 reforming the filiation law (Mémorial A, no. 37 of the 5<sup>th</sup> of May 1979), Bill of the 5<sup>th</sup> of December 1978 reforming the divorce (Mémorial A, no. 81 of the 6<sup>th</sup> of December 1978), Bill of the 4<sup>th</sup> of February 1974 reforming the matrimonial property regimes (Mémorial A, no. 10 of the 22<sup>nd</sup> of February 1974), Bill of the 12<sup>th</sup> of December 1972 on rights and duties of the spouses (Mémorial A, no.77 of the 22<sup>nd</sup> of December 1972)... These reforms took place in the context of similar evolutions in France and Belgium. But, after the 70s, Luxembourg law has not been reformed between the 2000s, despite practical difficulties. The reform of divorce has been launched in 2006 but failed at that time, and the reform of the filiation is still on the way. The reforms become more and more necessary, since the Constitutional Court, established in 1997, declared several provisions of the Civil Code contrary to the Constitution: art. 302 and 378 of the Civil Code on the unilateral parental authority after divorce (Constitutional Court of the Grand-Duchy of Luxembourg, n°47/08, 12<sup>th</sup> of December 2008, Mémorial A, no. 197 of the 22<sup>nd</sup> of December 2008), article 316 regarding the contestation of legitimate filiation (Constitutional Court of the Grand-Duchy of Luxembourg, n°50/09, 15<sup>th</sup> of May 2009, Mémorial A, no. 127 of the 8<sup>th</sup> of June 2009), article 349 on civil adoption (Constitutional Court of the grand-Duchy of Luxembourg, n°25/05, 7<sup>th</sup> of January 2005, Mémorial A, no. 8 of the 26<sup>th</sup> of January 2005), article 380 concerning unilateral parental authority in case of natural filiation (Constitutional Court of the Grand-Duchy of Luxembourg, n°07/99, 26<sup>th</sup> of

March 1999, Mémorial A, no. 41 of the 20<sup>th</sup> of April 1999)... In absence of legislative reforms, judges had to find practical solutions, but this was considered unsatisfactory<sup>1</sup>.

- The **civil union** was introduced by legislation passed on 9 July 2004 .
- Same-sex marriage became legal in Luxembourg on 1 January 2015. A bill for the legalisation of such marriages was enacted by the Chamber of Deputies on 18 June 2014.
- Divorce: Bill 6996 **reforming divorce and child custody rules has been adopted and became the bill of the 27<sup>th</sup> of June 2018 establishing the family court and reforming divorce and parental authority (Mémorial A, no. 589 of the 12<sup>th</sup> of July 2018)**. The law eliminates “at fault” divorces. The two divorce choices are mutual consent and irreversible breakdown of marital relations. The law also sets up a specialist family court. Family judges handle questions of alimony, parental custody and visitation rights, and division of property. By default, both parents will share joint parental authority, under the new law. Alternative custody is allowed if it is in the best interest of the child. In addition, other family members, such as grandparents, may potentially be granted certain rights. Children are able to, under certain conditions, petition a family judge directly for a change in custody and alimony arrangements.

### 2.1.3. What are the general principles of FL in your country?

Family law governs relationships between related persons. It deals with the following matters: the birth and establishment of the filiation of a child; marriage and other couple relationships; divorce or separation of married couples<sup>2</sup>; the abduction of a child; the death of a person. The general principles which underpin family law are freedom to marry, privacy, the interest of the child, the equality principle.

#### **ADOPTION**

Luxembourg has two forms of adoption:

- plenary (or full) adoption
- simple adoption.

The district courts process adoption applications that are submitted by way of a lawyer's request to the Court, and check whether the conditions of the law are met, especially if the proposed adoption is in the child's interest.

The examination of the application and the debates are carried out in chambers (in the absence of a public), but in the presence of the public prosecutor (public prosecutor's office).

Adoption is open to Luxembourg residents, nationals or not.

The qualities required to adopt have been analysed according to the national law of the adopter. The conditions for adoption shall be governed by the national law of the adopted person, unless the proposed adoption confers on the adopted person the nationality of the adopter.

For Luxembourg nationals, only married couples may proceed to a full adoption (The Constitutional Court declared article 367 conform to the constitution: Constitutional Court of the Grand-Duchy of Luxembourg, n°102/98, 13<sup>th</sup> of November 1998, Mémorial A, no. 102 of the 8<sup>th</sup> of December 1998). However, it may still be considered by a single spouse for the benefit of his spouse's child.

Age requirements:

The child to be adopted must be under 16 years of age; and the adopters must be at least 25 years old and at least 21 years old and 15 years older than the child to be adopted.

Effects

The full adoption is irrevocable and the filiation it creates replaces the original filiation; in the event of adoption by one of the spouses of the child of his or her spouse, the original filiation with respect to that spouse shall continue.

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<sup>1</sup> Moreau, P., 2018.

<sup>2</sup> Hiez, D., 2019.

## Civil adoption

### Age requirements

The adopter must be at least 25 years old and the age difference between adopter and adopted must be at least 15 years old; in the event of adoption by a spouse of his spouse's child, an age difference of 10 years is sufficient; the adopted person must have reached the age of at least 3 months. If the adopted person is married and not legally separated, his or her spouse must consent to the adoption.

### Effects

The filiation with the family of origin is maintained, but the adopter acquires in his adoptive family the same inheritance rights as a legitimate child, **at least in the relations with the adoptants themselves.**

Simple adoption may be revoked for serious reasons.

## **DIVORCE**

Luxembourg law now only provides for two types of divorce: divorce by mutual consent; divorce for irremediable breakdown of marital relationships:

- Divorce by mutual consent: When both spouses agree on the breakdown of the marriage and its consequences, they may jointly apply to the family court for divorce, by submitting to the family court an agreement settling: the residence of each of the spouses for the duration of the proceedings, the fate of common minor children, both during the proceedings and after the divorce, the contribution of each spouse to the maintenance and education of common minor children, the possible alimony to be paid by one spouse to the other during the proceedings and after the divorce.

Divorce by mutual consent does not require either the minimum age of the spouses or the minimum duration of the marriage. The agreement must be drafted by a lawyer in court or a notary.

- Divorce for irremediable breakdown of conjugal relationships: Divorce due to excess, abuse or serious insults, commonly known as fault-based divorce, was repealed by a law of 27 June 2018. However, a number of criminal misconduct committed during marriage (such as rape, indecent assault and physical violence) has consequences in terms of the right to alimony and the matrimonial benefits granted during marriage.

Divorce for irremediable breakdown of conjugal relationships may be requested either by one or both spouses (in case they agree on the principle of divorce, but not on all its consequences).

During the divorce proceedings before the Family Court, either spouse may request the Family Court to take interim measures relating to the person, maintenance and property of both spouses and children. Spouses may request to reside separately during the divorce proceedings.

At the end of the divorce proceedings, the divorce judgment establishes the irreparable breakdown of the conjugal relationships, pronounces the divorce, orders the liquidation and division of the matrimonial regime and decides on the consequences. Once the divorce judgment has become final, the provisional measures taken by the family court judge automatically end.

Any request for modification of the ancillary measures (maintenance, family home, custody of children, visiting and accommodation rights) set out in the divorce judgment must be addressed to the judge in charge of family matters by means of an application under the contentious procedure (general provisions).

In both cases of divorce by mutual consent and divorce for irremediable breakdown of conjugal relationships, the divorce judgment dissolves the marriage on the date on which it acquires the force of res judicata:

- Body separation
- Spouses who wish to separate, but who do not already want to divorce, can opt for a legal separation.
- Spouses separated from bed and board are no longer required to reside together, but the other duties and obligations of marriage, such as fidelity and assistance between spouses, remain.

## **FILIATION**

The filiation is governed by personal status, is governed by the national law of the person concerned. It is above all the principle of the search for biological truth which has greatly facilitated the exercise of the various State actions and which has led to the development of an important litigation in this

field, whether it involves establishing a certain filiation link or having the inaccuracy of an existing filiation link established.

All actions concerning the establishment or contestation of a filiation - legitimate or natural - fall within the jurisdiction of the district court (sitting in civil matters) of the defendant's domicile. Actions are brought by summons and representation of the parties by a lawyer's ministry is mandatory.

The lawyers inform the parties of the time limits provided by law for the institution of the various actions for the establishment or contestation of a filiation, as well as of the modalities and details of such proceedings. The actions differ according to whether they are natural or legitimate filiation.

Cases are communicated to the State Prosecutor. In the event of a conflict between the interests of the child's legal representative (mother, father or both parents), an ad hoc administrator will be appointed to defend the child's interests in the proceedings.

In order to establish with certainty, the existence or non-existence of a parent-child relationship, the court generally uses an expertise of the genetic fingerprint of the parties concerned (mother, child, alleged father). The costs of the investigative measure are to be advanced by the requesting party.

Judgments handed down in matters relating to the establishment or contestation of a parent-child relationship are recorded in civil status registers and mentioned in the margin of the birth certificate of the child concerned.

And the other hand, in Luxemburg has possibility to establish a filiation after a surrogacy made abroad. No provision of the Luxemburgish law states the validity or invalidity of surrogacy in Luxembourg, but an ongoing bill states its invalidity (n°6568). But no provision of the bill deals with a surrogacy made abroad. A French lady requires the recognition of a full adoption of a child born after a surrogacy made in Ukraine, the legally established father being Luxemburgish. The full adoption has been rejected, in application of French law that the Luxemburgish international private law considers applicable. However, the judge accepted to state the legal adoption of the lady, in application of Luxemburgish law, despite the fraud consisting of surrogacy, because of the interest of the child: Cour d'appel, 15th of July 2015, Numéro 41814 du rôle.

#### **MAINTENANCE PAYMENTS**

The family court shall always hear any appeal and to whatever value the dispute may arise in respect of any claim for maintenance. Maintenance is an ordinary civil matter and the competent court is the court of the defendant's domicile. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters provides for an alternative ground of jurisdiction which is that of the court of the place where the maintenance creditor is domiciled.

#### **2.1.4. Define “family” and “family member” in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

As the French Civil Code, the Luxembourgish **Civil Code does not define what family is**. The word family is used through the code in relation with other words “family council”, “interest of family”, etc. The notion of family has changed since the implementation of the Civil Code on 18 March 1803. Neither the Civil Code neither the Law of 29 August 2008 on free movement of persons and immigration defines the notion of family. However, article 68 c) of the Law of 29 August 2008 defines family reunification as the entry and stay of family members of a third country national who is resident in the member state to maintain family unity, even if the family links back to before or after the entry of the resident third country national and article 70 describes only who the law considers family members that can benefit from family reunification (Article 78) of the Law of 29 August 2008 also considers that some persons that are not contemplated by Article 70 can obtain a residence permit based on family or personal links. In these cases the authorities will analyze the intensity, seniority and stability of these links in regard to the impact a refusal can have on the right of family and private life).



In Luxembourg, marriage is a contract where there has to be the mutual consent of both parties (Article 146 Civil Code). This means that no marriage is possible without mutual consent (Article 146 Civil Code). It can be considered lack of consent the situation where the parties are willing to go on with the ceremony in order to obtain a result different from a sustainable long-lasting relationship foreseen by articles 203 ss of the Civil Code, and to avoid the legal consequences of it.

**Art. 146 Cc:** There is no marriage where there is no consent.

The following are considered to be **family members**:

- the **spouse**;
- the **registered partner**;
- the **direct descendants** (sons or daughters) of the EU citizen or their spouse/partner if the child is under 21 or is under their care;
- the **direct ascendants** (father or mother) if they are under the care of the EU citizen or their spouse/partner;
- any **other family member** if:
  - in their country of origin, they were under the care or were a member of the household of the EU citizen with the right to reside; or
  - the EU citizen is obliged to personally take care of the family member in question due to serious health problems;
- the **non-registered partner** (free union) with whom the EU citizen has a duly demonstrated long-term relationship. These partners cannot be linked to another person through marriage, declared partnership or long-term relationship. The long-term nature of the relationship is assessed according to how strong, long-lasting and stable the links between the partners are, including, in concrete terms:
  - uninterrupted legal cohabitation lasting at least a year before the request; a common child for whom they share parental responsibility.

#### 2.1.5. Family formations.

##### 2.1.5.1. Define the “spouse” in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?

To be able to marry you both of them has to be at least 18 years of age and one of you must have his/her official place of residence in Luxembourg. Since the law of 4 July 2014 reforming marriage, which came into force in January 2015, homosexual couples are placed on the same footing as heterosexual couples.

In Luxembourg, a religious marriage by itself has no legal validity. Civil marriage is obligatory and must always take place before religious marriage.

Given that a certain number of administrative steps have to be accomplished before the civil wedding, it is highly recommended that the preparations start no later than 2 months (if you are a resident of Luxembourgish nationality) or 3 months (if you are resident but not Luxembourgish) before the date of the marriage.

A few documents must be presented to the civil register of the commune in which one of you lives: identity card (EU) or passport, birth certificate issued no later than six months before the marriage, residence attestation less than 3 months old if you are not legally domiciled in Luxembourg and a certificate of single-status or celibacy.

- If you are Luxembourgish, a recent copy of your birth certificate prepared in Luxembourg is enough.

- If you are not Luxembourgish, proof that your marital status is single, must be attested by a certificate of capacity to contract marriage. But, when this certificate can not be supplied, it may be

replaced by a certificate of national custom and a certificate of single-status (usually delivered by your embassy).

Other documents that might be needed on certain circumstances can be divorce decree, death certificate of a former spouse and birth certificate of children to be legitimised. Children born before the marriage must be recognised by the father before the civil marriage. Duly recognised children are automatically legitimised.

The required documents must be submitted to the civil registrar's office no later than 1 month before the date of the marriage and must be in English, French or German. For the commune to accept translation of another language, the documents need to be translated by a sworn translator. A list can be found on the website of the Ministry of Justice.

In Luxembourg, every marriage must be preceded by the publication of marriage proclamation (or banns) at least ten days before the marriage in the commune where you live in. Your banns are published as soon as the commune in which the marriage ceremony is to be held receives the required documents.

When all the documents required for the publication of the wedding banns have been submitted, the civil registrar sets with you the date and time of the ceremony. The civil ceremony will usually take place on a weekday but some communes may have particular days only available for a wedding ceremony and some may allow you to have a ceremony on Saturday. You do not need witnesses for the civil ceremony but, of course, friends and family are welcome. After the civil ceremony, you will receive an official document - a family record book (*livret de famille*). You can obtain a wedding certificate – which is needed for any religious ceremony you may have at a later date – by writing to the commune where your marriage took place.

As a consequence, in accordance with this definition, marriage does not cover:

a) Partnerships. However, family reunification is permitted in partnerships defined by the Law of 9 July 2004.

This law was modified by law of 12 August 2010 (<http://www.legilux.public.lu/leg/a/archives/2010/0134/a134.pdf>). Article 4-1 allows that partnerships that were celebrated abroad can be registered in Luxembourg. For doing it the parties must address a formal request to the public prosecutor office. However, both of the parties must prove that they do not have a forbidden family link as foreseen by articles 161 to 163 and 358 § 2 of the Civil Code and reside legally on the territory. A Grand-ducal regulation can determine the formalities of the application and the documents that must be filed, that included article 4-1 that allows registering a partnership concluded in a foreign country. Partnerships are possible between people of different sex and people of the same sex (See article 2 of the Law of 9 July 2004).

b) Cohabitation: Marriage does not cover simple cohabitation.

**2.1.5.2 What types of relationships/unions between persons are recognised in FL of your country? In particular, formal (registered) and informal (*de facto*) unions, heterosexual and same-sex unions, unions with and without *affectio maritalis*. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

The types of relationships/unions between persons has recognised in Luxembourg's Family Law:

- formal (registered) and informal (*de facto*) unions
- heterosexual and same-sex unions

**2.1.6. What legal effects are attached to different family formations referred to in question 2.5?**

To have a **civil marriage** in Luxembourg, it is necessary to accomplish certain formalities in advance (which may vary depending on the nationalities of the future spouses) and to assemble all of the documents required to constitute the marriage file.

**Religious marriage** may only be celebrated after the civil marriage has taken place. Therefore, religious marriages alone, that is to say not preceded by a civil marriage, are strictly prohibited.

All married couples, without exception, are subject to general provisions on their patrimonial relationships (Civ. C., arts. 220-226). Moreover, they are subject to a **matrimonial regime**, by which is meant a set of rules governing the pecuniary interests of the spouses, the purpose of which is to regulate their property relations during the marriage and at its dissolution.

If **no marriage contract** was entered into by the couple, the default 'legal community' regime applies to the property of the spouses. However, the couple is free to adopt any other form of marriage contract, or to make changes to their existing matrimonial regime.

#### LEGAL IMPLICATIONS OF ENTERING INTO A CIVIL PARTNERSHIP (PACS)

A partnership is a **domestic arrangement** between **2 individuals** of the same or opposite sex who live together in the same **household**, and who have made a formal declaration of civil partnership before the civil registrar in their shared place of domicile or habitual residence.

As a result of this declaration, the partners are subject to certain provisions of civil law, social security law and tax law. The aim is to grant civil partners **rights that are, to a large extent, similar** to those enjoyed by **married couples**.

Accordingly, civil partners are entitled to the same social benefits as married persons (e.g. the right to a survivor's pension) and are afforded the same forms of tax relief as married persons, in particular with respect to stamp duty or registration fees, inheritance taxes and direct taxes.

To enter into a PACS, neither of the partners may already be married or bound by another civil partnership. Partners must also not fall within the prohibited degrees of relationship, based on consanguinity and affinity. In addition, they must be legal residents of Luxembourg.

The legal provisions on civil partnerships do not apply to domestic arrangements/households of more than 2 persons.

Whether or not the PACS involves a specific written agreement, declaring the partnership establishes **certain rights and obligations between the partners**.

The following rules apply to all civil partnerships and cannot be circumvented by any contrary provisions contained in an agreement entered into by and between the partners.

Civil partners are mutually obliged to a material support. The contribution of each other to the expenses of the civil partnership is proportionate to its faculties. The mutual support ends with the partnership itself, if not otherwise provided by the partners themselves or the judge. Exceptionally, maintenance may be allocated by the judge to a partner.

Even after the partnership is dissolved, both civil partners are liable for any **debts** they or one of them may have incurred during the partnership for the everyday needs of their household and for expenses relating to their shared home (e.g. rent payments).

Nevertheless, an exception is made to this rule for expenditures by one of the partners, that are clearly excessive in light of the couple's standard of living, or the utility or lack of utility of the purchase. Similarly, one partner is not liable for the debts incurred by the other if these debts result from purchases on credit for which the former's consent was not given (e.g., the purchase of a household appliance through the payment of monthly instalments).

For all other debts, the principle is that each partner remains liable only for those debts which they have personally incurred. In this respect, it is irrelevant whether such debts were incurred before or during the civil partnership.

A partner is **never liable** for any debts incurred by the other partner after the civil partnership is dissolved.

Civil partners may formally establish the terms of the property relations within their partnership by way of a written agreement. Entering into such an agreement is not required, but is entirely possible. The partners may choose to enter into this agreement when declaring their civil partnership or afterwards, and it may be amended at any time following the declaration.

Civil partners are free to set the terms of the property relations within their partnership as they wish, provided they do not contravene the mandatory rules that apply to all civil partnerships. If the property relations to be regulated are particularly complex, the property settlement agreement may include an inventory statement specifying which items of movable and immovable property are owned individually by each of the partners, and which are owned jointly. All the goods on which one of the partners is not able to establish property is assumed to be jointly owned.

None of the partners is allowed to sell or by any other way cease the household of the family, even if he or she is the single owner.

Whereas the civil partnership is distinct from marriage, notably with no obligation to fidelity, and consequently no effect on filiation, many of its provisions are inspired by the chapter regulating marriage, with some adjustments.

**2.1.7. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/*de facto* family formations? Explain briefly.**

The major requests for reform were driven by the social evolution on sexual orientation, non-discrimination and, therefore, in favour of same sex couples recognition. This has been achieved through the civil partnership and, then, more perfectly, by the reform of 2014 that validated marriage of same sex persons. The other concern has been the struggle against blanc marriages, and this has been achieved by the adoption of specific consideration of marriage celebrated to acquire a right related to residence; this has been completed by special power of the public prosecutor. The recent reform on divorce has satisfied the expectations of a more peaceful dissolution of marriage. The only reform remaining ongoing is that of the filiation.<sup>3</sup> Only few organisations voice the request to modernize the matrimonial duties.

**2.2. Property relations.**

**2.2.1. List different family property regimes in your country.**

There are four basic matrimonial regimes in Luxembourg:

- default community of property regime,
- separation of property regime,
- conventional community of property regime,
- participation in acquired assets regime.

The default regime applies when spouses do not choose any other matrimonial regime, which is very frequent. In practice, participation in acquired assets is very seldom chosen. Conventional community of property regime is rare as well, except some specific clauses, and some old couples chose (often during the marriage) universal community.

Default community regime (limited to acquired assets): **This regime distinguishes between two sets of assets:**

- The personal assets of each spouse. This type of asset includes property acquired before the marriage, personal items acquired during the marriage, and property inherited or received as a gift during the marriage. It also includes debt taken out before the marriage or which reduces the inheritance and gifts assigned to either spouse before or during the marriage.
- Assets that the spouses own jointly. These assets include the fruit of each spouse's labour, the benefits and income of jointly owned property, and goods purchased by each or both

<sup>3</sup> Proposal file no. 6568, available at : <https://www.chd.lu/wps/portal/public/Accueil/TravailALaChambre/Recherche/RoleDesAffaires?action=doDocpaDetails&backto=/wps/portal/public/Accueil/Actualite&id=6568> (18.5.2019).

spouses during the marriage. It also includes all goods that cannot be deemed to belong to one spouse or the other.

If the marriage ends, then all property is divided up according to these two categories. For example, a home that you owned before the marriage would remain your own property. The same goes for assets that you receive through inheritance or as a gift while you are married. However, wages, and income from moveable or immovable property that you receive, is shared – even when this income comes from individually owned sources.

To prove that you own an item, you will have to provide evidence of ownership, such as a receipt or notarised inventory.

Separation of property: **In principle, there are no jointly owned assets under this regime. This does not mean that spouses under this regime cannot both own something (for example, if they each pay half for an item). Such property is considered as joint (“indivis”) subject to general provisions on joint property Civ. C., arts. 815 to 815-17).**

If the marriage ends, assets that cannot be established as belonging exclusively to either spouse are deemed to belong to both spouses in equal proportion. The same applies to deposits in joint accounts. Each spouse retains sole liability for their debts, except as regards loans taken out for household expenses or the children’s education, for which both spouses remain liable.

In the event of divorce or death, spouses must only divide these jointly owned assets. Individually owned items do not have to be shared.

Universal community regime: **Under this regime, your individual wealth is limited to your personal affairs and rights, such as clothes and professional equipment. All the rest is shared, including debts.**

If the marriage ends, then in theory, each party should receive half of each item included in the shared assets.

And if you ever want to change regimes? No problem. No matter which one you choose when you marry, once you have been married for at least two years, you have the right to change to another by notarised deed.

**2.2.2. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?**

The equal division of property regime applies automatically when the spouses choose not to sign a prenuptial agreement.

- The personal assets of each spouse. This type of asset includes property acquired before the marriage, personal items acquired during the marriage, and property inherited or received as a gift during the marriage. It also includes debt taken out before the marriage or which reduces the inheritance and gifts assigned to either spouse before or during the marriage.
- Assets that the spouses own jointly. These assets include the fruit of each spouse’s labour, the benefits and income of jointly owned property, and goods purchased by each spouse during the marriage. It also includes all goods that cannot be deemed to belong to one spouse or the other.

**2.2.3. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a “new regime just for them”?**

As such, there is no other matrimonial regime for non-married couples, matrimonial regime being reserved to marriage. However, a patrimonial arrangement is allowed for civil partners (Bill of the 9<sup>th</sup>

of July 2004 concerning the legal effects of certain partnerships (Mémorial A, no. 143 of the 6<sup>th</sup> of August 2004), art. 6), with respect to articles 7 to 9 of the same law. There is no precision about the content of this arrangement; it is only stated, procedurally, that it shall be communicated to the civil registrar, in order to be opposed to third parties. As articles 7 to 9 are mandatory, this arrangement may only increase the obligations of partners.

There is no other specific contract foreseen for any other family cell. However, any persons that have a shared property are allowed to arrange their relationships through a shared property convention ("*convention d'indivision*": Civ. C., art. 815 (1)).

Concerning married couples, they are free to elaborate a matrimonial regime fully specific to them. However, they must comply with the general provisions applicable to marriage, notably its patrimonial effects (Civ. C., arts. 220-226). Indeed, the various matrimonial regimes provided by the civil code are templates that spouses may use, or in which they may pick up some clauses, especially to regulate the dissolution of marriage and its consequences.

**2.2.4 Explain briefly the rules on the administration of family property and compare if there are difference for different property regimes.**

All **married couples**, without exception, are subject to a **matrimonial regime**, by which is meant a set of rules governing the pecuniary interests of the spouses, the purpose of which is to regulate their property relations during the marriage and at its dissolution.

If **no marriage contract** was entered into by the couple, the default 'legal community' regime applies to the property of the spouses. However, the couple is free to adopt any other form of marriage contract, or to make changes to their existing matrimonial regime.

**2.2.5. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

There is no public registry for matrimonial regimes, but there is a procedure to inform third parties. First of all, any matrimonial regime arrangement, established through a marriage contract ("*contrat de mariage*") if chosen before the marriage, has to be passed before a notary. If this happens before the marriage, a certificate is given to the civil registrar and is mentioned into the marriage act, with the name of the notary. If the matrimonial regime is amended after the marriage, this is as well communicated to the civil registrar and mentioned on the birth act. This is a condition to oppose it to third parties.

**2.2.6. What if there are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

**Separation regime:**

- property owned by the spouse alone before the date of the marriage (e.g. car, home or furniture acquired before the marriage);
- property acquired during the marriage, but which is personal in nature and therefore considered as the spouse's private property (e.g. personal clothing of each spouse, family souvenirs);
- property received as a gift or inheritance during the marriage by the spouse (e.g. a painting offered by a spouse's parents as a birthday present, property inherited by a spouse from a deceased parent) unless the testator, donor or grantor stipulated otherwise.

Debts held by either of the spouses prior to the marriage remain personal. However, creditors may collect on this debt not only in relation to the separate property of this spouse, but may also come after assets having become community property through the actions of this spouse (for example, the latter's income).

Debts incurred by either of the spouses for the maintenance of the household or the education of the couple's children may be recovered against the entirety of community property.

When a debt became community property through the action of only one of the spouses, it cannot be recovered against the separate property of the other spouse.

**Universal community of property:**

Under this regime, all property, both movable and immovable, present and future, becomes part of a joint estate and all debts are discharged from this joint estate.

Consequently, any property owned by either of the spouses alone before the marriage becomes community property, regardless of whether it is movable (e.g. jewellery, cars) or immovable (e.g. land, apartments). All property acquired during the marriage will also become community property.

In other words, in the case of universal community of property, the spouses no longer have any separate property. The only exceptions relate to property considered as personal in nature for one or the other of the spouses (e.g. personal clothing of each spouse, family souvenirs).

All of the married couple's debts are the joint and equal responsibility of both spouses, even debts incurred by either of them before the marriage (e.g. a bank loan concluded 10 years before the marriage).

**Separation of property regime:**

Each spouse therefore retains the sole benefit and right to dispose freely of their property, as well as sole responsibility for its management.

Similarly, each spouse is alone responsible for their debts, whether or not these debts were incurred before or during the marriage. The only exception relates to debts incurred by either spouse for the maintenance of the household or the education of the couple's children. Both spouses are always responsible for this type of debt.

**2.2.7. Describe allocation and division of property in case of divorce, separation or dissolution of the union**

A marriage is dissolved by the death of one of the spouses or by divorce.

In both cases, the matrimonial regime comes to an end and community property must be liquidated. Liquidation requires the division of community assets and liabilities. This division is carried out between ex-spouses (in the case of divorce) or between one of the spouses and the heirs of the other spouse (in the case of the latter's death), in line with their respective rights.

Under the regime of separation of property, as none of the assets or liabilities are jointly held, there is nothing to liquidate. As a matter of principle, the matrimonial benefits ("*avantages matrimoniaux*", i.e. benefits offered by one of the spouses to the other, possibly reciprocal, into the shaping of their matrimonial regime) are executed even in case of divorce; surely, it can be provided differently in a consensual divorce if the convention so states; the only explicit derogation to the application of these matrimonial divorce is when one of the spouses has been sentenced for violence into the family (C.civ., art. 251).

**2.2.8. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?**

No, there are not special rules.

**2.3. Cross-border issues.**

**2.3.1. Is your country participating in the enhance cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?**

Yes. From December 2015 to February 2016, Luxembourg addressed requests to the Commission indicating that they wished to establish enhanced cooperation between themselves in the area of the property regimes of international couples and, specifically, of the jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships<sup>4</sup>, and asking the Commission to submit a proposal to the Council to that effect.

**Law of 1 August 2018**, 1° on the implementation of Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the field of jurisdiction, applicable law, recognition and enforcement of judgments in matrimonial property regimes and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the field of jurisdiction, applicable law, recognition and enforcement of decisions on the property effects of registered partnerships; and amending the New Code of Civil Procedure by adding an article 685-2ter.

Pursuant to Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the field of jurisdiction, applicable law, recognition and enforcement of judgments in matrimonial matters and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the field of jurisdiction, of the applicable law, the recognition and enforcement of decisions concerning the property effects of registered partnerships, notaries appointed by grand-ducal decree are competent to adapt rights in rem in immovable property referred to in Article 29 of the above-mentioned Regulations (EU) 2016/1103 and (EU) 2016/1104.

The adjustment referred to in the first paragraph shall be made no later than the time when the property to which the right in rem referred to in Articles 29 of the aforementioned Regulations (EU) 2016/1103 and (EU) 2016/1104 relates is transferred *inter vivos* for free or against payment.

The New Code of Civil Procedure is amended as follows:

In Part One, Book VII, Title VI, Section I is supplemented by a new Article 685-2ter, which reads as follows:

Art. 685-2ter.

Judicial decisions in civil matters given in a Member State of the European Union which are enforceable in that Member State and which, under Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the field of jurisdiction, applicable law, recognition and enforcement of judgments in matrimonial property regimes and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the field of jurisdiction, of the applicable law, the recognition and enforcement of decisions relating to the property effects of registered partnerships, fulfil the conditions for recognition and enforcement in Luxembourg, and are rendered enforceable in the manner provided for in the aforementioned Regulations (EU) 2016/1103 and (EU) 2016/1104.

**2.3.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as “marriage”, “matrimonial property agreement”, “partnership property agreement” etc.?**

There are two international conventions of the Hague Conference on Private International<sup>5</sup> Law relevant to this issue, namely the Convention of 17 July 1905 on conflict of laws relating to the effects of marriage on the rights and duties of spouses in their personal relationships and with regard

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<sup>4</sup> Bendito Cañizares, D. T., 2015.

<sup>5</sup> Van Loon, H., 2007, 8-9.



to their estates, and the Convention of 14 March 1978 on the law applicable to matrimonial property regimes. However, only three Member States (France, Luxembourg, The Netherlands) have ratified them and they do not offer the solutions needed to deal with the scale of the problems.

To facilitate spouses and partners management of their property, the Regulation enhances the role of party autonomy in the organization of the property regime. Some national laws as Luxembourg already admit a limited party autonomy. Nevertheless, at this moment there are open issues revealed through interpretation of the new Regulations<sup>6</sup>, as far as some speculations on matters arising in the future which will raise questions and uncertainties for judges while hearing a relevant case.

A doubt arises on the perfect correspondence between the authorization and its implementation.

Scope of application will be in Luxembourg:

- a) **Temporal scope:** According to art. 69. 1. This regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 29 January 2019 subject to paragraphs 2 and 3;
- b) **Territorial scope:** This regulation should be binding and directly applicable only in the Member States, which participates in enhanced cooperation, by virtue of Decision (EU) 2016/954, y
- c) **Substantive Scope:** The scope of this regulation should include all civil-law aspects of matrimonial property regimes, both the daily management of matrimonial property and the liquidation of the regime, in particular as a result of the couple's separation or the death of one of the spouses.

### **2.3.3. Are you expecting any problems with the application of the rules on jurisdiction?**

Some rules of some European Regulations have a wider scope than that of determination of international competition, and they also fix territorial competence, so that it does not have to deal with the international jurisdiction of any court of the Member State designated by the Regulation to which it is addressed<sup>7</sup>.

It is only the place of the State indicated in the Regulation. This is the case with many of the provisions of article 7 of the Brussels I Regulation bis, which do not refer to the courts of a State, but to the specific court of a place: that of performance of the obligation, that of the production of the damage or that of the situation of the property to give just a few examples. But so far there are no rules the type of court or tribunal that will be responsible for the determination of objective jurisdiction, i.e. the type of tribunal to deal with the case, except in a case which is also found in article 7 of the Regulation Brussels I bis.

### **2.3.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

Some of the problems that could occur in the more immediate future is determine to which couples the Regulation will apply, because the definition contained in its article 3.1 leaves a multitude of questions without no unanswered. For example, between them: whether or not the Register is to be constitutive, if it is to be a register of a country the Regulation, if it is to be a single register or several registers may coexist, different registrations in the same State, if there is a possibility that it is a Registry administrative or has to be a Civil Registry.

### **2.3.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

With regard to the recognition and enforceability of judicial decisions have enforceability al of court settlements. While, notarial documents are only valid if they are authentic instruments.

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<sup>6</sup> Spyros Tsantinis, 2018.

<sup>7</sup> Schockweiler, 1997, 104.

According to settled case law of the Court of Justice of the European Union, it is the Court of Justice of the European Union that has the role to "control the limits within which the judge of a Contracting State may have recourse" with the exception of public policy. Indeed, the judges in Luxembourg continue, the scope of this mechanism "cannot be determined unilaterally by each of the Member States without control of the institutions of the European Community". Thus, as Jürgen Basedow pointed out, "the reservation of public policy, which traditionally draws on the values and principles of the national legal order of the forum, is increasingly fed by another source, that of Community and European law"<sup>8</sup>. This approach therefore justifies the development of a restrictive concept of the public policy clause, which can only be applied in exceptional circumstances where the fundamental values of the "European democratic society" are called into question and there is a real, present and sufficiently serious threat to them.

From its first decisions, the Court of Justice has underlined the exceptional nature of the application of public policy within the European area. This approach was subsequently confirmed first in Regulation No 44/2001 (recast in Regulation No 1215/2012) and, secondly, by the other instruments that have enriched the Union's private international law. Thus, according to a formulation that has now become classic in this field, the recognition of a foreign decision can only be excluded if the violation of public policy is "manifest".

Thus, this option has been taken up in Article 35.1 of Regulation No 650/2012, supra analysed (No 221 et seq.), as well as in Article 40.1 a) thereof, according to which "A decision given shall not be recognised if the recognition is manifestly contrary to public policy in the Member State in which recognition is sought".

### **2.3.6. Are there any national rules on international jurisdiction and applicable (besides the Regulations) concerning the succession in your country?**

It is therefore with this in mind that Regulation (EU) No 612/2012 comes into play: the provision of a single conflict rule, both for jurisdiction and for the applicable law, as well as the general admission of the *professio juris*, aim to simplify the regulation of cross-border succession, by providing a predictable and uniform solution for all acceding Member States.

In Luxembourg, the succession procedure is instituted by the heir or heirs, who, on their own initiative, assign all transactions for the settlement of the estate to a notary chosen by them or appointed by the testator.

The jurisdiction, recognition and enforcement of judgments in civil and commercial matters (Brussels I):

- Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I recast)

- Communication from Luxembourg and the other Member States.

About Jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (Brussels II):

- Council Regulation (EC) No 2201/2003 of 27 November 2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility repealing Regulation (EC) No 1347/2000 (Brussels IIa)

- Communications from LUXEMBOURG and other Member States

- Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children

Divorce and body separation:

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<sup>8</sup> Bonomi, A., Wautelet, P., 2016.

- Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.
- Regulation applicable from 21 June 2012 between Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia.
- Regulation applicable from 22 May 2014 to Lithuania o Regulation applicable from 29 July 2015 to Greece.

### 3. Succession law.

#### 3.1. General.

##### 3.1.1. What are the main legal sources of Succession Law (SL) in your country? What are the additional legal sources of SL?

The Civil Code of Luxembourg Decree of 19 April 1803. Successions: Title I which deals with general issues relating to succession from art. 718 to 892) and Title II which contains different chapters, all of which refer to *inter vivos* and *mortis causa donations* (arts. 893 to 1100) and which are structured in chapters: Chapter I for general provisions in arts. 893 to 900), Chapter II on the ability to dispose of or receive by gift *inter vivos* or by will in arts. 901 to 912; Chapter III. Of the available portion of goods and the reduction in arts. 913 to 930; Chap. IV On *inter vivos* donations from arts. 931 to 966, in chapter V on testamentary dispositions in arts. 967 to 1047; Chap. VI The portion of available goods, and the reduction of the provisions allowed for the grandchildren of the donor or testator, or the children of their siblings in arts. 1048 to 1074; Chap. VII referring to actions carried out by ascendants; and Chap. VIII on Donations made by marriage contract to spouses and unborn children of marriage (arts. 1081 to 1090) or dispositions between spouses either by marriage contract or during marriage arts. 1091 to 1100

Other regulations exist but are not applicable to the core questions: tax regulation, missions and cost of the notary. In Luxembourg, case law is not abundant/rich.

##### 3.1.2. Provide a short description of the main historical developments in SL in your country.

The legal comparatists have historically promoted the theory of legal origins with respect to the European Civil Codes, basing the Luxembourg Civil Code on Napoleon's Code, as well as other EU countries such as France, Spain, Italy, the Netherlands, Portugal or Belgium.

Since these precedents, there have been numerous changes in the material of successors to the Luxembourg Civil Code, including the Law of 13 April 1979 on material filiation, the Law of 26 April 1979 regulating the inheritance rights of the surviving spouse and natural children and amending other provisions of the Civil Code relating to succession, bill of the 8<sup>th</sup> of April 1993 on the organization of joint property ("*indivision* ", Mémorial A, no. 32 of the 29<sup>th</sup> of April 1993), bill of the 9<sup>th</sup> July 1969 concerning mutual donations between spouses and reversibility clauses (Mémorial A, no. 35 of the 22<sup>nd</sup> of July 1969).

Currently, with the entry into force of European Regulation 650/2012, the estates opened in Luxembourg are, since 17 August 2015, governed by a single law. Thus, the adoption of the Regulation put an end to the application of the secessionist system, in particular followed in Luxembourg, which periodically led to the application of different laws depending on the nature and location of the goods included in the Succession.

In the absence of a derogatory testamentary provision, the estate is henceforth subject in principle to the law of the country in which the deceased had his last habitual residence, and this without taking into account the location of the property making up the estate of the deceased.

A second important innovation of the regulation is the option given to the deceased to make a choice of law in favour of the law of the estate of the country of which he is a national at the time of the election, or at the time of his death. This choice must be expressed expressly or derived from the terms of a testamentary disposition. Therefore, a Luxembourg resident with English nationality or dual Luxembourg nationality could opt for the application of English law to his succession. It should be noted that this same singularity does not exist at the tax level. It should therefore be made clear that, unlike direct taxation, Luxembourg has not concluded any Convention against double taxation in the field of inheritance rights. It is not uncommon for many States to exercise their taxing powers simultaneously with the same assets, which can lead to double taxation.

### 3.1.3 What are the general principles of succession in your country?

In Luxembourg inheritance law, there are restrictions on the freedom to dispose mortis causa. In particular, the figure of the legitimate inheritance prevents a person from disinheriting his legal heirs by means of a donation or a disposition mortis causa in favour of third parties. Under Luxembourg law, only the descendants of the deceased (the children or, if the children have died, their children) are entitled to legitimate rights. This is regulated through the mechanism called “*réserve*”, the descendants being “*héritiers réservataires* “. The legitimate right amounts to half of the legal estate if the deceased leaves only one child, to two thirds if he leaves two children and to three quarters if he leaves three or more children. The legitimate one is renounceable. The renunciation must be express, by means of a declaration before the registry of the court of the place of opening of the succession and must be registered in a special register for this purpose. Although we must clarify that only the descendants of the deceased have the right to the reserving party, not to the spouse or ascendants. The reserve of the heir cannot renounce his share until the death of the deceased. After the death of the *de cuius*, all the heirs are considered to have joint property (“*propriété indivise* “). Therefore, many provisions of succession state how to share the goods in order for each heir to get individual property. The principle is a distribution of goods themselves, but it may be necessary to sell them in order to distribute money. Another important matter is dealing with the equality of heirs, which requires that each of them has the same chance to get any good in the inheritance, so that the distribution, in case of disagreement among heirs, is made per hazard/by chance. However, more and more provisions derogate from that solution, notably to allow some people to get some specific goods by priority to other heirs, e.g. the farmer for fields and buildings necessary for the farm, or the surviving spouse with children for the house.

### 3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.

The succession procedure is initiated by the heirs, who on their own initiative entrust all operations to the notary<sup>9</sup> of their choice or determined by the deceased. Furthermore, it should be borne in mind that the competent authority will be that of the country where the deceased had his habitual residence at the time of his death, except in respect of immovable property that was outside the country of residence of the deceased, since such property is subject to the law of its location, under the principle of the division of the estate. Thus, the law of Luxembourg does not allow for exceptions to this law. With respect to cross-border succession:

- In the event of the death of a family member or close relative, the heir can in principle settle the succession: in the courts of the EU country where the deceased last lived; with a notary in any EU country.

<sup>9</sup> Droz, A., 1989.

- As a general rule, the authority responsible for succession will apply the national law of the EU country in which the deceased last lived, unless the deceased had chosen the law of his or her country of nationality.

**3.1.5. Describe the types (legal basis) of succession: intestate and testamentary. Explain the relationship between the different legal bases of succession and the priority that exists between them. Is the cumulative application of legal titles possible?**

The guiding rules are given for *ab intestato* successions, with their complex structure. Then, comes possibly the last will, which may derogate the *ab intestato* succession but will not change its structure. When drawing up wills, the rules to be complied with include the following:

- Firstly, the testator must be of sound mind. Persons declared to lack legal capacity cannot make a will. In the case of minors specific rules apply. These are mainly designed to protect the assets of the persons concerned.

- Some wills, such as joint wills, are prohibited. So too are agreements as to succession.

The Civil Code lists the following forms of will provided for by the Luxembourg law of succession:

- holographic will;
- notarially recorded will;
- sealed will.

Procedures and arrangements vary depending on the type of will chosen.

The "sharing estate" or "roots" therefore consist of assets existing at the time of death (taking into account the matrimonial regime of the deceased) less debts, under certain conditions, gifts made by the deceased. If you make a Will, your property will be shared among your relatives, according to the rules of legal real estate return. They define not only the beneficiary of your property, but also the part of the inheritance that corresponds to each of your legal heirs.

Both the principle of freedom to test and the system of lawfulness are recognized in Luxembourg's legal system, but when setting the limits of this freedom, as well as when determining who is lawful and to what extent, the provisions of its Civil Code must be observed.

Its regulations configure the right of legitimate women according to three contents:

- The legitimate one has a patrimonial content in all the mentioned systems.
- The designation of descendants as essential legitimate remains unchanged again (applying the rule that children exclude subsequent descendants). The same does not apply to the widowed spouse, who normally appears as legitimate (sometimes granting him the property and in other cases the usufruct) although not always, let alone the de facto cohabitant. With respect to ascendants, fewer and fewer systems recognize this right, and most limit it to the parents. Siblings and other collateral relatives are practically ignored in almost none of them.
- Another common aspect that can be appreciated is a certain abandonment of satisfaction *in natura*, that is to say, the payment of the inheritance in goods (speaking then of *pars bonorum*), yielding to satisfaction in money, even *extraherence* (in which case it would be a *pars valoris bonorum*).
- The European succession legislations are approximated in relation to the foundation of the legitimate one. In this regard, a certain common dissociation of the vital or economic needs of forced heirs (as in the case of food law) should be noted, the legitimate being objectively attributed to them.

Despite the similarities observed, the homogeneity in the configuration of the legitimate ones is not absolute. Among the differences that can be seen, the following stand out in the way of setting the legitimate quota: The concretion of the legitimate quota through the distinction between an available quota and another reserved for the legitimate one.

The trust is possibly the most distinctive contribution made by Anglo-Saxon systems to the science of Law. Although, it is true that it is currently also envisaged in some countries of Civil Law and in some mixed systems (such as Puerto Rico, Quebec, South Africa and Scotland), generally their specificity and absence in other countries Belonging to these legal families may pose difficulties both in their

qualification and in their recognition. Although, it would be legitimate to consider the approximation of this figure to that of the trust or the trust business. It no way can be considered equivalent. The figure of the testament trust is presented as a figure of enormous practical impact in the field of inheritance. Basically, the constituent leaves in testamentary disposition The constitution of a trust for the assumption of his death, with certain determination of trustee and beneficiaries. In more detail, in the trust probate a testator bequeaths his assets to a trustee (usually a bank), in such a way that he is in charge of paying the benefits produced by the goods to the surviving spouse for the duration of his life, as well as Distribute the goods to your children, either to the death of the spouse, whether they are of age if they are even less than the death of the child. The trustee is vested with full powers of administration and disposition on the estates bequeathed under the testament. He owns the goods for the third party. It is also free to sell and reinvest the product of the sale. On the other hand, this one has, in addition to the obligation.

### **3.1.6. What happens with the estate of inheritance if the decedent has no heirs?**

They pass to the State, if the deceased was single and without children or siblings, and neither his or her father nor his or her mother lives.

### **3.1.7 Are there special rules or limitations concerning succession with reference to the deceased's (or heir's) culture, tradition, religion or other characteristics?**

The revival of tradition, culture and customs is part of the new national and international identity; however, this revival must be rooted in a way of life based on human rights, democracy and equality for all. Thus, culture, tradition and customs have to be balanced within the social and legal context of the constitution and provisions of the Bill of Rights<sup>10</sup>.

Indeed, the existing international instruments on succession or matters relating to the field of succession, when the European Commission began to prepare the new instrument back in the 1990s, date from the 1960s and 1970s and were clearly insufficient. The Hague Conventions of 5 October 1961 on the conflict of laws in the form of testamentary dispositions and of 2 October 1973 on the international administration of succession, although they had entered into force (5 January 1964 and 1 July 1993 respectively), did not represent either the consensus of the veteran countries in Europe or the new ones. This situation was not remedied in the 1980s as the Convention of 1 July 1985 on the law applicable to the trust and its recognition, although in force since 1 January 1992, was ratified only by a few European Anglo-Saxon countries and the Convention of 1 August 1989 on the law applicable to succession to the estates of deceased persons, was ratified only by the Netherlands and signed by Luxembourg, so it did not enter into force and has not entered into force.

## **3.2. Intestate succession.**

### **3.2.1. Are men and women equal in succession? Are domestic and foreign nationals equal in succession? Are decedent's children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?**

- **EQUAL IN SUCCESSION:** Yes, in Luxembourg, men and women equal in succession. In fact, there is a specific reference to gender issues in the constitutional text which, following the amendment of 13 July 2006, provides in article 11.2 for equal rights and an obligation for public authorities to promote such equality. In addition, in this country there is an association for the promotion of gender equality

<sup>10</sup> Maluleke, M. J., 2012.

known as the "National Council of Luxembourg Women", which plays an important role in promoting equal opportunities<sup>11</sup>. To this end, the Council actively collaborates with Luxembourg institutions and proposes initiatives aimed at improving the status of women in the country. One of the many initiatives is to promote - with the support of the European Commission and the Luxembourg Government - equal opportunities at local level through the establishment of an Equal Opportunities Commission in each municipality.

- **DECEDEN\*** Nationals and foreigners are equal in succession

\* Children born in and out of wedlock are equal before succession: Art. 334-1.

\* The child born out of wedlock has the same rights and duties as the legitimate child.

**T'S CHILDREN BORN IN OR OUT OF WEDLOCK:**

- **ADOPTED through legal adoption CHILDREN ARE EQUAL BEFORE THE SUCCESSION:** Art. 357 CIVIL CODE say that the adoption takes effect both with respect to the parties and to third parties from the date of submission of the application for adoption. And according with art. 358: The adoptee remains in his family of origin and retains all rights and obligations, including inheritance rights. However, if the adopted child takes the place of any child in its adoption family, even for succession, but he/she is not a legitimate heir (hériter réservataire) for his/her adoptant's ascendants (C.civ., art. 363); in other words, he will normally get the same rights as the other children, but his/her adoptant's ascendants may derogate to his/her rights without any limitation. Concerning full adoption, the adopted child is exactly in the same situation as other children.

- **THE UNBORN CHILD HAS THE SAME RIGHTS IN THE EVENT OF BIRTH:** Art. 725: In order to have rights one must necessarily exist at the time of the opening of the succession. So they are incapable of succeeding: 1<sup>o</sup>, that which is not yet conceived; and 2<sup>o</sup> The child who is not born viable;

- **Civil partners do not benefit from the protection of the surviving spouse, but the partners may by will establish the same protection, and they will be submitted to the same tax treatment as married couples.** The Law of 9 July 2004 (Mém. P. 2019 et seq., Parl. Doc. no. 4946) on the legal effects of certain unmarried couples entered into force on 1 November 2004.

Persons who have made a declaration of unmarried partnership and have registered in accordance with the provisions of art. 3 thereof, in addition to registering the declaration as a *pareh* in a file referred to in Articles 1126 et seq. of the New Code of Civil Procedure. They may determine the financial consequences of the unmarried couple by means of a written agreement between them. This agreement may be concluded or modified at any time. Notification of the agreement or amendment is sent to the Public Prosecutor's Office within three working days (article 6 of the 2004 Act).

In the absence of an agreement, however, the declaration of unmarried partnership creates rights and obligations between taxpayers which, in many respects, are similar to those of spouses. The above provisions apply only to unmarried couples declared in accordance with article 3 of this Act (article 1 of the 2004 Act). There are no special provisions in relation to the ownership regime of unregistered non-marital unions.

The 2004 Act was recently supplemented by the Act of 3 August 2010 (Mém. P. 2190, Parl. Doc. no. 5904), article 4-1, which recognizes unions entered into abroad, allowing them to benefit from the same advantages as those granted to Luxembourg *de facto* couples.

- **REGISTERED AND UNREGISTERED HOMOSEXUAL COUPLES ARE THE SAME FOR SUCCESSION:** more than 10 per cent of marriages are between Luxembourgers and non-Luxembourgers and approximately 50 marriages are concluded each year between persons of the same sex since same-sex marriage was legalized in 2015.

Both the Recommendation of the Parliamentary Assembly of the Council of Europe 924/81, and the European Parliament resolution A-0028/94, of 8 February, on the equality of the law of homosexuals and lesbians in the European Community, laid the foundations and, thus, have encouraged the member countries of the European Union to legislate on the coexistence of *de facto* couples. Within

<sup>11</sup> Rodrigues Canotilho, M., 2012, 103-118.

the European map, we can find countries such as Greece, Italy, Austria, Spain, Luxembourg and Ireland where there is still no legislation in this respect, or it is sectoral.

If you have a stable partner with whom you live continuously, throughout the EU you are recognized a number of rights even if your union has not been registered with any administration.

If you are going to live with your common-law partner in another EU country and you can prove that you live together or prove in some other way that you have a lasting relationship, that country must facilitate the entry and residence of your partner, whether or not he or she is an EU citizen.

In EU countries that recognise common-law unions, you will also have rights and obligations in terms of property, inheritance and alimony in the event of separation. These rights are particularly important for same-sex couples, as not all EU countries allow them to marry or register their union<sup>12</sup>. However, the majority of Member States have not defined exactly how a cohabitation or long-term relationship is accredited. In any case, remember that you can always go to the notary closest to you. They will be able to answer any questions you may have.

### **3.2.2. Are legal persons capable of inheriting? If yes, on which basis?**

Yes, the legal persons are capable of inheriting in Luxembourg, in accordance with the provisions of the Civil Code: where the art. 902. say: "All persons may dispose of and receive, either by *inter vivos* donation or by will, except those declared incapable of doing so by law". In addition, Art. 910 civil code(L. 22 February 1984) says: "Provisions *inter vivos* or by will for the benefit of the State and other legal persons governed by public law, with the exception of municipalities, associations of municipalities and public or public utility establishments placed under the supervision of municipalities, shall only have effect to the extent that they are authorised by a Grand Ducal Decree. This authorization will not be required for the acceptance of donations of securities whose value does not exceed 12,394.68 euros.

The acceptance of donations subject to authorisation and their request for delivery may be made provisionally, as a precautionary measure. The subsequent authorization will take effect on the day of such acceptance".

### **3.2.3. Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.**

The **article 727 civil code Luxembourg** says: "Are unworthy to succeed, and, as such, excluded from succession:

- \* The person who is convicted of having given or attempted to give death to the deceased;
- \* A person who has made a capital charge against the deceased that is considered slanderous;
- \* The adult heir who, after investigating the murder of the deceased, has not reported him to the courts.

Finally, the **article 729** says: "The heir excluded from the succession on the grounds of unworthiness is required to return all the fruits and income he has enjoyed since the opening of the succession".

### **3.2.4. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?**

If there is no will, the succession is governed by the applicable rules of law.

The order of succession is usually as follows:

- \* descendants (children, grandchildren);
- \* surviving spouse;

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<sup>12</sup> Burkhard H., Mariottini, C., Camara, C., 2012.



- \* father and mother, together with brothers and sisters of the deceased and descendants of the latter;
- \* ascendants other than the father and mother (grandparents, great grandparents, etc.);
- \* collateral relatives other than brothers and sisters (uncles, aunts, nephews, nieces, etc.);
- \* the State.

Several situations might arise with this hierarchy of heirs:

Situation 1: the deceased has a surviving spouse and children (or grandchildren). In law, the surviving spouse is an undivorced spouse against whom there is no final separation order. The estate is shared equally between the children of the deceased in proportion to their number, subject to the rights of the surviving spouse. Example: If the deceased has left one child, it is that child that inherits the whole estate, subject to the rights of the surviving spouse. If the deceased has left two children, those two share the deceased's estate, again subject to the rights of the surviving spouse. In that situation, the surviving spouse has a choice between:

- \* usufruct (the right to enjoy the use and benefits) of the property jointly occupied \* by the spouses and its furniture, on condition that the deceased had full ownership of the property or joint ownership with the survivor, and
- \* the smallest legitimate child's portion, provided that it is not less than a quarter of the estate.

The surviving spouse is allowed three months and 40 days from the death to exercise the option by a declaration to the registry of the district court in the jurisdiction in which the succession is opened. If no choice is made within the specified period, the surviving spouse is deemed to have opted for usufruct. If the surviving spouse opts for the child's portion, the children's shares will be reduced proportionately, to the extent necessary to constitute the portion of the surviving spouse.

What happens if one of the children of the deceased has predeceased them but has left children?

In that case, substitution (representation) applies. The child(ren) of the predeceased child (i.e. the grandchildren of the deceased) then divide their father's or mother's reserved portion between them. In other words, together they receive the portion that would have passed to that person if they had survived the deceased.

What happens if the surviving spouse remarries after opting for usufruct of the joint home?

In that case, the children, or grandchildren where the deceased has been predeceased by one of the children, may seek a joint agreement for the usufruct to be converted into capital.

The capital must be equal to the value of the usufruct, which depends, inter alia, on the age of the beneficiary of the usufruct.

The application for conversion must be made to the court within six months of the surviving spouse's remarriage and must be made by all the children, or grandchildren where the deceased has been predeceased by one of the children.

If not all the children have agreed to apply for conversion into capital, the decision is at the court's discretion.

Situation 2: the deceased has a surviving spouse but no children. If the deceased leaves no children or descendants of children, the surviving spouse takes precedence over all other relatives of their deceased spouse and accordingly receives the deceased's whole estate, regardless of whether the surviving spouse subsequently remarries. However, surviving spouses are not entitled heirs (héritier réservataire). Therefore, unlike the children of the deceased, they are not legally entitled to a reserved portion. In other words, if the deceased has no children the surviving spouse could theoretically be excluded from the spouse's estate by either a gift or a will.

Situation 3: the deceased has no children or spouse but leaves brothers and sisters (or nephews and nieces). In that situation, a distinction has to be made according to whether the deceased's parents are still alive. If the parents are still alive, the father and mother each receive one quarter of the estate, i.e. one half in total. The other half is shared between the brothers and sisters or their descendants.

If only the father or mother survives the deceased, they receive one quarter of the estate, while the brothers and sisters or their descendants are allocated the remaining three quarters.

The children of the brothers and sisters (i.e. the nephews and/or nieces of the deceased) share between them the reserved portion of their father or mother by right of representation if their parents predecease the deceased.

Thus, together they receive the portion that would have gone to their father and/or mother if he/she had survived the deceased.

Situation 4: the deceased has no children, spouse, brothers and sisters or nephews and nieces but their parents are still alive

In that situation, the whole estate goes to the father and mother of the deceased, each receiving half.

If only the father or the mother is still alive, that person inherits the whole estate of their predeceased child (*ibidem*).

Situation 5: the deceased has no children, spouse, brothers and sisters or nephews and nieces and their parents and other ascendants are dead. In that situation, the uncles and/or aunts of the deceased, their great uncles and/or great aunts, cousins and descendants of cousins are to be considered heirs. The estate is divided between two lines, the paternal and the maternal line, each receiving half of the estate. Any heir beyond a cousin's grandson or granddaughter, in the maternal or paternal line, can no longer inherit. In that situation, the estate becomes the property of the State, which is known as estate in escheat.

### **3.2.5. Are the heirs liable for deceased's debts and under which conditions?**

Yes, provided that the heirs accept the heritage pure and simple. However, there are to be noted in this context that, at the time of the opening of a succession, heirs can also accept the inheritance for the benefit of inventory.

On the other hand, we must remember the acceptance to benefit of inventory gives the heir to the advantage of the debts of the succession to respond only up to the value of the goods received and even free themselves of these payments abandoning all real inheritance the creditors and legatees

Exactly, the Civil Code in art. 778 say: "Acceptance may be express or tacit: it is express, when the title or capacity of heir is taken in an authentic or private deed; it is tacit, when the heir makes an act which necessarily implies his intention to accept, and which he would only be entitled to do in his capacity as heir". And art. 779, say differentiate of the purely protective acts, of supervision and provisional administration, are not acts of addition of heredity, if the title or capacity of heir has not been taken.

Besides the heirs are the legatees. Indeed, they may enjoy an important part of the succession and it may be unfair to discharge them from any debt. The rule is to distinguish particular and universal legacy (legacy of the whole inheritance or a share of it). Particular legatees are discharged of debts, but not universal ones.

### **3.2.6. What is the manner of renouncing the succession rights?**

Under the Luxemburg Civil Code, waiver of succession must be made at the registry of the court of first instance in the district in which succession takes place, in a special register maintained for that purpose.

In view of the implications, rights and obligations that might result from a succession, it is recommended that a notary is consulted before accepting or waiving succession.

Respect to declaration of waiver of the legacy, the Luxembourg Civil Code does not contain any specific rules on that point and Luxembourg case-law is therefore based on the principle that any procedure may be used for renunciation of a legacy (universal, by general title, or individual). The same applies to renunciation of an individual legacy. Thus renunciation may, inter alia, be tacit, if for example the legatee refuses to perform the obligations associated with the legacy.

In the case of renunciation of a universal legacy or legacy by general title, some courts require compliance with the formal rules laid down for waivers of succession, whilst other courts hold that these rules do not apply.

To receive a declaration of waiver of a reserved share, a reserved portion can only be waived at the registry of the court of first instance in the district in which the succession is opened, in a special register maintained for that purpose.

### **3.3. Disposition of property upon death.**

#### **3.3.1 Testate succession.**

##### **3.3.1.1. Explain the conditions for testate succession.**

There are some restrictions on the freedom to dispose of property upon death: Under the Luxembourg law of succession there are restrictions on the freedom to dispose of one's property on death. More specifically, the reserved portion prevents a person disinheriting certain legal heirs by means of a gift or testamentary arrangement. In Luxembourg law, only the descendants of the deceased (children, or their children if they have already predeceased him at the time of his death) are entitled to the reserved portion.

##### **3.3.1.2. Who has the testamentary capacity?**

The testator must be in possession of his mental faculties. They may not test persons declared incapable by law. As regards children, apply specific provisions aimed, in particular, to protect their heritage.

##### **3.3.1.3. What are the conditions and permissible contents of the will?**

When drawing up wills, the rules to be complied with include the following:

Firstly, the testator must be of sound mind. Persons declared to lack legal capacity cannot make a will. In the case of minors specific rules apply. These are mainly designed to protect the assets of the persons concerned.

Some wills, such as joint wills, are prohibited. So too are agreements as to succession.

The Civil Code lists the following forms of will provided for by the Luxembourg law of succession: holographic will; notarially recorded will; and sealed will.

Procedures and arrangements vary depending on the type of will chosen.

##### **3.3.1.4. Describe the characteristics of will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a will?**

1. **Holographic will.** A holographic will is a will entirely written, dated and signed by the testator in person. Holographic wills have the advantage of simplicity. Their disadvantage is that they may be drawn up by the testator without anyone being informed that the will exists. As a result the will might not be found after the testator's death. There is also a risk of falsification or destruction. Furthermore, a holographic will might not be valid if it is illegible, ambiguous or incomplete. It should

be noted in that connection that even an incorrect date on a holographic will could make it null and void. It might also be invalidated by a material defect. It is therefore in the testator's best interests to make known the existence of the will and the place where it is stored and to ensure that the will is valid. The testator can ensure that the existence of the holographic will is known by telling a person they trust, or, on payment of a fee, they may have the main information on the will (such as name and address of testator and place where will has been lodged) entered in the central register of wills. The register is a database maintained by the Land Registry and Estates Department (*Administration de l'Enregistrement et des Domaines*) (also see below). As regards the validity of the will, it must have been written entirely in the testator's own handwriting and must be dated and signed by the testator. In view of the above, use of an expert in the law of succession, such as a notary, is recommended in order to ensure that the will is valid.

**2. Notarially recorded will.** Secondly, since a notarially recorded will is lodged with a notary, it will remain sealed until the testator's. A notarially recorded will is received by two notaries or one notary assisted by two witnesses. It has considerable advantages compared with a holographic will. Firstly, the notary drawing up the document provides the testator with legal advice. That ensures that there is no procedural or material defect in the testator's last will and that the will is valid. After death, his last wishes will nonetheless be found. It should also be noted in that connection that it is the responsibility of the notary drawing up the will to have the key details of the will he has drawn up entered in the register of wills.

**3. Sealed will.** A sealed will is a document written by the testator or another person and presented to a notary by the testator closed and sealed, in the presence of two witnesses or a second notary. The notary receiving the sealed will draws up an endorsement in the shape of an act in public or private form (*acte de suscription en minute ou en brevet*). The notary stores the sealed will, preventing any risk of substitution or falsification. With a sealed will, like a notarially recorded will, it is possible to keep the arrangements made by the testator sealed during his lifetime. Also, since the will is lodged with a notary it will be found after the testator's death. The fact that the notary draws up an endorsement when he receives the will does not mean that the will lodged is valid. In fact, even if the sealed will has been drawn up and lodged in accordance with the relevant procedural rules, it might nevertheless be rendered invalid by the material defect. The notary is unable to ensure that the will is valid, since it is presented to him closed and sealed. The sealed will form is rarely used in Luxembourg

**4. Testamentary Trust.** The trust is possibly the most distinctive contribution made by Anglo-Saxon systems to the science of law, and is regulated in Luxembourg. It is an institution born of trust, in which the constituent (settlor) transfers all or part of its assets to a third party (trustee), in which it trusts the management of that assets for the benefit of another person (beneficiary). Thus, for purely explanatory purposes, we would differentiate two aspects of the same property: a formal property (which corresponds to the manager) and another material property (which corresponds to the beneficiary). There are many types of trusts, but now we will focus on the so-called "testamentary trust", as it is the one that tends to cause the most problems in practice in the field of succession. It should also be noted, however, that along with the trust contained in the will, it is equally possible that an inter vivos trust may contain dispositions of cause of death, which will become virtual at the time of the death of the constituent. The trust is presented as a figure with enormous practical repercussions in the area of succession. Basically, the constituent leaves in testamentary disposition the constitution of a trust in the event of his death, with a certain determination of trustee and beneficiaries. In more detail, in the testamentary trust a testator bequeaths his assets to a trustee (usually a bank), in such a way that the latter is responsible for paying the benefits produced by the assets to the surviving spouse during all the time that he lives, as well as distributing the assets to his children, either on the death of the spouse, or at his majority if they are still younger at the death of the spouse. The trustee is vested with full powers of administration and disposition over the property bequeathed under the will. It is the owner of the assets vis-à-vis third parties. He is also free to sell them and to reinvest the proceeds of the sale. On the other hand, in addition to the obligations

expressly established in the will, the owner has the duty, imposed by law and controlled by the courts, to act always in the interest of the beneficiaries.

**3.3.1.5. Is there a (public) register of wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

In Luxembourg, the key details of some wills must or may be entered in the register of wills (see also answer to the previous question). Registration is compulsory for notarially recorded wills and for sealed and holographic wills lodged with a notary. That also applies if such wills are cancelled, revoked or amended in any other way. Registration is optional for holographic wills held by individuals.

The will itself and its contents are not kept on the register. The registration only shows the testator's first name and the surname and name of the spouse if applicable, the testator's date and place of birth, identity number, occupation, address or place of residence, type and date of document to be registered, the name and address of the notary who drew up the document or with whom it is lodged or, in the case of holographic wills, if necessary the name and address of any other person or institution entrusted with the will or the place where it is stored.

**3.3.2. Succession agreement (*negotia mortis causa*). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.**

In Luxembourg, certain mortis causa provisions, such as joint wills, are prohibited. The same applies to pacts of succession. The European legal reality shows the coexistence in the continent of two clearly differentiated positions, favourable and contrary to the contractual succession, although the majority of the States prohibit the Covenants inheritances. Of this kind, the civil legislation of Luxembourg, which derives from the Roman system, prohibits generally this third way of ordering the inheritance. While certain exceptions are accepted, as is the case with the pact on the early renunciation of succession, this does not happen in Luxembourg, as the advance waiver of succession is prohibited.

**3.3.2 Are conditions for validity of wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

The validity of the will is firstly considered through general civil law rules. The will is analysed as a unilateral act, and if unilateral acts are not specifically regulated by the Civil Code, it is admitted that contract law applies to them. Therefore, the validity of a will is firstly scrutinized through conditions required for the validity of a contract. This concerns for example the compliance with morality or public order. But these conditions are completed by specific provisions, notably with regard to each category of will. A special provision applicable to all the wills concerns the conditions that may affect a will (C.civ., art. 900): whereas an illicit condition in a contract renders the contract itself void, an illicit condition in a will makes only the condition void, and therefore the will remains valid without any condition; this is a way to resist against the temptation for a legator to use the legacy to impose unfair pressure on the legatee.

I wonder if all these paragraphs are really answering the question, but maybe I am wrong. Yes, such restrictions exist under Luxembourg law. This is forced heirship, as defined in the Civil Code (Code civil). However, it is worth noting that these provisions do not impose restrictions on certain types of property or specific enterprises within the meaning of the question, or on the special categories of assets referred to in the question. Forced heirship imposes restrictions on a legal part of the estate, irrespective of the nature of the property included within that portion.

Article 913 of the Civil Code defines the principles according to which bequests in wills cannot exceed half of the testator's assets if the latter is survived by one child, one-third if he/she is survived by two

children, and one-quarter if he/she is survived by three or more children. Under Article 916 of the Civil Code, where there are no descendants, bequests in wills or lifetime gifts through deeds can concern all the assets.

For the sake of completeness, although these restrictions do not stem from the law on successions, the amended Law of 18 July 1983 on the conservation and protection of national sites and monuments (loi modifiée du 18 juillet 1983 concernant la conservation et la protection des sites et monuments nationaux) should be mentioned. Immovable property that has been listed in accordance with the provisions of said Law is subject to certain restrictions, irrespective of whether it is covered by a future or open succession. Thus, for example, Article 10, first paragraph, first sentence, of said Law provides that a listed immovable property cannot be destroyed or moved, its use cannot be changed, and it cannot undergo any restoration, repair or alteration work without the competent minister having given authorisation. Furthermore, Article 15, first paragraph, of the same Law states that no new structure can be joined to a listed immovable property without special authorisation from the minister.

On the other hand, under the law of this Member State, these do special rules apply to the succession in respect of the above-mentioned assets irrespective of the law applicable to the succession. The expert opinion is divided as to whether forced heirship of an estate falls within international and must therefore be upheld irrespective of the law applicable to the succession.

Finally, under the law of this Member State, the special procedures exist ensure compliance with the above-mentioned special rules, with regard to the forced heirship. If the attributions, whether lifetime gifts or bequests upon death, exceed the available portion, they may be reduced to that portion when the succession is opened. Article 920 et seq. of the Civil Code lays down the procedure for reducing donations and bequests that is applicable in this type of situation.

**3.3.4 Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

Where the deceased has the distributor of his last principal residence or the seat of his estate in Luxembourg, the succession shall be applied as follows.

Persons/Legataire. You may or may not be resident in Luxembourg. The heirs are appointed by will (if it exists) subject to the reserve part, or in the order of distributing succession by Luxembourg law, namely:

- Descendants: the children (or their descendants by representation in case of previous death of one of them) inherit in equal part. Whatever their statue (legitimate, adulterous, adoptive or natural), they exclude all other heirs except the surviving spouse.

The surviving spouse benefited a privileged statue. In the absence of children, he inherits all property. However, he could be expelled from the estate by the will. In the event of the presence of children, and with the exception of the special "special provision available to spouses," the spouse may inherit the OPTR. Of all the usufruct in the conjugation furniture and household chattels (if that was the owner).

- In this case, children benefit from naked ownership in this property and full ownership in the rest. The prospective spouse also opts for a share equivalent to that of the children, i.e. 1/4 the minimum inheritance.

- In case of absence of children and surviving spouse, the parents and collateral are reserving heirs. They inherit the property, up to 1/4 for each parent and the rest is not shared among siblings or their representatives. In case of absence of collateral, the parents inherit at all.

- In fourth order, it is the elevators that inherit half of the side of the maternal branch, and half of the side of the paternal branch. It is then the nearest ascendant who inherits at all. In case of absence of one of the branches, the whole is invested in the other branch.

- In fifth order, it is the closest collateral of each branch, maternal and paternal, which inherits at the height of each branch by half. The succession goes back to the 4th degree, that in absence of one of the branches, the whole is invested in the other branch.
  - In the sixth and last order, the state will inherit the fortune of the deceased.
- The designated heirs may accept the succession as it is or subject to the inventory, challenge it.

### **3.3.5. Cross-border issues.**

#### **3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?**

The admissibility and acceptance of agreements as to successions vary among Member States. In fact, Luxembourg, currently prohibit joint wills or agreements regarding successions. However, because the reasons for such interdictions are being progressively considered outdated, jurisprudence and legal practice have already given a restrictive interpretation to those interdictions where the deceased has made use of them under a foreign law. The Regulation now ensures that such cross-border agreements be considered as valid and be admitted by Member States. In fact, in Regulation No. 650/2012 the provisions on agreements as to succession and disposition of property upon death clarify the pre- requisites for the verification of validity of such agreements and, in perspective, it is likely that they will facilitate the acceptance of the validity of these agreements by those legal systems that, to this date, consider them invalid on a domestic level. However, while the definition of joint wills is provided at Article 3 lit c), the Regulation's provisions on joint wills would have benefitted from major clarity.

The transitional provisions (Article 83) ensure the validity of a disposition of property upon death made prior to the Regulation's entry into force, provided that the choice of law and the disposition meet the conditions laid down in the Regulation. However, it is unfortunate that the text remains silent as to the grounds for contesting or revoking wills prior to the Regulation's entry into force.

#### **3.3.5.2. Are there any problems with the scope of application?**

What place should public order have then? As with other instruments European, the Regulation of 4 July 2012 limits the public policy reserve to only cases where the provision of the law designated by the *de cuius* is "manifestly incompatible with the public policy of the forum" (art. 35) and that this incompatibility is justified by "exceptional circumstances or public interest considerations".

A similar provision is also allowed in Article 40 of the Regulation which includes among the grounds for non-recognition of a decision rendered in a State member the case where it is "manifestly contrary to public policy" of the State required. Thus, on reading these provisions, the objective of the European legislator would seem to be clear: in order to ensure the effective and uniform application of the Regulation, the order public can and should certainly intervene, but only as an exceptional mechanism and only in the case of a clear violation. This raises the problem of determining when and how to make this exception work.

The settlement of successions occupies a prominent place in the law international private international<sup>13</sup>. Defined as "all the patrimonial consequences for after of persons dies", this matter poses a multitude of difficulties for the conflict of laws plan. Differences between national laws are still numerous: first, as to the scope of the applicable law, governing the entirety of the succession in some systems and distinguishing between movable succession and real estate in others<sup>14</sup>. The same problems then arise with regard to connecting factors, which are necessary for the designation of the law(s) applicable to the succession but which vary from one country to another (domicile, nationality

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<sup>13</sup> Azcárraga Monzonís, C., 2008, 11-12.

<sup>14</sup> Debernardi, G., 2017.

or again, for countries adopting the "split" regime, the location of the property building), thus creating an inevitable situation of legal uncertainty and disharmony.

**3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country have experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?**

However, as the judges in Luxembourg have pointed out in cases relating to the application of the Brussels II bis Regulation<sup>15</sup>, this notion of habitual residence could not be directly transposed to all situations, but must be based on a set of factual circumstances specific to each case of species

Consequently, "habitual residence" would be a unitary concept, as it concerns the place where the person's living center is located, but which requires, for the determination of this location, the consideration of factual elements that vary according to each type of situation concerned. It is also a concept that is independent that provided for by the national laws of the Member States and by other texts international, which therefore gives it a "functional" character, giving it the ability to vary its interpretation according to the applicable rule.

Given the increasing mobility in the European Union, every year 500 000 families are affected by transnational succession. Since 17 August 2015, a European regulation has framed these cross-border legacies by determining the jurisdiction of the country of the European Union, which will be competent to settle the succession and the applicable law<sup>15</sup>.

**3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?**

The applicable law to the succession in principle, the law applicable to the whole of the succession is that of the country in where the deceased had his or her habitual residence at the time of death.

Nevertheless, a person can choose as the law applicable to his succession, the law of which she is a national and in cases of multiple nationalities the law of any country of which she is a national.

This regulation (Reglament UE 650/2012) applies to persons whose estate includes an element of foreignness (i.e., a foreign element).

Examples:

- A Luxembourger residing in a other country;
- A Luxembourger with property abroad
- A resident of Luxembourg, who is not Luxembourgish;
- A person who does not reside or have the Luxembourg nationality but who owns property in Luxembourg

On the other hand, a Luxembourg resident in Luxembourg and having only of property in Luxembourg will not be concerned by the regulation.

We have remember, that the regulation only applies to the successions, donations, contracts, life insurance and matrimonial regimes for example, are excluded from the scope of application of the regulations. Similarly, it does not apply to tax matters. And this would be a problem if the persons pay twice, which can happen when the immovable property is not in Luxembourg and the heir applies his national law or by residence.

**3.3.5.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?**

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<sup>15</sup> Max Planck Institut für Ausländisches und Internationales Privatrecht, 2010, 552-720.



Let us start with the general rule: the liquidation of the succession implies a prerequisite and necessary liquidation of the matrimonial regime. This is an obvious fact that does not require doubts: to know the consistency of the succession mass, you must first determine all the deceased's property resulting from the dissolution of his matrimonial regime. However, we have just seen that the presumption of veracity affecting the certificate does not extend to matrimonial matters, which remain governed by the national private international law. This is how the complementary act comes into play: in parallel with the issuance of the Community instrument the competent public authority issues a subsequent national deed, certifying in an authentic manner the rights of the spouse survivor resulting from the dissolution of the matrimonial regime. The advantage would therefore be double: on the one hand, this document would make it possible to complete the content of the certificate European under the profile of matrimonial intelligence; on the other hand it would be governed by the simplified acceptance system provided for in Article 650/2012 of Regulation No. 650/2012.

It should therefore be able to move freely in all Member States concerned by the succession, without any prior procedure by the authorities competent and unless refused on grounds of public policy under the aforementioned Article 59, paragraph 1, Regulations.

Following the model of the definition used in the other European instruments<sup>16</sup> and the guidelines laid down by the Court of Luxembourg<sup>17</sup>, the 2012 Regulation opted for an "autonomous" concept of the authenticity of an authentic act. Let's see then what the conditions are, in order to then check whether they are satisfied by the European Certificate of Succession.

The Court of Justice had ruled that the authenticity of the acts must be established "incontestably, in such a way that the court of the requested State is able to rely on the authenticity of the latter". That is why the Luxembourg judges had concluded that the establishment of such an act required the intervention of a "public authority or any other authority authorised by the State of origin".

#### **3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?**

Following on from the previous question, the regulation in Luxemburg about certificate European succession, intended to allow heirs and legatees to prove in another Member State that they have quality and their share in the succession as well as the allocation for their benefit of one or more specific assets as part of the succession.

Indeed, once issued, the certificate is valid and recognized in all countries of the EU without the need for recourse to any proceedings. It will make it possible to therefore to accelerate the processing of successions and to reduce the number of international cost.

#### **3.3.5.7. Are there any national rules on international jurisdiction and applicable (besides the Succession Regulation) concerning the succession in your country?**

- Civil Code
- Nouveau Code de procédure civile
- Code de la Coopération judiciaire en matière civile et commercial au sein de l'Union européenne  
This code does not exist,, it is only a privat code from a publisher.
- Loi organique 9 décembre 1976. – Loi relative à l'organisation du notariat.
- 1er juillet 1985: Convention relative à la loi applicable au trust et à sa reconnaissance

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<sup>16</sup> Article 2(c) of the Brussels I Regulation (now the same provision has been transposed into the Brussels I bis Regulation; Article 4(3) of Regulation No 805/2004 on the European Enforcement Order; Article 2(1)(3) of Regulation No 4/2009 on maintenance

<sup>17</sup> Notably ECJ, 17 June 1999, Unibank A/S v. Flemming G. Christensen, C-260/97.

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## Links

- [https://e-justice.europa.eu/content\\_succession-166-lu-es.do#toc\\_1](https://e-justice.europa.eu/content_succession-166-lu-es.do#toc_1) (18.5.2019)
- <https://guichet.public.lu/en.html> (18.5.2019)
- [https://e-justice.europa.eu/content\\_succession-166-lu-en.do](https://e-justice.europa.eu/content_succession-166-lu-en.do) (18.5.2019)

## Malta

Maria Virginia Maccari

### 1. Social perspective.

#### **1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without *affectio maritalis*).**

The traditional household structure is undergoing change, with single-parent families becoming more common.

The extended family is considered to be very important. Family connections are maintained through both sides of the family, but there is a tendency for Maltese to have close emotional ties and frequent contact with the maternal side. After a mother passes away, sibling relationships may become less close. Matrilocal residence, or living with or near the wife's family, is more common than patrilocal residence<sup>1</sup>

The most prevalent types of families in households are those with dependent children, those without dependent children, and elderly households.

In 2015 the total number of households with dependent children stood at 57,601, nearly 35 per cent of the households. This share has dropped from 42.3 per cent recorded in the Household Budgetary Survey (HBS) 2008<sup>2</sup>.

A household is considered to be elderly when the reference person is aged 65 and over. The average age of the reference person of households with dependent children stood at 44, while for households without dependent children the average age stood at 62. This result is consistent with the fact that the largest group of Maltese households without dependent children comprises elderly households.

#### **1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.**

In general, the number of marriages registered in Malta and Gozo increased between 2011 (2,562) and 2016 (3,034). Data shows that while civil marriages have been a constant increase since 2011 there was a decline in religious ones.

There were 3,072 marriages occurring in 2017 which were registered in Malta and Gozo (including marriages among foreigners). Civil marriages accounted for 54.6 per cent of the total marriages registered in 2017, an increase of 3.1 per cent over the previous year. Out of the total marriages registered, 20.8 per cent were among spouses aged between 25 and 29 years. 42.4 per cent of total marriages registered were between spouses within the same age group. On the other hand, there were 1,227 registered marriages, or 39.9 per cent, in which one spouse was within one age group higher than that of the other.

<sup>1</sup> <https://culturalatlas.sbs.com.au/maltese-culture/family-a5119be6-8ed0-4b72-b657-0aa05142c1af> (11.5.2019).

<sup>2</sup> See, Household Budgetary Survey Malta 2015, National Statistics Office, Malta, 2018, page 27, [https://nso.gov.mt/en/publicatons/Publications by Unit/Documents/C1 Living Conditions and Culture Statistics/HBS%20Publication%202015.pdf](https://nso.gov.mt/en/publicatons/Publications%20by%20Unit/Documents/C1%20Living%20Conditions%20and%20Culture%20Statistics/HBS%20Publication%202015.pdf) (11.5.2019).

Regarding civil unions, in April 2017 were registered 163 civil unions since in April 2014 the civil unions were introduced into the Maltese legal system— an average of 54 every year.

In 2018, just four couples opted for a civil union, the marriage equality laws having made the 2014 legislation almost redundant.

Of the four civil unions, one was between a man and a woman and the other three between same-sex couples<sup>3</sup>.

**1.3. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.**

The number of marriage dissolutions also registered an increase between 2011 and 2016. Registered separations increased from 518 in 2011 to 701 in 2016. As one would expect, with the enactment of the divorce law at the end of 2011, the number of divorces recognised by the Maltese Authorities spiked from 115 in 2011 to 510 in 2012. An inverse trend can be noted in the number of registered annulments. Out of divorces recognised by the Maltese Authorities in 2016, 371 were obtained locally and 129 were obtained from foreign countries<sup>4</sup>.

**1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).**

Between 2011 and 2016, just over half (1,571) of the marriages registered were between Maltese citizens, 115 were between a Maltese bride and a foreign groom, whereas 196 had a Maltese groom and a foreign bride. Marriages registered in 2016 in Malta e Gozo between foreigners totalled 987<sup>5</sup>.

## *2. Family law.*

### **2.1. General.**

**2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?**

Family Law is part of the Maltese Civil Code and provides the main legal framework for relations among family members. The Civil Code regulates issues regarding adoption, child custody, divorce, domestic violence, property rights, support obligations and marriage.

There are also additional legal sources.

- Marriages and Civil Unions in Malta are subject to the provisions of the Marriage Act<sup>6</sup>, Cap 255, which became effective on the 12th August 1975 and Civil Unions Act<sup>7</sup>, Cap 530 which became effective on the 14th April 2014. Both acts were amended by Act XXIII of 2017, effective 1st September 2017;

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<sup>3</sup> [https://nso.gov.mt/en/News\\_Releases/View\\_by\\_Unit/Unit\\_C5/Population\\_and\\_Migration\\_Statistics/Documents/2018/News2018\\_107.pdf](https://nso.gov.mt/en/News_Releases/View_by_Unit/Unit_C5/Population_and_Migration_Statistics/Documents/2018/News2018_107.pdf) (11.5.2019).

<sup>4</sup> [https://nso.gov.mt/en/News\\_Releases/View\\_by\\_Unit/Unit\\_C1/Living\\_Conditions\\_and\\_Culture\\_Statistics/Documents/2018/News2018\\_075.pdf](https://nso.gov.mt/en/News_Releases/View_by_Unit/Unit_C1/Living_Conditions_and_Culture_Statistics/Documents/2018/News2018_075.pdf) (11.5.2019).

<sup>5</sup> [https://nso.gov.mt/en/News\\_Releases/View\\_by\\_Unit/Unit\\_C1/Living\\_Conditions\\_and\\_Culture\\_Statistics/Documents/2018/News2018\\_075.pdf](https://nso.gov.mt/en/News_Releases/View_by_Unit/Unit_C1/Living_Conditions_and_Culture_Statistics/Documents/2018/News2018_075.pdf) (11.5.2019).

<sup>6</sup> <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8749&l=1> (11.5.2019).

<sup>7</sup> <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12172&l=1> (11.5.2019).

- Cohabitation Act<sup>8</sup>, Cap 571 which became effective on the 21st April, 2017 and was created to regulate cohabitations;
- The Family Business Act, Cap 565 became effective on the 1<sup>st</sup> January 2017 and was created to *“encourage and assist family businesses to enhance their internal organisation and structure with the aim of effectively operating the business and working towards a successful succession of the family business; and for other matters consequential or ancillary thereto”*<sup>9</sup>

**2.1.2. Provide a short description of the main historical developments in FL in your country.**

Family Law is a dynamic subject that shifts according to the norms and values of Maltese society as it changes throughout the years. Nowadays, hardly a year goes by without there being any legal development in one or more areas of Family Law in Malta.

The following are significant legal developments in Maltese Family Law, that happened in fairly recent times<sup>10</sup>: Marriage Act – 1975: Prior to the introduction of the marriage act couples could only formalize their relationship through the Catholic rite. This meant that civil marriages were not recognised and non-Catholics could not get married in Malta. The Marriage Act of 1975 made it also possible for marriages to be annulled – something that was unheard of in Malta at the time. The 1975 Marriage Act was fiercely opposed by factions of the Catholic Church who did not want the introduction of civil marriage in Malta.

Children and young person (Care orders) Act - 1980: This Act made it possible for governments to protect children from harm, by taking them into their care. Through a Care Order issued under the Children and young person (Care orders) Act, children who were subject to harm, could be removed from their environment and placed in an alternative form of care.

Widening of the Grounds for Annulment – 1981: The Marriage Act, introduced in 1975 offered limited grounds on which the Courts could find that a marriage could be annulled. Before that, it was difficult for spouses to annul the marriage. Through the 1981 amendments, marriage could be declared null on less restrictive grounds.

Equal Partners in Marriage – 1993: Prior to 1993 married women were held to be in an inferior status than their spouse. Upon marriage, the husband became in charge of the community of acquests and he exercised control over his wife's earning. Indeed, if his wife had civil issues, for example, sue an employer for wages, her husband would have to appear in her name in such court proceedings. Back then, children were subject to the authority of the man rather than woman, women did not enjoy equal parental rights to those of their husband, and the father had more custody rights than the mother. The amendment to the Civil Code, Act XXI of 1993 ‘Equal Partners in Marriage’, did establish some basic equality principles especially regarding the rights of mothers over their children, in married women’s financial rights (to submit their own income tax return) and others. It also established that where the marriage was regulated by the community of acquests, husbands could not dispose of any part of the acquests without the agreement of the wife<sup>11</sup>.

Child Abduction and custody Act 2000: Malta ratifies the 1980 Hague Convention on the Civil Aspects of Child Abduction by enacting chapter 410: Child Abduction and Custody Act.

Family Court – 2003: Prior to the establishment of the Family Court, all family cases were heard before the First Hall of the Civil Court. All family law cases used to be heard on a particular day of the week. The volume of work on family matters necessitated the establishment of a family court that had judges assigned only to hear cases on family matters. The Family Court was established in 2003

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<sup>8</sup> <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12651&l=1> (11.5.2019).

<sup>9</sup> <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12569&l=1> (11.5.2019).

<sup>10</sup> <https://www.family-law.com.mt/> (11.5.2019).

<sup>11</sup> Darmanin, M., 2006, 79.

through different subsidiary legislation under the Code of Organisation and Civil Procedure, giving it all the powers of the Civil Court. Two judges were appointed with these<sup>12</sup>.

Mandatory Mediation – 2003: In conjunction with the establishment of the Family Court, mediation prior to initiating family court disputes became mandatory in Malta.

Domestic Violence Act - 2005: A significant portion of all criminal reports filed relate to the crime perpetrated within the family home. The Domestic Violence Act of 2005 gave a formal definition to domestic violence, thereby making it easier for the law courts to award higher punishment in such cases. It also established a commission together with agencies.

Foster Care Act - 2007: The Foster Care Act established a Foster Care Board, whose objective was to screen whether a person was fit to serve as a foster carer or not. Prior to the Foster Care Act, prospective foster parents used to be screen by the Adoption and Fostering Panel which was not established by law.

Divorce – 2011: Divorce was proposed to Maltese parliament through a private members bill. By then it was only the Philippeans and the Vatican City, which were the two only states which did not provide for divorce. The government submitted the matter to a referendum which was won by the yes camp and subsequently proceeded to the enactment of a bill on enabling divorce.

Civil Unions Act - 2014. The Civil Union Act of 2014 gave same-sex couples legal recognition and gave them equal rights as married individuals. The Civil Union act provided that same-sex couples, were deemed, for all legal intents and purposes, as married persons. Therefore, until the introduction of same-sex marriage in the Marriage Act, the main legal discrimination suffered by same-sex spouses was that they had to settle for a Civil Union (which had the same legal effects as marriage) rather than to marriage.

Gender Identity Gender Identity, Gender Expression and Sex Characteristics Act - 2015. The Gender Identity Act provide for the recognition and registration of the gender of a person and to regulate the effects of such a change, as well as the recognition and protection of the sex characteristics of a person made.

Cohabitation Act:- 2017. The aim of this Act is to protect cohabiting couples by legally recognising their rights and duties. Prior to this Act, Maltese law did not recognise, and therefore did not offer protection to cohabiting couples.

Gay Marriage - 2017: The Marriage Act was amended so that same-sex couples could also get married. Following these changes, there was no difference between a Civil Union and Marriage, given that all laws that were applicable to marriage applied mutatis mutandis to civil unions. The only difference between the two was the title, with the title 'marriage' only reserved to heterosexual couples.

### **2.1.3. What are the general principles of FL in your country?**

The Maltese context has been faced with ever-increasing changes and it has become a very different society from that of previous, not too distant, generations. The increase in globalisation; the entry into the European Union in 2004; the introduction of the Divorce Law in May 2011, the Embryo Protection Bill (IVF Bill) in November 2012, and the Civil Unions Act in April 2014, are a few examples of the rapid social changes that are taking place in Maltese society.

The general principles to be mentioned are:

- respect for private and family life is a fundamental right (The Constitution of Malta, Chapter IV of the Laws of Malta);
- in marriage and civil unions spouses have equal rights and assume equal responsibilities;
- the marriage and civil unions are opened to persons of different and same sex;
- Maltese spouses may separate, divorce and do the annulment of a civil marriage;
- mediation is a compulsory step the couple has to go through before instituting proceedings for separation before the Civil Court (Family Section).

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<sup>12</sup> <http://judiciarymalta.gov.mt/family-section> (11.5.2019).

- there's a prohibition of polygamy under the Maltese law. It is a criminal offence in Malta for a person to marry more than one person at the same time and it is irrelevant whether such marriage was contracted abroad. Bigamy is prohibited by Article 196 of the Maltese Criminal Code.

**2.1.4. Define “family” and “family member” in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

The Maltese Civil law does not provide a general definition of “family” and “family member”. However, in some specific areas the Maltese legislator provides such definitions. The definition of “family member” is intended to identify those relatives who, according to Maltese law, will be considered to fall within the parameters of the Act. For example:

- In the Family business Act “family member” means the family business owner’s spouse, ascendants, descendants in the direct line and their relative spouses, brothers or sisters and their descendants or as the Minister may prescribe;
- The Subsidiary Legislation 217.06 in the area of Family Reunification Regulations, defines in part three article 4 the Family members for the purpose of family reunification (a) the sponsor’s spouse who shall be twenty-one years of age or over; (b) the unmarried minor children of the sponsor and of his spouse, including children adopted in a manner recognized by Maltese law; (c) the unmarried minor children, including adopted children, of the sponsor or of the spouse, as the case may be, where the sponsor or the spouse has custody and the children are dependent on him.:

**2.1.5. Family formations.**

**2.1.5.1. Define the “spouse” in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

Spouses are defined as two married people of the same or different sexes.

The spouse is the person who has contracted marriage with another person of the same or a different sex. The definition of spouse can be regarded as valid in all areas of the legal system.

An act recently introduced in Malta (ACT No. XXIII of 2017 Marriage Act and other Laws (Amendment) Act, 2017) to amend the Marriage Act and various other laws in connection with the introduction of marriage equality provides that the words "husband or wife" shall be substituted by the word "spouse". References to “husband and wife” will be changed to the gender neutral “spouse” to cover situations when the partners are two men or two women. This change affects the Criminal Code, the Civil Code, the Code of Organization and Civil Procedure, the Marriage Act and Civil Unions Act.

ACT No. XXIII of 2017 (Marriage Act and other Laws (Amendment) Act, 2017) also amended the Interpretation Act (chapter 249) and provided that *“the words “spouse” and “husband and wife” shall be construed as referring to a spouse of either sex who has contracted marriage in accordance with the Marriage Act”*.

In Malta, the formalities relating to marriage are given in the Marriage Act (chapter 255). This law governs, inter alia, the restrictions on the subject of marriage.

A marriage contracted shall be void between:

- persons either of whom is under the age of sixteen (art. 3).
- persons either of whom is incapable of contracting by reason of infirmity of mind, whether interdicted or not (art. 4)

- (a) an ascendant and a descendant in the direct line; (b) siblings, whether of the full or half blood; (c) persons related by affinity in the direct line; or (d) the adopter and the adopted person or a descendant, or the spouse, of the adopted person, shall, whether the relationship aforesaid derives from legitimate or illegitimate descent (art. 5);
- either of whom is bound by a previous marriage or by a registered cohabitation or a unilaterally declared cohabitation under the Cohabitation Act (art. 6).

The celebration of marriage must be preceded by the publication of banns of matrimony.

A marriage may be contracted either in a civil form between two consenting individuals, that is to say in the form established by Marriage Act for civil marriage, or in a religious form, that is to say in a religious form in accordance with the provisions of Marriage Act.

**2.1.5.2. What types of relationships/unions between persons are recognised in FL of your country? In particular, formal (registered) and informal (*de facto*) unions, heterosexual and same-sex unions, unions with and without *affectio maritalis*. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

Malta offers three types of legal arrangement for couples who want to formalise their relationship: Marriage, Civil Union and Cohabitation. All these forms of legal unions are open to same-sex couples. The legal effects of a Civil Union are identical to Marriage. Civil Union law was enacted in 2014 in order to provide for same-sex couples who wanted to formalize their relationship but were not allowed to get married back then. In 2017 marriage laws were changed so that same-sex couples could also get married, making the law providing for civil unions somewhat redundant.

The law on cohabitation was enacted to protect persons who are living together but have not formalised their relationship. If two persons share a home and are in an intimate relationship, they are deemed to be cohabitantes. The Cohabitation Act provides for three different forms of cohabitation:

(i) *De facto* cohabitation: Couples who are already cohabiting and have done so for at least the past two years are automatically recognised as *de facto* cohabitantes. No legal document is necessary for this kind of cohabitation.

(ii) Cohabitation by means of a contract: Persons who have the intent of cohabiting or persons who are already cohabiting and wish to formally regulate their cohabitation may do so by entering into a contract of cohabitation.

(iii) Cohabitation by means of unilateral declaration: The Act gives an opportunity to one party to the relationship to declare an existing cohabitation by means of a judicial letter. This form of cohabitation applies to those couples who are in disagreement on how and if their relationship should be regulated, which could potentially give rise to situations where a party is in a vulnerable situation. In this case, the Act provides the possibility to be formally regulated by means of this letter.

**2.1.6. What legal effects are attached to different family formations referred to in question 2.5.?**

Civil unions bring about the same legal effects as marriage. After contracting marriage or a civil union the couples establish the community of acquests, spouses are obliged to maintain each other according to their means, they owe each other fidelity and by default bequeath everything to each other and their children upon their death. Indeed Marriage and Civil Unions provide for a change in surnames.



(i) *De facto* cohabitation does not give rise to mutual legal rights and obligations between cohabitants, however, after two years of cohabitation, the couple is granted a limited set of rights, namely:

- Cohabitants are considered as each other's tenant for all intents and purposes of the law with regard to the rents of their common home;
- Cohabitants shall be considered as each other's next of kin;
- Cohabitants shall have the right to take decisions relating to each other's medical care; Cohabitants may not be compelled to be witnesses against each other in legal proceedings.

(ii) Cohabitation by means of a contract: The contract is flexible and can be drafted according to the couple's wishes and needs. As a minimum, however, the contract must state the following:

- The house that shall be deemed to be the common home of the cohabitants, as well as the legal title of each cohabitant on the said home and the transfer of the rights on the said house in the event of separation;
- The division of assets and liabilities in the event of separation;
- Maintenance, if one of the cohabitants is or becomes dependent on the other cohabitant, and the annual percentage mark up on the said maintenance, if the couple wishes to establish such maintenance;
- Matters related to the cohabitants' children, whether or not such children are the result of their relationship or a previous one, including their care and custody in the event of separation, the right to live in the common home, and the maintenance of any dependent children.

These rights and duties are similar to those, which married, or civil union couples enjoy, including, among others, succession rights and social security rights.

(iii) Cohabitation by means of unilateral declaration: Unilaterally declared cohabitations will be accepted by the State for five years after the coming into force of the Act (2017). This period is envisaged to give vulnerable parties enough time to regulate themselves by means of this letter. Following the end of these five years, unilateral declarations may not be filed. Once the judicial letter is registered, and it is ascertained that there are no impediments or objections to it made by the other cohabitant, the two parties will have the basic rights and duties listed in the Act.

The couple is always at liberty to choose to enter into a contract of cohabitation as previously described, following which the judicial letter would become null and void.

ACT No. XXIII of 2017 (Marriage Act and other Laws (Amendment) Act, 2017) amended the Civil Union Act (chapter 530) and provided that conversion of civil union into marriage. Art. 11:

*“(1) Partners in a civil union contracted prior to the coming into force of the Marriage Act and other Laws (Amendment) Act, 2017 and in accordance with the provisions of this Act, may, within five years from the coming into force of the Marriage Act and other Laws (Amendment) Act, 2017, convert their civil union into marriage:*

*Provided that persons who commenced the necessary procedures to contract a civil union prior to the coming into force of the Marriage Act and other Laws (Amendment) Act, 2017, and contract that civil union prior to the first day of December 2017, may also convert their civil union into marriage in accordance with this article.*

*(2) The procedure by which a civil union may be converted into marriage shall be established by the Minister by virtue of regulations to that effect.*

*(3) Where by virtue of the provisions of this article, a civil union is converted into marriage, the civil union shall end upon conversion, and the resulting marriage shall be deemed to have subsisted from the date when the civil union was formed”.*

**2.1.7. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/*de facto* family formations? Explain briefly.**

As it stands, there are no proposals to reform the present legislation, but the amendment of Civil Code made by Marriage Act and other Laws (Amendment) Act, 2017 that provides the substitution of the word "mother", by the word "person who gave birth" means that the legislator is preparing for a new reform.

The change is in line with the other provisions for gender neutral references. This change also suggests that the government is looking ahead to a situation where sperm and egg donation become legal, which is the only way for a lesbian couple to conceive naturally.

**2.2. Property relations.**

**2.2.1. List different family property regimes in your country.**

Under the Maltese law different family property regimes are possible:

- Community of Acquests (CoA)
- Community of Residue under Separate Administration (CORSA)
- Separation of Estates (SoE)

**2.2.2. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?**

By default, when a couple gets married in Malta the Community of Acquests régime applies. Therefore, unless a couple does not make a marriage contract their relationship is governed by the Community of Acquests set of rules.

Whenever marriage is regulated by the Community of Acquests régime (set of rules), it is assumed that almost all of the property brought in by the spouses during the marriage falls into one large 'estate'. The administrators of this estate (community of property) are the spouses themselves and they jointly administer the goods composing such estate.

In ordinary circumstances, under the Community of Acquests régime everything acquired by the spouses during marriage is deemed to belong to both in equal shares.

Article 1320 of the Civil Code holds that the following will become part of the community:

- i. all that is acquired by the spouses through their work or profession;
- ii. as a general rule, all earnings (fruits) from property owned by spouses; However if the property has been transferred (e.g. through donation, inheritance, etc...) to either of the spouses with the express condition that proceeds made out of the use of that property does not become part of the community of acquests, then such money remains property of the spouse and does not enter the community;
- iii. as a general rule, the earnings (fruits) made from property owned by the children become part of the community of acquests;
- iv. any property which is acquired with money or other property which is already in the community of acquests, even if the property is in the name of only one spouse;
- v. property acquired after marriage by the personal property of the spouses;
- vi. any fortuitous winnings by either of the spouses;

**2.2.3. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are**

**the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a “new regime just for them”?**

Maltese law provides that spouses may choose, with a marriage contracts (*Kitba taż-Żwieġ*), between one of three different ‘régimes’ (set of regulations) which they can use to regulate the financial aspect of their married life<sup>13</sup>. The only permissible financial agreements (a.k.a. matrimonial régimes) for marriages in Malta are the:

Community of Acquests (CoA)

Community of Residue under Separate Administration (CORSA)

Separation of Estates (SoE)

A couple may opt for a different financial agreement before getting married (through an ante-nuptial agreement) or change the agreement after marriage (post-nuptial agreement).

The following are restrictions on marriage contracts:

- i. parties may not enter into agreements that are contrary to morals or are inconsistent with the rules of the Civil Code (Article 1237, Civil Code).
- ii. spouses cannot in virtue of a marriage contract establish themselves as ‘head of the family’, or enter into a contract that diminishes any of the rights they enjoy as parents or anything that is prohibited (Article 1238, Civil Code).
- iii. spouses cannot vary their legal order of succession, either in respect of themselves or their children or their descendants, or with respect to children between themselves, saving testamentary dispositions that are allowed by law.
- iv. A marriage contract is only valid if it is expressed in a public deed. Therefore, a marriage contract will have to be presented before a notary for him to create a public deed.

**2.2.4. Explain briefly the rules on the administration of family property and compare if there are difference for different property regimes.**

Spouses administer all property within the community of acquests jointly and therefore certain acts of minor importance may be performed alone while other acts require the consent of the other spouse. Acts of ordinary administration may be performed by one spouse alone. While acts of extraordinary administration must be performed by spouses together. The law only defines acts of extraordinary administration (article 1322) and therefore anything else is deemed to be ordinary administration<sup>14</sup>.

However, spouses may appoint each other as mandatories (make a power of attorney – ‘prokura’ in Maltese), with regards to acts of extraordinary administration.

Failing to give consent: If one of the spouses fails to give their consent to an act of extraordinary administration the other spouse may apply to the court of voluntary jurisdiction for authorization when the extraordinary act “*is necessary in the interest of the family*” (Article 1323(1), Civil Code).

Unilateral Action: Acts which require the consent of both spouses but are performed by one spouse alone may be annulled by the other spouse where such acts relate to the transfer of immovable property. If the unilateral acts relate to movable property then such acts can only be annulled if the transfer was made gratuitously (i.e. transfer something without an obligation to give something back) (Section 1326, Civil Code).

Through the Separation of Estates régime each spouse retains full control over his or her estate. In such case there is one family unit but economically they are two separate individuals. By opting for this régime spouses remain the sole owners of any possession they had before marriage and after marriage.

<sup>13</sup> <https://www.family-law.com.mt/relationships/marriage-contracts> (11.5.2019).

<sup>14</sup> <https://www.family-law.com.mt/relationships/community-acquests> (11.5.2019).

The objective of CORSA is to strike a balance between the Community of Acquests and the Separation of Estates régimes. In the former régime, nearly everything acquired by either of the spouses will be pooled into one large estate, while in the latter all the property of the spouses remains individually owned.

Through the CORSA régime:

all that is acquired by the spouses is held to be administered separately. However, spouses can be co-owners of specific items they choose to co-own (identical to the Separation of Estate régime).

once the régime is terminated (either because spouses have retired from work or due to marriage breakdown) all that has been acquired by the spouses will be 'pooled-in' and divided between the two.

Property that is subject to the CORSA: All the property that becomes co-owned through the Community of Acquests régime is also will also form part of the CORSA régime. Therefore, upon dissolution of the CORSA régime, all of this property is pooled in and divided in equal shares.

**2.2.5. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

A marriage contract is to be registered by the notary not later than 15 days after the date of conclusion of the contract. Only one register exists: It is the Public Register administered by the Ministry of Justice.

The information in the Public Register can be accessed by any person who requests information. A simple request in writing is made at the Registry and an official reply is received within 10 days of the request. Notaries can access the Register online and obtain an immediate reply.

The main effect is that third parties (especially creditors) are presumed to know of the existence of the marriage contract.

**2.2.6. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

Both spouses are jointly responsible for debts related to the community property and for those incurred for the needs of the family with their community property and their personal property (Art. 1327 and 1330 CC).

Debts related to a spouse's personal property form part of his/her personal debts, as do debts incurred through extraordinary administration of the community property without the necessary consent of the other spouse. Creditors of personal debts shall satisfy their claims against the personal property of the debtor spouse. If that is not sufficient, however, they may also use the community property, but only to the extent of the value of the share which the debtor spouse has in the community property (Art. 1329 CC)<sup>15</sup>.

**2.2.7. Describe allocation and division of property in case of divorce, separation or dissolution of the union.**

This depends on the matrimonial property regime adopted. If the divorce/separation is contested, then it is the court which decides how the property is to be divided. If there is no contestation, then it is the spouses themselves who decide, subject to court ratification. Article 1333 of the Civil Code stipulates that the community property shall be divided by assigning to each of the spouses one half of the assets belonging to the community property.

Under the community of property regime, each of the spouses has to reimburse the community if he/she has used community property to satisfy his/her own debts (Art. 1331 para. 1 CC). If a spouse's

<sup>15</sup> <http://www.coupleseurope.eu> (11.5.2019).

personal property was used to satisfy a community debt or for an investment in the community property, he/she has the right to be reimbursed (Art. 1331 para. 2 CC). This reimbursement shall be made by assigning money (Art. 1331 para. 3 CC)<sup>16</sup>.

**2.2.8. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?**

No, there are no special rules or limitations concerning property relationships between spouses or partners with reference to their culture, tradition, religion or other characteristics.

**2.3. Cross-border issues.**

**2.3.1. Is your country participating in the enhanced cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?**

Yes, Malta participates in enhanced cooperation (Council Decision EU 2016/954 of 9 June 2016) with regard to the two Regulations: 1103/2016 and 1104/2016.

**2.3.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as “marriage”, “matrimonial property agreement”, “partnership property agreement” etc.?**

Till now no information has been found.

**2.3.3. Are you expecting any problems with the application of the rules on jurisdiction?**

Till now no information has been found.

**2.3.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

Till now no information has been found.

**2.3.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

Till now no information has been found.

**2.3.6. Are there any national rules on international jurisdiction and applicable law (besides the Regulations) concerning the family law in your country?**

Malta joined the European Union ('EU') in 2004. Prior to the transposition of the *acquis communautaire*, statutory rules on private international law were scarce. The Code of Organisation and Civil Procedure did contain detailed rules on jurisdiction and there were some miscellaneous conflict-of-laws rules in the Civil Code on succession and matrimonial property. Today the rules on international jurisdiction and applicable law are contained in the European regulations.

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<sup>16</sup> <http://www.coupleseurope.eu/en/malta/topics/5-what-are-the-consequences-of-divorce-separation/> (11.5.2019).

### 3. Succession law

#### 3.1. General.

##### **3.1.1. What are the main legal sources of Succession Law (SL) in your country? What are the additional legal sources of SL?**

Succession under Maltese law is mainly regulated by the Civil Code (Chapter 16 of the Laws of Malta), which regulates testate succession, the drafting of wills and intestate succession.

##### **3.1.2. Provide a short description of the main historical developments in SL in your country.**

Over the years, the Maltese Civil Code provisions have evolved hand in hand with social changes and today adequately cater for all aspects of inheritance in Malta.

Act XVIII of 2004 introduced a number of significant amendments to the Law of Succession, mainly intended to eliminate discrimination present in the law in force before 2004 between legitimate and illegitimate children.

Malta has allowed civil unions for both same-sex and opposite-sex couples since 2014 following the enactment of the Civil Unions Act. It grants civil unions the same rights, responsibilities, and obligations as marriage. The civil union partner is also protected at law since they are entitled to a reserved portion of the estate of their civil union partner over and above the right of habitation over the matrimonial home.

##### **3.1.3. What are the general principles of succession in your country?**

The disposal of property after somebody's death can be performed in three ways: (a) by means of a will — which can be a joint one, known as *unica carta*, between a husband and wife — or (b) by means of a secret will deposited in Court by the testator or the notary, or in the absence of one of these (c) the distribution of property is carried out according to law (intestate succession).

Holograph wills are not accepted under Maltese law.

The status and rights of the beneficiary since succession automatically passes upon death.

Malta law also guarantees a reserved portion for certain heirs. The Civil Code refers to the reserved portion. This is a right of credit on the estate of the deceased set aside by law for the descendants of the deceased by the surviving wife or husband.

##### **3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.**

Maltese law does not require probate or letters of administration. A succession opens at the time of death. The possession of the property of the deceased is, by operation of law, transferred by way of continuation, to the heir, whether testamentary or an heir-at-law, subject to his obligation of discharging all the liabilities of the inheritance.

However, an order of the court is required where there is a secret will.

If a person would like to check whether the deceased has left any secret wills, then he must take a copy of the death certificate to the registry of the Court of Voluntary Jurisdiction. If a secret will is discovered an application must be filed with the Court of Voluntary Jurisdiction asking the Court to declare the succession open, and to appoint a notary to publish the will.

In case of intestate succession, upon the death of the deceased the succession devolves upon the heirs-at-law automatically; however some banks require a “declaration of the opening of succession” in favour of the person claiming the inheritance. This declaration can be obtained from the Court of

Voluntary Jurisdiction by filling an application asking the said court to declare that the succession has opened in favour of the applicant/s.

Whit respect to this declaration mentioned, a person may enter his opposition by a note, within a time of not less than eight days and not exceeding one month. In the absence of opposition, the court shall examine the claim of the applicant, and if the claim appears to be justified it will allow the demand and declare the succession opened in his favour. Where an apposition is registered with the court, it will not make the declaration and the matter falls to be determined by the Civil Court First Hall.

Furthermore, even if the declaration is made in does not bar any other person entitle to the succession from claiming the inheritance or any portion thereof before the First Hall of Civil Court.

With the introduction of the Succession Regulation EU650/2012, the heirs will now be able to request the notary to provide them with a European Certificate of Succession as proof of their inheritance.

**3.1.5. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?**

There are two types of succession in Malta: legitimate succession (intestate succession: articles 788-816 of Civil Code) and testamentary succession (testate succession: articles 588-787 of Civil Code).

The rules on the legitimate succession only apply if no will was drawn up.

A testator may dispose of all their property or part of it by will. When there is no will, the will is not valid, the heirs do not want to inherit or cannot inherit, or there is no right of accretion between the heirs, intestate succession takes place under the law.

**3.1.6. What happens with the estate of inheritance if the decedent has no heirs?**

The Civil Code provides for those situations where there are no descendants, surviving spouse or ascendants to receive, in which case the inheritance shall devolve upon the government of Malta. These rules would also apply when no person entitled to receive accepts the inheritance; hence, no one to claim the right over the inheritance.

**3.1.7. Are there special rules or limitations concerning succession with reference to the deceased's (or heir's) culture, tradition, religion or other characteristics?**

There are no special rules or limitations concerning succession with reference to the deceased's or heir's culture, tradition or religion.

**3.2. Intestate succession.**

**3.2.1. Are men and women equal in succession? Are domestic and foreign nationals equal in succession? Are decedent's children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?**

There is no distinction made between male and female heirs Domestic and foreign nationals are equal in succession. The law no longer distinguishes between children born in or out wedlock, therefore, the right to the reserved portion pertains to all the descendants of the deceased. An adopted child has the same inheritance rights as his or her sibling. Those who are not yet conceived cannot receive by will unless they are the immediate children of a determinate person who is alive at

the time of the death of the testator. Furthermore, those who are not born viable are incapable of receiving by will.

The Civil Unions Act stipulates that a civil union celebrated in accordance with the Act produces rights equivalent to a civil marriage under Maltese law. So the spouses and registered partners are equal in succession. Homosexual couples (spouse and registered partners) are equal in succession.

**3.2.2. Are legal persons capable of inheriting? If yes, on which basis?**

No, under Maltese law, legal persons are not capable of inheriting.

**3.2.3. Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.**

In certain instances a person is deemed unworthy of receiving by will, such as, if he has wilfully killed or attempted to kill the testator or his spouse; or compelled or fraudulently induced the testator to make his will or to make or alter any testamentary disposition. Incapacity in such cases is total so that these persons are not even entitled to the reserved portion. A person is also incapable of receiving by will if he has been disinherited by the testator. The reasons for the disinheritance must be expressly stated in the will.

**3.2.4. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?**

In the event of intestate succession, the inheritance passes down by law to the descendants, the ascendants, the collateral relatives, the spouses of the deceased person and the Government of Malta. In this case succession operates in accordance with the proximity of the relationship, which is determined by the number of generations.

Where the deceased is survived by a spouse and descendants, his succession devolves as to one half upon the descendants and as to other half upon the spouse. The surviving spouse is also granted the right of use and habitation over the matrimonial home and its contents.

If the deceased is survived by descendants but no spouse, the succession devolves upon the descendants. If the deceased is survived by spouse yet leaves no descendants his succession devolves on the surviving spouse.

Where the deceased is survived by neither descendants nor a spouse the succession devolves on the ascendants and siblings as to one half each. In the absence of ascendants, the succession devolves upon the siblings and vice versa in the absence of siblings. Where the deceased is survived by neither ascendants nor siblings the successions devolves upon nearest collateral relatives.

**3.2.5. Are the heirs liable for deceased's debts and under which conditions?**

Yes, the heirs are responsible for the debts of the deceased person in the proportion and manner established by the testator. If the testator dies intestate or if he does not provide for the apportionment of the debts, the co-heirs shall contribute to the payment of such debts in proportion to their respective share in the inheritance (art. 939). Each heir is personally responsible for the debts of the inheritance.

If the heir accepts the inheritance under benefit of inventory, he shall not be liable for the debts of the inheritance beyond the value of the property to which he succeeds. The heir may free himself from the payment of the debts by giving up all the property of the inheritance to the creditors, the legatees, and even to the co-heir who does not similarly elect to give up the property (art. 890).



### 3.2.6. What is the manner of renouncing the succession rights?

Under Maltese law (articles 860 et seq. of the Civil Code) is possible to renounce an inheritance or to accept it under the benefit of inventory. If an heir wants to renounce the inheritance, it is vital that one does not accept any part of the inheritance and does not accept any of the property of the deceased and is not in possession of any such property.

The Registrar of the Court and Notaries are the authorities competent to receive a declaration of waiver of the succession.

### 3.3. Disposition of property upon death.

#### 3.3.1. Testate succession.

##### 3.3.1.1. Explain the conditions for testate succession.

Firstly, a Will is needed. According to the Maltese legal system, a Will can only be drawn up in ways expressly regulated by the Civil Code. Article 588 establishes that the will is an instrument, revocable of its nature, by which a person, according to the rules laid down by law, disposes, for the time when he shall have ceased to live, of the whole or of a part of his property.

In Maltese law, the will must adhere to very strict formal rules, under penalty of being declared null and void.

##### 3.3.1.2. Who has the testamentary capacity?

Capacity is defined by exclusion, therefore, the law provides that these persons are incapable of making a will:

- persons who are not yet 16 years of age;
- those who, even if not interdicted, are not capable of understanding and volition, or who, because of some defect or injury, are incapable of expressing their will;
- those who are interdicted on the ground of insanity or who not being interdicted, are not of sound mind at the time of the will;
- those who are interdicted on the ground of prodigality

##### 3.3.1.3. What are the conditions and permissible contents of the will?

Wills may include dispositions by universal title, where the testator may bequeath all of his property to one or more persons (known as heirs), and dispositions by singular title, with persons inheriting under that title known as legatees.

Any testamentary disposition granting a third party the authority to determine the identity of a beneficiary would be void. However, the law allows testamentary disposition by singular title (legacies) in favour of a person to be selected by the heir among several persons specified by the testator.

A trust can be created or funded by a will.

##### 3.3.1.4. Describe the characteristics of will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a will?

Mainly there are two types of will:

- An ordinary public will is an instrument drawn up in writing, and received and published by a notary public in Malta in the presence of two witnesses. This type of will must contain the date

and the hour when it was drawn up together with the signatures of the testator, of the witnesses and of the notary on every page of the will. The will must also contain a declaration made by the notary that it has been drawn up and published in the presence of two witnesses. A public will must be drawn up in either Maltese or English.

A particular form of public will is the *unica charta* will, drawn up by spouses (or by partners in a civil union) in one and the same instrument. Provisions in relation to the estate of one of the spouses are drawn up in a part separate from that containing the provisions of the other spouse. Before the 2004 amendments to the Code of Organisation and Civil procedure (ch. 16) the will of the spouses was expressed as one and was not easily distinguishable.

- Maltese law also recognizes secret wills if drawn up according to the formalities at law. A secret will may be printed, typewritten or written in ink either by the testator himself or by a third person and signed by the testator at the end thereof. The paper on which the will is written or the paper used as its envelope shall be closed and sealed. The testator must deliver the sealed envelope / paper to a notary public or to the registrar of the Court of Voluntary Jurisdiction in the presence of a judge or magistrate sitting in that Court and declare that it contains his secret will. The will is deemed to have been made on the date when it is delivered. Where the secret will is received by a notary, the notary himself must present the secret will to the Court of Voluntary Jurisdiction within four working days of the date of delivery. See articles 654-660 of the Civil Code (Chapter 16 of the Laws of Malta).

A secret will may be written in any language.

Holograph wills not accepted under Maltese law; a will, whether public or secret must always be received by a notary or by Court. The only exception to this principle is in the case of privileged wills, where in the light of special circumstances (when communication have been interrupted by order of the public authority or in case of will made at sea on board any ship registered in Malta), the law allows the testator to do away with certain formalities. See Articles 673-675 and Articles 676 and 680 of Civil Code.

**3.3.1.5. Is there a (public) register of wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

Within fifteen days from the date of the will, the notary draws up a note of enrolment and registers it with the Director of the Public Registry. Secret wills may be delivered by the testator before a judge or magistrate sitting in the Court of Voluntary Jurisdiction: they may also be delivered in person to a notary, who has four working days from the date of delivery to file the will in the Court of Voluntary Jurisdiction for safekeeping by the Court registrar.

**3.3.2. Succession agreement (*negotia mortis causa*). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.**

In the Malta legal system, as a general rule, the Will is the only way of disposing of one's estate after death.

However, a trust may be also established for succession purposes in accordance, with the Malta Trusts & Trustees Act. This entails three exceptions to the law of succession. These being, that the trustee may be granted the discretion to the determine who the beneficiaries will be and the quantity of any benefit, at what time, and in what manner beneficiaries are to benefit and such other powers relating to the appointment, application or advancement of trust property.

**3.3.3. Are conditions for validity of wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

The requirements for ensuring the validity of a Will are governed by specific articles of the Civil Code.

The requirements for ensuring the validity of a trust are governed by The Trusts and Trustees Act, Chapter 331 of the Laws of Malta.

**3.3.4. Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

The Civil Code refers to the reserved portion. This is a right of credit on the estate of the deceased set aside by law for the descendants of the deceased by the surviving wife or husband. In accordance with Section 616 of the said Code, the reserved portion set aside for all of the children — whether conceived or born in wedlock, conceived or born out of wedlock, or adopted — amounts to one-third of the value of the estate where there are no more than four children, and half of the value of the estate where there are five children or more.

In the event of violations of these rules, the heirs can claim the nullity of the will. If their action is successful then the inheritance will devolve according to the law. The heir/s may also renounce the inheritance and claim the reserved portion instead, since this is due in full ownership and not subject to the debts of the estate.

**3.3.5. Cross-border issues.**

**3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?**

At present, it seems there are no rulings applying Regulation 650/2012.

The Maltese legislature, with the Act No. XVI of 2015, adapted the Code Civil, the Notarial Profession and Notarial Archives Act and the Public Registry Act to the Succession Regulation 650/2012. Furthermore, the Act No. XVI of 2015 implements the provisions of Regulation (EU) No. 650/2012 of the European Parliament and of the Council of the 4th July, 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

**3.3.5.2. Are there any problems with the scope of application?**

Nothing found until now.

**3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country had experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?**

At present it seems there are no rulings applying Regulation 650/2012.

**3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?**

There is no information available.

**3.3.5.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?**

There is no information available.

### 3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?

The competent authorities to issue a certificate according to Article 64 are the Civil Court (Voluntary Jurisdiction Section) and notaries who possess a warrant according to Notarial Profession and Notarial Archives Act.

According to Articles 958D and 958 E, the Civil Court (Voluntary Jurisdiction Section) shall be competent to issue a European Certificate of Succession in all cases.

A notary may only issue a European Certificate of Succession where all the beneficiaries of the succession are in agreement on the contents of the certificate and have expressed their consent in writing to the notary to proceed with the issue of the certificate.

A notary shall not issue a European Certificate of Succession:

(a) where an application for the issue of such a certificate concerning the succession of the same person has been made to the Civil Court (Voluntary Jurisdiction Section) prior to the issue of a certificate;

(b) where the agreement of all the beneficiaries of the succession in accordance with sub-article (2) has not been attained; or

(c) where the notary is aware that there is a dispute concerning the inheritance or estate or parts of the estate of the deceased.

### 3.3.5.7. Are there any national rules on international jurisdiction and applicable (besides the Succession Regulation) concerning the succession in your country?

Yes, articles 741 et seq. Code of Organization and Civil Procedure contain the international private law provisions, which apply (*rectius*, traditionally applied) in case of a cross-border succession. However, these provisions shall apply only in so far as they are not incompatible with the Succession Regulation (EU) No. 650 of July 2, 2012.

In fact, Article 742-6 of the Maltese Code of Organization and Civil Procedure provides that any regulation of the European Union establishing jurisdictional rules that are different from those established in this section shall prevail over those established in this section.

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## The Netherlands

F.W.J.M. Schols and T.F.H. Reijnen

### 1. Social perspective.

**1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without *affectio maritalis*).**

The table below gives a general overview of households in the Netherlands.

Periods	Persons by household position Total of the Netherlands	Private households By household size		Multi-person households Total multi-person households	Persons in institutional households By type of Homes			
		Total private households	One-person households		Total persons living in institutions	for the elderly and in nursing homes	Other health care institutions	Other type of institutions
2005	16,305,526	7,090,965	2,449,378	4,641,587	213,202	126,667	74,645	11,890
2006	16,334,210	7,146,088	2,502,084	4,644,004	208,653	123,891	73,306	11,456
2007	16,357,992	7,190,543	2,536,891	4,653,652	206,732	121,027	74,358	11,347
2008	16,405,399	7,242,202	2,571,014	4,671,188	206,864	119,619	76,293	10,952
2009	16,485,787	7,312,579	2,619,394	4,693,185	207,003	118,945	77,188	10,870
2010	16,574,989	7,386,144	2,669,516	4,716,628	208,687	119,063	79,218	10,406
2011	16,655,799	7,443,801	2,708,251	4,735,550	219,315	121,674	86,901	10,740
2012	16,730,348	7,512,824	2,761,764	4,751,060	219,224	120,393	88,295	10,536
2013	16,779,575	7,569,371	2,802,182	4,767,189	214,784	118,252	85,743	10,789
2014	16,829,289	7,590,228	2,803,852	4,786,376	249,942	121,644	110,984	17,314
2015	16,900,726	7,665,198	2,867,797	4,797,401	244,794	118,593	104,661	21,540
2016	16,979,120	7,720,787	2,906,334	4,814,453	254,888	120,668	104,764	29,456
2017	17,081,507	7,794,075	2,961,228	4,832,847	245,302	115,321	98,600	31,381
2018	17,181,084	7,857,914	2,997,617	4,860,297	248,772	116,189	106,605	25,978

Source: CBS<sup>1161</sup>

The Household Forecast 2018-2060<sup>1162</sup> reports the following: "Currently, 17 percent of all residents of the Netherlands are single. In addition, more than one percent lives in an institution, usually

<sup>1161</sup> <https://opendata.cbs.nl/statline/#/CBS/en/dataset/82905ENG/table?ts=1549287253882> (13.5.2019).

without a partner or other family. As part of the remaining 81 percent, the vast majority of Dutch people are, therefore, part of a multi-person household. This will also be the case in the future, despite the increase in single-person households. In 2060, 79 percent of the population will live with one or more other people. Due to the ageing population in the Netherlands, more than 2 percent of the population is expected to be living in an institution in 2060."

The following table shows the proportion of 'multi-person households' that are married/registered partnerships (married couples) and the unmarried/unregistered partnerships (unmarried couples).

	Onderwerpen	Particuliere huishoudens: samenstelling				Particuliere huishoudens: grootte						
		Totaal particuliere huishoudens	Meerpersoonshuishoudens			Totaal particuliere huishoudens	Eenpersoonshuishoudens	Meerpersoonshuishoudens				
			Niet-gehuwd paar	Gehuwd paar	Eenouderhuishoudens			Totaal meerpersoonshuishoudens	2 personen	3 personen	4 personen	5 of meer personen
Leeftijd referentiepersoon	Perioden	<i>aantal</i>										
Totaal	1995	6468682	518116	3436991	360754	6468682	2109149	4359533	2058363	903381	957174	440615
	2000	6801008	657579	3440642	384317	6801008	2272219	4528789	2242256	897408	943509	445616
	2005	7090965	747056	3402433	444124	7090965	2449378	4641587	2317627	905839	973043	445078
	2010	7386144	836339	3339959	486250	7386144	2669516	4716628	2417798	907781	970519	420530
	2015	7665198	934671	3275358	545289	7665198	2867797	4797401	2512123	923286	961010	400982
	2016	7720787	954074	3261124	557426	7720787	2906334	4814453	2530437	924877	958746	400393
	2017	7794075	975602	3253633	562124	7794075	2961228	4832847	2540703	926964	961007	404173
	2018	7857914	997648	3249848	572419	7857914	2997617	4860297	2565256	929901	959802	405338

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In 2018 the Netherlands had 7,857,914 private households. Of these, 997,648 couples were an unmarried/unregistered couples and 3,249,848 a married/registered couples.

<sup>1162</sup> Van Duin, C., Te Riele, S., Stoeldraijer, L., Huishoudensprognose 2018-2060: opmars eenpersoonshuishoudens zet door, [https://www.cbs.nl/-/media/pdf/2018/51/2018st28%20huishoudensprognose\\_web.pdf](https://www.cbs.nl/-/media/pdf/2018/51/2018st28%20huishoudensprognose_web.pdf) (13.5.2019) 5, 6.

<sup>1163</sup> <https://statline.cbs.nl/Statweb/publication/?DM=SLNL&PA=37975&D1=0,5,10,15,20-26&D2=0&D3=0,5,10,15,20-23&HDR=T&STB=G1,G2&CHARTTYPE=1&P=L&VW=T> (13.5.2019).

It is important to note that couples increasingly live together without marrying. The Household Forecast 2018-2060<sup>1164</sup> indicates that this hardly occurred at all in 1971. In 1995, 16% of couples were unmarried and now more than 23% of couples are unmarried or unregistered as partners. The prognosis is that this percentage will be 36% of all couples in 2060. These are unmarried couples both with and without children.

There is also an increasing number of combined families, namely households and couples where both parents of the children do not live at that address. Steenhof estimated the number of stepfamilies in 2007 to be 149,000 (this was the lower end of the estimation) with a total of 282,000 children. In 1998 it was just 115,000. Moreover, according to Steenhof, a large proportion of stepfamilies consist of unmarried or unregistered cohabiting couples.<sup>1165</sup> The Dutch Youth Institute reported in 2015 that the number of stepfamilies in the Netherlands is approximately 184,000.<sup>1166</sup>

### 1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.

The following table shows the number of married couples and registered partnerships.<sup>1167</sup>

		1950	1960	1970	1980	1990	2000	2015	2016	2017
<b>Marriages</b>										
<b>Total marriages</b>	number	83,110	89,100	123,631	90,182	95,649	88,074	64,308	65,249	64,402
Marriages, relative	per 1,000 inhabitants	8.2	7.8	9.5	6.4	6.4	5.5	3.8	3.8	3.8
Between man and woman	number	83,110	89,100	123,631	90,182	95,649	88,074	62,912	63,813	63,027
Between men	number							647	665	620
Between women	number							749	771	755
<b>Marrying persons</b>										
By sex and marital status	number	82,389	88,016	122,287	90,375	97,321	84,573	62,208	63,018	62,116
<i>Men</i>										
Total men										
Never married	number	72,941	80,880	113,399	79,090	80,409	66,957	47,450	47,884	47,036
Partnership	number							1,263	1,401	1,490
Widowed	number	4,053	3,221	3,187	1,794	1,270	1,811	1,383	1,355	1,387
Divorced	number	5,395	3,915	5,701	9,491	15,642	15,805	12,112	12,378	12,203
<i>Women</i>										
Total women	number	82,572	88,713	123,521	89,978	97,148	82,773	60,440	61,341	60,505
Never married	number	74,620	83,014	116,141	80,307	81,476	66,769	47,049	47,593	46,778

<sup>1164</sup> Van Duin, C., Te Riele, S., Stoeldraijer, L., Huishoudensprognose 2018-2060: opmars eenpersoonshuishoudens zet door, [https://www.cbs.nl/-/media/pdf/2018/51/2018st28%20huishoudensprognose\\_web.pdf](https://www.cbs.nl/-/media/pdf/2018/51/2018st28%20huishoudensprognose_web.pdf) (13.5.2019), 21.

<sup>1165</sup> Steenhof, L., Schatting van het aantal stiefgezinnen, <https://www.gezin-in-beweging.nl/wp-content/uploads/2017/12/Schatting-van-het-aantal-stiefgezinnen-CBS-2007-k4-b15-p19-art.pdf> (13.5.2019), 19.

<sup>1166</sup> <https://www.nji.nl/nl/Databank/Cijfers-over-Jeugd-en-Opvoeding/Cijfers-per-onderwerp/Stiefgezinnen> (13.5.2019).

<sup>1167</sup> <https://opendata.cbs.nl/statline/#/CBS/en/dataset/37772eng/table?ts=1549621368142> (13.5.2019).



		1950	1960	1970	1980	1990	2000	2015	2016	2017
Partnership	number						.	1,255	1,405	1,485
Widowed	number	2,976	1,785	1,812	1,154	970	1,441	1,136	1,091	1,067
Divorced	number	4,976	3,914	5,568	8,517	14,702	14,563	11,000	11,252	11,175
<b>Partnership registrations</b>										
Total partnership registrations	number						2,922	12,772	15,706	17,866
Partnership registrations, relative	per 1,000 inhabitants						0.18	0.75	0.92	1.04
Between man and woman	number						1,322	12,331	15,090	17,194
Between men	number						815	202	286	316
Between women	number						785	239	330	356
<b>New partnerships</b>										
Total new partnership registrations	number						2,922	12,772	15,706	17,866
Between man and woman	number						.	12,331	15,090	17,194
<b>Between men</b>	<b>number</b>						.	202	286	316
<b>Between women</b>	<b>number</b>						.	239	330	356

Source: CBS<sup>1168</sup>

The number of marriages is falling and the number of registered partnerships has increased somewhat in recent years. As already noted in no. 1.1. the Household Forecast 2018-2060<sup>1169</sup> predicts that the number of informal unions will increase.

### 1.3. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.

The table below shows, among other things, the divorce figures. The table only refers to marriages and not to registered partnerships.

Marriage dissolutions; due to divorce and death

Total marriage dissolutions	number	39	47	65	76	81	85	92	93	88	88	92	92	91
Total marriage dissolutions	number	74	27	28	88	50	81	53	60	17	18	55	22	73
Marriage dissolutions	per 1,000	3.9	4.1	5.0	5.6	5.8	5.7	6.0	5.9	5.4	5.3	5.5	5.4	5.4

<sup>1168</sup> <https://opendata.cbs.nl/statline/#/CBS/en/dataset/37772eng/table?ts=1549621368142> (13.5.2019).

<sup>1169</sup> Van Duin, C., Te Riele, S., Stoeldraijer, L., Huishoudensprognose 2018-2060: opmars eenpersoonshuishoudens zet door, [https://www.cbs.nl/-/media/pdf/2018/51/2018st28%20huishoudensprognose\\_web.pdf](https://www.cbs.nl/-/media/pdf/2018/51/2018st28%20huishoudensprognose_web.pdf) (13.5.2019), 21.

1,000 inhabitants.														
Marriage dissolutions per 1,000 couples	o/oo	18.6	18.4	21.0	23.0	23.8	24.6	26.4	26.4	25.2	25.6	27.4	27.4	27.3
<b>Marriages dissolved due to divorce</b>	number	6,4	5,6	10,31	20,09	25,73	28,41	34,17	34,65	31,90	32,54	34,23	33,41	32,76
Divorces	r	62	72	7	3	5	9	0	0	5	4	2	4	8
Divorces per 1,000 inhabitants	o/oo	0.64	0.49	0.79	1.47	1.82	1.90	2.21	2.18	1.95	1.96	2.02	1.96	1.91
Divorces per 1,000 couples	o/oo	3.0	2.2	3.3	6.0	7.5	8.1	9.7	9.8	9.1	9.5	10.1	9.9	9.7
Average duration of marriage at divorce	year	11.2	11.1	11.8	12.5	11.9	12.7	12.2	12.9	13.8	14.4	14.8	15.0	15.1
Total percentage divorces	%	.	.	.	3	0	1	7	9	4	2	6	1	8
<b>Marriages dissolved due to death</b>														
Total men and women	number	33,28	41,60	54,96	56,79	55,76	57,39	58,36	58,95	56,27	55,63	58,32	58,81	58,96
Deceased partners	r	4	0	8	2	9	7	9	3	3	8	0	5	2
Deceased partners per 1,000 couples	o/oo	15.6	16.2	17.7	17.0	16.3	16.4	16.5	16.6	16.1	16.2	17.3	17.5	17.5
Men		19,	26,	37,	40,	40,	41,	41,	41,	38,	37,	38,	39,	39,
Deceased male partners	number	56	78	84	00	06	23	58	06	61	76	98	21	19
Deceased male partners per 1,000 couples	o/oo	9.2	10.4	12.2	12.0	11.7	11.8	11.7	11.6	11.0	11.0	11.6	11.7	11.7

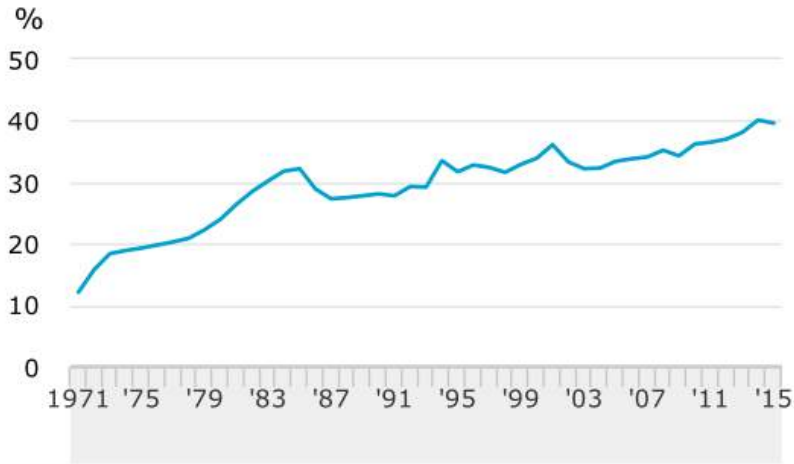
Source: CBS<sup>1170</sup>

The Central Bureau for Statistics in the Netherlands (CBS) reports that marriages have become less stable over the last few decades. In 1971 the total divorce rate was just 12%. In 2015 this had increased to almost 40% (2-12-2016).<sup>1171</sup>

The following diagram charts the chances of a marriage ending in divorce.

<sup>1170</sup> <https://opendata.cbs.nl/statline/#/CBS/en/dataset/37425eng/table?ts=1550522000950> (13.5.2019).

<sup>1171</sup> <https://www.cbs.nl/nl-nl/nieuws/2016/48/meer-stellen-gaan-op-jonge-leeftijd-uit-elkaar> (13.5.2019).



In 1971 the total divorce rate was just 12%. In 2015 this had increased to almost 40% according to the CBS.

The number of registered partnerships that are being dissolved has also increased, according to the CBS. In 2014 more than 1,800 partnerships ended in dissolution, 16% more than the year before.<sup>1172</sup>

The following table shows that in 2015 the number of dissolutions of registered partnerships was 1,937. In 2016 this had increased to 1,957 and in 2017 this number was 2,252.<sup>1173</sup>

**Geslacht van betrokken partners**

Perioden	Huwen, partnerschap: sluiting				Huwen, partnerschap: ontbinding				
	Sluitingen van geregistreerde partner...				Scheiding na geregistreerd partnerschap				
	Totaal	Man	- Man	- Vrouw	Totaal	Man	- Man	- Vrouw	-
	aantal	man	vrouw	vrouw		man	vrouw	vrouw	
2010	9 571	234	9 084	253	1 179	54	1 055	70	
2011	9 945	235	9 464	246	1 245	59	1 104	82	
2012	9 224	217	8 789	218	1 448	63	1 290	95	
2013	9 445	208	9 038	199	1 568	57	1 415	96	
2014	10 363	201	9 962	200	1 823	63	1 670	90	
2015	12 772	202	12 331	239	1 937	70	1 767	100	
2016	15 706	286	15 090	330	1 957	62	1 806	89	
2017	17 866	316	17 194	356	2 252	58	2 079	115	

Recent reports from the CBS show that 53% of the couples who started living together in 2000 were still together fifteen years later. Almost all couples who were still together had one or more children together and 80% were married.<sup>1174</sup>

**1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders**

<sup>1172</sup> CBS, Meer echtscheidingen, <https://www.cbs.nl/nl-nl/nieuws/2015/37/meer-echtscheidingen> (13.5.2019).

<sup>1173</sup> <https://opendata.cbs.nl/statline/#/CBS/nl/dataset/83519NED/table?dl=194F6> (13.5.2019).

<sup>1174</sup> <https://www.cbs.nl/nl-nl/nieuws/2019/06/helft-eerste-samenwoners-na-15-jaar-nog-samen> (6.2.2019).

**elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).**

The following table gives a further specification of married couples giving country of birth of the married partners. It concerns marriages in which at least one of the partners is registered in the population register of a Dutch municipality.<sup>1175</sup>

		1996	2011	2012	2013	2014	2015	2016	2017
<b>Huwelijkssluitingen</b>									
<b>Naar wederzijds geboorteland</b>									
Beide partners in Nederland geboren	aantal	67 791	52 546	51 668	46 278	47 663	46 849	47 419	46 309
Één in Nederland, ander in buitenland									
Eén Nederland, ander buitenland	aantal	10 217	11 730	11 680	11 058	10 548	10 635	10 745	10 731
Eén Nederland, ander EU-landen	aantal	3 087	3 362	3 258	3 029	3 006	3 026	3 125	3 152
Eén Nederland, ander westers land	aantal	5 650	5 262	5 161	4 823	4 778	4 771	4 836	4 929
Eén Nederland, ander niet-westers land	aantal	4 567	6 468	6 519	6 235	5 770	5 864	5 909	5 802
Eén Nederland, ander België	aantal	535	493	472	451	437	452	446	427
Eén Nederland, ander Duitsland	aantal	1 174	946	926	821	841	803	838	833
Eén Nederland, ander Marokko	aantal	459	1 055	992	945	893	821	853	844
Eén Nederland, ander Nederlandse Antillen	aantal	389	376	354	343	328	377	343	352
Eén Nederland, ander Suriname	aantal	809	746	690	613	576	572	544	602
Eén Nederland, ander Turkije	aantal	810	1 030	1 074	1 029	924	944	912	907
Beide partners hetzelfde buitenland	aantal	5 696	5 102	4 899	5 098	5 123	4 806	5 065	5 274
Buitenland									
Europese Unie (exclusief Nederland)	aantal	210	797	879	978	1 164	1 199	1 302	1 374
Westers land (exclusief Nederland)	aantal	593	1 326	1 370	1 459	1 610	1 572	1 772	1 790
Niet-westers land	aantal	5 103	3 776	3 529	3 639	3 513	3 234	3 293	3 484
België	aantal	25	33	51	23	49	58	58	53
Duitsland	aantal	95	52	63	61	49	59	56	59
Marokko	aantal	1 280	900	758	786	788	660	570	625
(Voormalig) Ned. Antillen en	aantal	134	184	208	120	146	128	116	113

<sup>1175</sup> <https://opendata.cbs.nl/statline/#/CBS/nl/dataset/60036ned/table?dl=18DAE> (13.5.2019).

		1996	2011	2012	2013	2014	2015	2016	2017
Aruba									
Suriname	aantal	1 074	416	375	357	301	278	293	303
Turkije	aantal	1 732	790	787	754	633	610	539	550
Beide partners verschillend buitenland	aantal	1 436	2 194	2 068	2 115	1 999	2 018	2 020	2 088

Bron: CBS

In 2017, 46,309 marriages were concluded where both partners were born in the Netherlands. In 10,731 marriages one partner was born in the Netherlands and the other in a foreign country. 5,724 marriages were between partners who had both been born in the same foreign country and 2,088 marriages where both partners had a different foreign nationality.

## 2. Family law.

### 2.1. General.

#### 2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?

The main source of Family Law in the Netherlands is Book 1 of the Dutch Civil Code (BW). This book is titled 'Natural Persons and Family Law'. If one limits 'family law' to that which governs the relationships between partners and disregards the position of children, then the relevant sections are Titles 5, 6, 7, 8 and 9 of Book 1 of the Dutch Civil Code. Title 5 of Book 1 of the Code contains the provisions concerning the requirements for entering into a marriage and the manner in which marriage can take place. Title 5A of the Code deals with registered partnerships. The most important rules regarding marriage apply *mutatis mutandis* to registered partnerships, so that only where there is a significant deviation a special reference will be made in the report.

Title 6 of Book 1 of the Dutch Civil Code concerns the rights and duties of spouses; how couples organise their marital property is not covered here. Title 7 of Book 1 of the Code sets out the standard marital property regime, which applies if the spouses have not deviated from this in a nuptial agreement. The standard Dutch legal position is that there is a community of property. This involves the creation of common assets; see also no. 2.2.2. Title 8 of Book 1 of the Code covers nuptial agreements. Title 9 of Book 1 of the Code deals with the rules on the substantive legal aspects of divorce. The manner in which a registered partnership can be terminated is covered in Title 5A of Book 1 of the Code.

In addition to Book 1 of the Dutch Civil Code, various provisions from other laws are also important with regard to issues effecting spouses. Of particular relevance is Title 7, 'Community', from Book 3 of the Dutch Civil Code (Property Law in general). This title contains the rules that apply to the community of property after dissolution of the community of property. Title 7 of Book 3 of the Code also applies to spouses who have completely or partially excluded the community of property when entering into a nuptial agreement but are nevertheless jointly entitled to assets (for example, the marital home). An important issue from Title 9 of Book 1 of the Dutch Civil Code is set out in Article 1:155 which states that the pension entitlements built up by the spouses during the marriage must be settled between them in accordance with the provisions of the Act on the Equalization of Pension Rights at a Separation. The Pensions Act also contains rules concerning the (special) partner's pension.

Finally, another important source of family law, is EU Council Regulation No 2016/1103 of 24 June 2016 implementing the requirement for enhanced cooperation in the area of jurisdiction, the applicable law, and the recognition and enforcement of decisions on marital property regimes (PbEU 2016, L 183); and EU Council Regulation No 2016/1104 of 24 June 2016 requiring enhanced cooperation in the areas of jurisdiction, applicable law and recognition and enforcement of decisions on the consequences of property owned by registered partnerships (PbEU 2016, L 183). In this context reference is also made to Book 10 of the Dutch Civil Code containing supplementary rules of private international law, including legal relationships between spouses, the marital property regime, dissolution of the marriage and the registered partnership. See, *inter alia*, Article 10:35 *et seq* of the Dutch Civil Code.

**2.1.2. Provide a short description of the main historical developments in FL in your country.**

**1838:** Marital property law is included in the newly adopted Dutch Civil Code. Since that year, the entire country of the Netherlands has recognised community of property. Community of property comprised all the assets of each of the spouses at the start of the marriage and all assets acquired later, irrespective of which spouse acquired these assets. All debts, arising both before marriage and during the marriage, and regardless of who entered into them, also formed part of the marital community of property. The only significant exception was assets received under a will or as a gift where the testator or donor had used an exclusion clause in order to ensure that those assets would remain outside the marital community of property. See below no. 2.2.1.

The fact that, at that time, there was no suggestion of equality between men and women is clear from the legal relationship between the two. The husband was the head of the union; the wife was obliged to show obedience to her husband whilst the husband had a duty to protect his wife. Further examples of the inequality between man and wife are the husband's power within the marriage and the fact that a wife had no legal capacity.

The entire history of family law can be characterised as the continuous emancipation of women.

**1957:** Apart from minor improvements in the legal status of the married woman in the nineteenth and first half of the twentieth century, there was little change until the law, which was passed on 14 June 1956, Stb. 1956, 343 (the so-called Lex Van Oven). As from 1 January 1957 the most important innovations brought about by this law were:

- Abolition of the principle of immutability; prior to 1 January 1957 spouses were allowed to enter into a prenuptial agreement, prior to the marriage, deviating from the standard terms of the marriage agreement and determining their own terms. After 1 January 1957 spouses who were already married could also enter into a nuptial agreement, changing the terms of the marriage. This had not been possible prior to the Lex Van Oven.
- Cancellation of the legal incapacity of married women. From then on a married woman could independently perform legal acts without the cooperation of her husband.

Because the husband remained the head of the union, the will of the husband remained decisive in many areas.

**1970:** The next important development came with the introduction of Book 1 of the new Dutch Civil Code in 1970. This version replaced, among other things, the marital property law of the previous Code (the frequently amended Dutch Civil Code from 1838). This new Book 1 of the Dutch Civil Code did not constitute a fundamental revision of the law, the only notable exception being the abolition of the position of the husband as head of the union. As a result, the husband and wife became equal in relation to marital property law. For the rest, the new code made certain technical adjustments to the old rules.

**1998:** Introduction of registered partnerships. The registered partnership provided an arrangement for two persons of the same sex and for persons of different sexes to create a legal relationship with each other which is very similar to marriage but which is not formally the same. In terms of property law, the registered partnership is identical to marriage.

**2001:** The institution of marriage is opened up to persons of the same sex. In 2001, persons of the same sex were allowed to marry for the first time. In view of the degree of overlap with registered partnerships, the conversion of a registered partnership into a marriage, and vice versa, was also made possible. In 2009, the latter option was subsequently abolished and it was therefore only possible to convert a registered partnership into a marriage (Article 1:80g BW).

**2001-2012:** The marital property law is amended a number of times. The changes were introduced in three different legislative processes and are referred to as three 'tranches'. The tranches mainly concerned technical changes which did not make significant changes to the basic rules of marital property law. However, it is worth mentioning the abolition of the cohabitation obligation included in the first tranche and a complicated arrangement from the third tranche that provides a reimbursement regime for cases where assets are transferred between spouses (Article 1:87 BW).

**2018:** As of 1 January 2018, the most significant change in marital property law since 1957 has been introduced (following the first to third tranches, this is known as the fourth tranche). The change relates to the restriction of the community of property. As a general rule, premarital possessions and debts no longer form part of the marital community of property, and any inherited assets are also in principle henceforth excluded. See also no. 2.1.3<sup>1176</sup>

### 2.1.3. What are the general principles of FL in your country?

Marriage is called an 'institution' in the Netherlands. A marriage comes with consequences - rights and obligations - which the spouses want, that are chosen by them, but also consequences that they have not chosen and perhaps ones that they do not want but are there anyway; a marriage exceeds the private interests of the spouses. This is what is meant by marriage as an institution.

The main principles of Dutch marital property law are set out in Title 6 and Title 7 of Book 1 of the Dutch Civil Code.

Title 6 of Book 1 of the Dutch Civil Code contains the provisions that apply to all married persons regardless of the marital property regime. Some provisions are mandatory law; it is not possible to deviate from this by entering into a nuptial agreement. Important provisions are Article 1:81 and Article 1:88 of the Code. Article 1:81 states that spouses must be loyal to each other, help and assist each other and provide each other with the necessities of life. This can be characterised as the core provision of the marital property law in which the solidarity that exists between spouses is expressed. This provision is also the basis for alimony because the solidarity does not end if the marriage is dissolved by divorce. Article 1:88 states that each spouse requires permission from the other for certain legal acts that could potentially jeopardise or endanger their joint essential circumstances (such as the sale of the marital home, the establishment of a mortgage right over the marital home or, in the case of a rented house, termination of the rental agreement); making excessive gifts; acting as surety for the benefit of third parties or entering into a (hire) purchase agreement. If no permission is granted, the action is voidable.

Title 7 of Book 1 of the Dutch Civil Code sets out the standard statutory system relating to the community of property, as described above. The community of property takes effect by operation of law if the future spouses marry without a prior nuptial agreement (Article 1:93 BW). As noted in section no. 2.1.1 above, these rules also apply to (prospective) registered partners. For the basic system, see no. 2.2.1 below.

If spouses want to deviate from the standard system of the community of property, they can enter into a nuptial agreement. Since the Lex Van Oven mentioned above in no. 2.1.2, this is possible both before marriage and during marriage. Contractual freedom is the starting point when drawing up nuptial agreements, although there are some subjects on which the spouses are not free to contract. The most notable is the solidarity as provided for in Article 1:81 of the Code, as mentioned above. Spouses are not free to deviate from this condition. It is also not possible to enter into arrangements concerning alimony in a prenuptial agreement that would result in a spouse who is entitled to

<sup>1176</sup> For an overview, see De Boer, J., Kolkman, W. D., Salomons, F. R., 2016, 1-10.

maintenance having fewer rights than he or she would have under the statutory norms. In addition, the aforementioned provision regarding consent (Article 1:88 BW) cannot be deviated from.

**2.1.4. Define “family” and “family member” in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

In Dutch, ‘family’ usually describes a household of one or more adults and/or one or more children. The adults do not have to be in a formal legal relationship with each other and the children do not need to be the children of one or both of the adults.

The law does not have a comprehensive description of the term ‘family’, although family law does naturally focus on the family.

The marital property law contains a number of so-called ‘family protection provisions’. These provisions offer the family protection of their living conditions/home and against excessive gifts, against one member acting as surety on behalf of third parties and against the entering into of (hire) purchase agreements (Article 1:88 BW, see no. 2.1.3).

The intestacy law is based on blood relationships. The first group of heirs consist of the surviving spouse, provided the spouses were not legally separated, and the deceased’s children (Article 4:10 BW). See no. 3.2.4. Furthermore, the Law of Succession has a number of provisions that apply to formal and informal family law relationships such as legal division (see below), the possibility of including stepchildren in a legal division and the possibility of protecting a life partner with whom a notarial cohabitation agreement has been entered into against legitimate claims of descendants of the deceased partner by making an intentional disposition to that effect (Article 4:82, BW). See no. 3.3.4.

In addition, under the Law of Succession, a minor is (under certain circumstances), entitled to a sum for the upbringing until the age of eighteen. A young adult until the age of 21 is also (under certain circumstances) entitled to a lump sum for example for education. A child, stepchild, foster child, son/daughter-in-law or grandchild can receive a sum from the estate of a testator if he/she has worked in the company or household of the testator without having received an appropriate remuneration. See no. 3.3.4.

The concepts of ‘child’ and ‘partner’ are interpreted differently across various regulations. For example, the concept of child in tax law (Article 19 SW 1956) is broader than in the civil law of succession (Article 10 BW) and the concept of a partner for tax purposes (Article 1a SW 1956) differs from the concept of life partner in succession law. See also no. 2.1.5.2.

**2.1.5. Family formations.**

**2.1.5.1. Define the “spouse” in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

In general terms, in the Netherlands, both men and women can marry from the age of eighteen. The marriage is entered into by the spouses in the presence of a civil registrar. A marriage may be entered into by two persons of different or the same sex. A marriage between more than two people is not possible.

The law considers a marriage only in its civil relationships (Article 1:30 BW). This means that the legislator does not want to interfere at all with the way in which spouses organise their relationship. In addition to marriage, the Netherlands also recognises registered partnerships (Article 1:80a BW). Partner registration is concluded by drawing up a deed to that effect by a civil registrar. The procedure largely resembles that of the execution of a marriage.



The rights and obligations of registered partners differ so little from those of spouses that it is even possible to convert a partnership into a marriage without affecting the marital property regime/partnership property regime or the rights and obligations of the spouses/registered partners. Because of the very close similarity of marriage and registered partnership, there have been several calls for the abolition of registered partnerships for new cases, so far without result.

For the concept of 'partner' in tax law see no. 2.1.5.2.

**2.1.5.2. What types of relationships/unions between persons are recognised in FL of your country? In particular, formal (registered) and informal (*de facto*) unions, heterosexual and same-sex unions, unions with and without *affectio maritalis*. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

As a starting point, it can be argued that legal regulation focuses on marriages and registered partnerships. See above. Nonetheless, various laws/regulations also deal with informal partnerships. In several areas of law, no (or virtually no) distinction is made between marriage/registered partnerships and informal partnerships. For example, tax law only knows the concept of 'partner' (Article 5a of the 'Algemene Wet Inzake Rijksbelastingen', (AWR)). When determining whether or not someone qualifies as a partner for tax purposes, consideration is given to both the material circumstances and formal characteristics. One of those formal characteristics is that a person is the spouse/registered partner. The tax partnership can be beneficial in certain circumstances. The most significant advantage can be observed when it comes to gift or inheritance tax as the concept of partner here has direct consequences for the rate of tax and the level of exemptions. This is why in Article 1a SW, in derogation from Article 5 AWR, a stricter definition has been included for unmarried cohabitants.

An informal cohabitation relationship can also have legal consequences in social security law, tenancy law and pension law. Whether or not these apply depends upon the material circumstances of the relationship (as opposed to the formal characteristics).

**2.1.6. What legal effects are attached to different family formations referred to in q 2.5.?**

In family law and succession law, legal consequences are only attached to marriage and registered partnership. For example, the obligation to provide for the maintenance of the other spouse/partner, even after dissolution of the marriage/registered partnership if a spouse cannot provide for him/herself. Under intestacy laws, spouses/registered partners are each other's heir if there is no valid will.

In principle, no enforceable legal rights and obligations are attached to informal cohabitation. For example, there is no basic relationship law regime and there are no partner maintenance obligations. Persons cohabiting are not each other's heirs in the event of intestacy.

There are, however, a few exceptions. For example, the inheritance provisions set out in Article 4:82 of the Dutch Civil Code (see no. 2.1.4 above and no. 3.1.4 below) and Article 4:28, paragraph 2 of the Code gives persons who had a permanent joint household with the deceased at the time of his/her death the right to continue living in the deceased's home for six months after the death of the testator.

In this way, the courts use general property law to give substance to the legal relationship that exists between the partners, applying the doctrines of 'tacit agreement', 'reasonableness and fairness', the 'natural unenforceable agreement' or 'unjust enrichment'.

In practice, unmarried cohabitants regularly choose to enter into a notarised cohabitation agreement setting out what they have agreed between them regarding mutual rights and obligations.

Contractual freedom applies. Topics which are generally covered in such cohabitation agreements are how household expenses are to be shared, the ownership of the household effects, rules of proof

with regard to goods, joint bank accounts, agreements with regard to the house (including in case of death), designation as partner if there is any survivor's pension, arrangements for what will happen if the cohabitation ends. Alimony obligations may also be agreed, but this is more the exception than the rule.

In practice, a notarial cohabitation agreement is often (but not exclusively) entered into when a couple purchases a property or decides to have children. Couples often draw up wills at the same time in order to deal with matters of inheritance and to ensure that the cohabitant has priority over parents, brothers and sisters and children (by making use of the aforementioned Article 4:82 of the Dutch Civil Code).

**2.1.7. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/*de facto* family formations? Explain briefly.**

With some regularity, it is suggested that basic rights and obligations for unmarried cohabitants, under certain conditions, should be set out in law. In particular, to deal with alimentation for a partner who is unable to provide for him/herself and in matters of inheritance. To date, any push for legislation has been rejected by the government on the grounds that unmarried cohabitants have chosen to have a relationship without rights and duties and therefore autonomy is allowed to prevail.

**2.2. Property relations.**

**2.2.1. List different family property regimes in your country.**

In general terms, the following applies:

The standard regime is the community of property which is created when a marital community is entered into (a couple gets married) and the spouses' property or household effects are joined together. This joining of estates involves a transfer of assets under general title; actual transfer/delivery does not have to take place. The community of property has two variants, depending on the date the marriage took place: **the wider community of property for spouses married before 2018** and **a more limited community of property for spouses married since 1 January 2018**. See no. 2.2.2.

In addition, it is possible to draw up a nuptial agreement which creates a marital community. This community can be both more extensive or more limited than the standard legal community of property. Contractual freedom is paramount.

In addition to the community with a property law effect, in practice a large number of nuptial agreements are entered into where no community of property arises, but which establish obligations regarding income and capital to be shared between the spouses (marital equalisation obligations). Such equalisation of obligations is only of effect between the spouses and takes place periodically (for example, once a year) or definitively (in the case of divorce and/or death). Specific equalisation provisions need to be set out in the nuptial agreement as the law only establishes a few general provisions. (Section 1.8.2 BW).

Some nuptial agreements rule out any settlement or division of property on divorce. Such agreements are referred to as a 'cold exclusion'. The right to pension equalisation can also be excluded. The only claim that still exists is the right to maintenance, which, as already mentioned, cannot be excluded before the marriage.

**2.2.2. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?**

The standard regime is the community of property and is regulated under Article 1:94 e.v. of the Dutch Civil Code. The law changed significantly on 1 January 2018. For couples who were already married before 1 January 2018, the old legislation remains in force. As a result, the community of property has two variants.

In general terms, the following applies:

- for spouses married before 1 January 2018: all assets that the spouses put into the marriage and all assets that they subsequently acquire, with some specific exceptions, form part of the marital community. Also assets obtained as gifts or under the law of succession form part of the marital community. The most important exception are those assets, regarding which the testator or the donor has determined – by means of an exclusion clause – that they will remain outside marital community of property (since 2018 included in Article 1:94 paragraph 4 BW and prior to 2018 in Article 1:94 paragraph 2a BW). These assets that remain outside the marital community are designated as 'own equity'. The benefits (fruits) of own equity and anything which replaces it are also part of own equity (and therefore fall outside the marital community). Another category that falls outside the community are assets and liabilities which are in a particular way attached to one of the spouses personally as provided for in Article 94, paragraph 5 of the Dutch Civil Code (prior to 2018, this was Article 1:94 paragraph 3 BW). This is, however, a very limited category as personal attachment is rarely recognised except under certain specific circumstances such as benefits claimed for personal injury. As noted in no. 2.1.1, there is a separate regime for (certain) pension rights as set out in the Act on Equalisation of Pensions on Divorce.

All debts of the spouses, whether incurred prior to or during the course of the marriage, fall into the marital community and are therefore community debts, except for those, which relate to assets excluded from the community, which belong to the spouse's own equity (Article 1:94 paragraph 5 old BW, which, as mentioned above, has remained in force for spouses married prior to 1 January 2018).

Attached liabilities are also own liabilities, but such debts are very rare.

A marital community from prior to 1 January 2018 can be seen as very comprehensive, although own equity can exist.

- for spouses married after 1 January 2018: all assets that the spouses receive during the marriage belong to the marital community, with the exception of those received as a gift or under the law of succession (unless otherwise indicated by the donor/testator) or assets that replace assets forming part of the spouse's own equity. Assets that are brought to the marriage no longer form part of the community of property with the exception of those assets to which the spouses were already jointly entitled to before the marriage. All debts of spouses arising during the marriage are, as a general rule, part of the marital community with the exception of those relating to assets excluded from the community. Pre-marital debts are no longer part of the community unless they relate to goods that were already joint property prior to the marriage. The notes above regarding attached assets, pensions and fruits of assets also apply here.

After 1 January 2018, the marital community is seen to be much more limited. The possibility that there is own equity, alongside community assets, is much greater.

It is important to point out the evidence rule in Article 1:96 paragraph 8 of the Dutch Civil Code: if there is a dispute about who an asset belongs to the asset in question will be deemed to belong to the marital EU community. Although no administrative duty exists, spouses run the risk that in the absence of a proper administration of their own equity, such equity could be deemed to fall under the community of property pursuant to Article 1:94 paragraph 8 of the Code. As spouses do not tend to have clear and separate administration of their own

equity, the system could actually turn into a community of property as it was prior to 1 January 2018.<sup>1177</sup>

**2.2.3. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a “new regime just for them”?**

In general terms, the following applies: By entering into a nuptial agreement, spouses may deviate from the legal regime of community of property (Article 1:93 BW) or from previously made nuptial agreements. Nuptial agreements can be entered into at any time during a marriage (Article 1: 114 BW).

Spouses have therefore a great degree of contractual freedom and can tailor their own regime. Restrictions exist in particular with regard to the waiving of alimony and Article 1:88 of the Dutch Civil Code (see above no. 2.1.3). Naturally, nuptial agreements may not be in conflict with public order and good morals (Article 3:40 BW and Article 1:121 paragraph 1 BW).

Since 2012, the law no longer offers a choice of legal regimes. Nuptial agreements can, as mentioned, be entered into both prior to and during a marriage. Nuptial agreements must be made by notarial deed (Article 1:115 paragraph 1 BW). The notary ensures, as far as possible, that there is no abuse of legal ignorance or actual/unfair dominance (HR 20 January 1989, ECLI:NL:HR:1989.AD0586, NJ 1989/766 (Groningen nuptial agreement)).

If a nuptial agreement is entered into during a marriage, then any pre-existing marital community of property is dissolved and can be divided up. (Article 1:100 BW). Title 7, Book 3 of the Dutch Civil Code is also applicable to such division of a marital community of property. See no. 2.1.1.

Research into nuptial agreements conducted by the Centre for Notarial Law at the Radboud University Nijmegen (researchers F.W.J.M Schols and F.M.H. Hoens) published in WPNR 2012/6956, showed that for many years the percentage of spouses/registered partners that entered into nuptial agreements/registered partnership agreements fluctuated around 25%. The expectation is that this percentage will be lower after 2018 due to the curtailment of the scope of the marital community of property. Figures are not yet available. Out of the couples who chose to enter into nuptial agreements in 2009, 34% opted for a regime which provided that in case of divorce, nothing or virtually nothing, would be shared. 66% of couples who entered into a nuptial agreement agreed to provide for a division of property.

**2.2.4. Explain briefly the rules on the administration of family property and compare if there are difference for different property regimes.**

The main rule is that each spouse is entitled to administer (exercise management over) his/her own (i.e. personal) assets (Article 1:90 paragraph 1 BW). These are the assets that do not fall under the marital community of property. For assets that belong to the marital community under Title 7 of Book 1 of the Dutch Civil Code (see no. 2.1.3), the following applies with respect to authority to administer them (Article 1:97 BW):

1. For registered assets (immovable property or shares in a private company): the spouse in whose name the assets are registered;
2. Assets acquired under an inheritance or as a gift: the spouse who acquired these assets;
3. Other assets: each of the spouses is entitled to manage (administer) the assets.

As an aside: with regard to the management of assets acquired under succession law or as gifts, it should be noted that these assets often do not belong to the marital community. This can be

<sup>1177</sup> For a detailed description see: De Boer, J., Kolkman, W. D., Salomons, F. R., 2016, 255-528 and Van Mourik, M. J. A., Schols, F. W. J. M., 2017, 43-46.

explained partly by the popularity of exclusion clauses (see no. 2.1.2 and no. 2.2.2) and also because since 1 January 2018, acquisitions under succession law or as gifts no longer automatically form part of the marital community of property. In practice this is of little consequence, because irrespective of whether acquisitions by inheritance or gift form part of a spouse's own equity or the marital community, the acquiring spouse is in any case the one who has administrative authority. If the community is dissolved (for example, on the filing of a petition for divorce (Article 1:99 BW), then the administrative regime changes as far as the assets in the marital community are concerned. As a rule, the spouses are only competent jointly (Article 3:170 BW). See no 2.2.7.

**2.2.5. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

Article 1:116 of the Dutch Civil Code represents the basis for the Marital Property Register, in which nuptial agreements can be registered, however, registration is not a legal requirement for nuptial agreements. The importance of the Marital Property Register lies in the fact that the provisions in a nuptial agreement can only be invoked against third persons who were unaware of their existence if those provisions have been registered.

**2.2.6. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

In general terms, the following applies: if no nuptial agreement has been entered into or such agreement has not been registered in the Marital Property Register, a third party may assume that the spouses are married in the sense of a community of property as set out in the law. See Article 1:116 paragraph 1 of the Dutch Civil Code.

The consequences are as follows:

- community of property for couples married prior to 2018:
  1. The spouse who incurred the debt is liable for the debt, with the exception of debts incurred in the normal course of running the household; for those debts both spouses are jointly and severally liable (Article 1:85 BW);
  2. Debts are recoverable both from assets which form part of the marital community of property and from the own equity of the spouse who incurred the debt (Article 1:96 paragraph 1 BW). This applies to both shared debts and relatively rare personal debts.
  3. Debts of the marital community are borne by the marital community (see no.2.2.2. for community debts). A debt which is a personal debt (which is not very common) is to be borne by the debtor.
- community of property for couples married on or after 1 January 2018:
  1. The spouse who incurred the debt is liable for the debt, with the exception of debts incurred in the normal course of running the household; for those debts both spouses are jointly and severally liable (Article 1:85 BW);
  2. Debts are recoverable both from assets which form part of the marital community of property and own equity (Article 1:96 paragraph 1 BW). This applies to shared (community) debts. Own, personal debts can be recovered from the own equity of the liable spouse, and then the balance from the value of half of the marital community of property (Article 1:96 paragraph 3 BW).
  3. The marital community is liable for the debts of the marital community (see no.2.2.2. For community debts). A debt which is a personal debt must be borne by the debtor.

**2.2.7. Describe allocation and division of property in case of divorce, separation or dissolution of the union.**

In general terms, the following applies: the marital community is dissolved by, for example, divorce or dissolution of the registered partnership at the time of filing of the petition for divorce/dissolution. Dissolution of the marital community also occurs in the event of death. The community is also superseded by any subsequent nuptial agreement. See Article 1:99 of the Dutch Civil Code. Any dissolution of the community can result in a division of property.

In case of community of property, each spouse is entitled to half of the dissolved marital community (Article 1:100 BW). Nuptial agreements can deviate from this equal share, although this is not often seen in practice. In principle, the partners themselves settle the distribution between them on the dissolution of the marital community. A notary or lawyer can help them with this, although such intervention is not a requirement. If the partners cannot agree on the division of property, they may turn to the courts (Article 3:185 BW). As an aside, it is worth noting that the dissolution of a marriage as such (disregarding the division of property) requires the intervention of a lawyer and a judge. This also applies to the dissolution of a registered partnership, although if this is by mutual consent and no minor children are involved, it can take place without the intervention of a judge (Article 1:80c paragraph 2 BW). In the latter case, however, a lawyer or notary must be involved in the procedure.

**2.2.8. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?**

No.

**2.3. Cross-border issues.**

To answer these questions, the Royal Notarial Association (KNB) was contacted. Ms. S. Heijning responded on behalf of the KNB.

**2.3.1. Is your country participating in the enhanced cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?**

Yes, the Netherlands has signed the two Regulations on matrimonial property and registered partner property and the regulations came into force on 29 January 2019.

**2.3.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as “marriage”, “matrimonial property agreement”, “partnership property agreement” etc.?**

No, but most people are not aware of the fact that the definition of agreement can also include other agreements between spouses, for example the agreement on wedding gifts, according to the KNB.

**2.3.3. Are you expecting any problems with the application of the rules on jurisdiction?**

We have no experience with the new rules as yet.

Zillinsky, WPNR 7216/2018, noted that the old Dutch jurisdiction rules in matrimonial property cases did not pose any significant problems in practice. He expresses concern about the refinement and manageability of the new regulation. He also regrets the limited freedom of choice of forum and predicts that the EU Court of Justice will still regularly be turned to, to provide clarity in various areas.

**2.3.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

We do not expect problems with the choice of law rules. The Netherlands has provided for a choice of law for a number of years in our private international law rules on matrimonial property law, and have been party to The Hague Convention on Matrimonial Property Law of 1978 since 1992, according to the KNB.

The fact that the options for choice are more limited than under The Hague Convention on Matrimonial Property Law of 1978 is a shame, but this disadvantage does not outweigh the fact that so many Member States are participating in the EU regulations.<sup>1178</sup>

The KNB expects uncertainty when applying the rules of article 26 paragraph 1 of the EU Regulation on matrimonial property. Which law applies if one of the spouses is joining the other spouse after a few months after the marriage? What is exactly 'shortly after the marriage', see recital 49?<sup>1179</sup>

The KNB expects many cases for spouses who never lived together and do not share a joint nationality, so article 26 paragraph 1 sub c will decide with which state the spouses have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances. The KNB is not very happy with the exception rule laid down in article 26 paragraph 3 of the regulation.<sup>1180</sup>

**2.3.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

The KNB does not expect cases on that topic.

**2.3.6. Are there any national rules on international jurisdiction and applicable law (besides the Regulations) concerning the succession in your country?**

Regarding 'succession' see below: no. 3.3.5.7.

Regarding matrimonial property law, as of 29 January the jurisdiction of the Dutch judge must be determined according to the jurisdiction rules of the Regulation.<sup>1181</sup>

### *3. Succession law.*

#### **3.1. General.**

**3.1.1. What are the main legal sources of Succession Law (SL) in your country? What are the additional legal sources of SL?**

The Law of Succession is set out in Book 4 of the Dutch Civil Code. This book bears the title 'Erfrecht' (Succession Law) and comprises six titles. Title 1: 'General Provisions', Title 2: 'Intestate Succession', Title 3: 'Intestate succession in respect of the relation between the spouse and the children of the deceased', Title 4: 'Last will of the deceased', Title 5: 'Last wills of various types', Title 6: 'Consequences of succession'.

But other books of the Dutch Civil Code are also important. In particular Book 1 of the Code, entitled 'Law of Persons and Family law', which regulates matters such as parental rights and the relationship

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<sup>1178</sup> See Ten Wolde, M. H., 2018.

<sup>1179</sup> As far as the problems surrounding the 'reference date' are concerned, reference can also be made to Frohn, E. N., 2018.

<sup>1180</sup> See also Frohn, E. N., 2018, Vlas, P., 2018, who calls this provision 'food for procedures'.

<sup>1181</sup> See Zillinsky, M., 2018.

property regime (see above) and therefore determines the scope and the composition of the estate. See no. 2.2.2. Also Book 3 of the Code, 'Property law in general', Title 7 'Community of property'. If there are multiple heirs, the regulations regarding the management, disposition and distribution of the estate are set out here. Book 7 of the Code, 'Particular agreements', Title 3 'Donation' is also significant in combination with the provisions regarding legitimate share (Article 4:63 BW) or contribution/apportionment of the estate (Article 4:229 BW). Also Book 10 of Code, 'Private International Law' includes Title 12, 'Law of succession' (Article 10:145 BW). As far as the taxation aspects of succession are concerned, the Succession Act of 1956 (SW 1956) is of particular important and also sections of the Income Tax Act 2001.

**3.1.2. Provide a short description of the main historical developments in SL in your country.**

**1923:** The surviving spouse, although not a legal blood relative, was admitted to the same order of succession as the children. Since then the surviving spouse has inherited together and in equal shares with the children, the so-called 'Child's Share' (Law of 17 February 1923, came into force on 12 August 1923).

**1945:** The Supreme Court (HR 30 November 1945, NJ 1946/62 (De Visser/Harms)), the highest court of the Netherlands, determined (on balance) that other legitimate claims had to give way in favour of the surviving spouse when preparations (inheritances and legacies) were made for the benefit of the surviving spouse in order to fulfill the urgent moral obligation (Article 6:3 BW) to ensure that he/she was properly provided for.

**1958** and later: The development in the notarial practice of the so-called parental division of property (Article 4:1167 old BW). This was a type of last will and testament that could deprive legitimate heirs to the property of the right to the estate or an inheritance in kind, leaving only a claim in cash. This meant that under the last will the surviving spouse could become the sole owner of the estate assets, albeit under the obligation to take the debts of the estate into account as well. The children were left with a claim in money, corresponding to the value of their inheritance. With regard to this monetary claim in common cases the testator could determine that it would only become due and payable on the death of the surviving spouse. This was possible, for example as outlined above, where due to an urgent moral obligation, the testator believed it to be necessary in order to provide for the surviving spouse.

**1982:** The Marckx judgment (ECHR 13 June 1979, ECLI:CE:ECHR:1979:0613JUD000683374), of 27 October 1982 (which became enforceable on 1 December 1982) brought an end to the distinction between legitimate and natural children regarding the right of inheritance. See also no. 3.2.1 below.

**1996:** With the law of 16 November 1995, Stb. 1995, 561, the legitimate portion of parents and grandparents (ascendants) was abolished with effect from 1 January 1996, so that a legitimate portion only existed for descendants.

**2003:** The law of succession was completely revised with effect from 1 January 2003. The position of the surviving spouse has been strengthened both in intestate law (Article 4:13ff. BW) and in the testamentary law of succession (Articles 4:28ff and 4:82 BW). The primary right of inheritance lies with the spouse. Only in the testamentary law of succession (Article 4:82 BW) does this also apply to the position of the 'other life companion'.

The legitimate portion of the children is only a claim for money (Article 4:63 BW) and legitimate heirs must, if the testator wishes, give way to the surviving spouse/registered partner or other life companion. It is possible to give the survivor full disposal rights over the estate. This person can use up the entire estate and dispose of the property of the estate. Not only when it is necessary for care, but in all cases. In that sense, they can continue to live as they are accustomed to. The claim for a cash inheritance, which legitimate heirs have, can be postponed until the death of the surviving spouse, or his/her bankruptcy. The legitimate heirs cannot demand security.



In addition, the position of executors and administrators has been strengthened and the settlement procedure for a negative or unmanaged legacy has been clarified.

**2016:** As of 1 September 2016 it is possible to accept an appointment as conditional (beneficial) heir even after initially unconditionally having done so (Act of 8 June 2016). This means an heir who initially unconditionally accepted his/her inheritance and therefore became liable to settle all the debts of the estate from his/her own assets (including those inherited) can now opt instead to accept the benefit whilst keeping a distance between him/herself and creditors whom he/she did not know, or could not have known (Article 4:184 BW and Article 4:7 BW). Conditional acceptance allows creditors to lay claim only to inherited assets and not to all the assets of an heir (as is the case with unconditional acceptance). See also no. 3.2.5.<sup>1182</sup>

### **3.1.3. What are the general principles of succession in your country?**

The Netherlands has two types of succession: Intestate (no will) and testate (valid will) (Article 4:1 BW). All heirs, both those who inherit under intestacy laws and those identified in a will, acquire the same rights/capacity (general title) in the property and the debts of the estate as those of the person who died (article 4:182 BW). This happens automatically by operation of law; no transfer mechanisms are necessary. The heir or the heirs together legally continue the posthumous person of the deceased. The legacy does not first transfer to an executor or administrator. In principle, the heirs are therefore responsible for the debts of the estate (4:184 BW). They can protect themselves by rejecting the inheritance or accepting it beneficially (conditionally). For this, see no. 3.1.1 and no. 3.2.5. and no. 3.2.6.

Intestate succession is based on blood relationships. A blood relationship is not purely biological, but also legal. See 'legal familial relations' in Article 4:10 paragraph 3 BW. Although entering into a marriage or registered partnership does not create a blood relationship between the spouses/registered partners, they do nevertheless form part of the order of succession (Article 4:10 BW paragraph 1a and Article 4:8 BW).

### **3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.**

In general terms, the following applies: as described under no. 3.1.3, the heirs follow the deceased with regards to both property and debts. This happens under general title and by operation of law. Proof that a person is the heir for the purposes of legal transactions is by means of a certificate of inheritance, which is drawn up by a notary (Article 4:188 BW). Third parties who rely on this certificate of inheritance are deemed to be acting in good faith and are therefore protected (Article 4:187 BW). The Netherlands also recognises the European Certificate of Succession. See Article 4:188a of the Dutch Civil Code.

In principle, the heirs settle the inheritance by mutual consultation. A notary is helpful, but his/her intervention is not legally required. The order of settlement is usually that the debts of the estate are paid first and then the inheritance is divided between the heirs. If the heirs do not reach an agreement about the division, then they can turn to the courts (Article 3:185 BW). The courts have far-reaching powers. If the testator has appointed an executor or a settlement administrator in his/her will, then - depending on the assignment given to this person - this person will have administrative powers and/or power to divide the inheritance.

If the 'legal division' of Article 4:13 of the Dutch Civil Code applies (in cases where the testator leaves a spouse and one or more children), the apportionment is simple. See no. 3.2.4. No further division needs to take place.

<sup>1182</sup> For a complete overview please see: Van Mourik, M. J. A., Schols, B. M. E. M., Schols, F. W. J. M., Waijer, B. C. M., Verstappen, L. C. A., 2015, no. 1.1ff. Perrick, S., 2017, 4ff. and Van Mourik M. J. A., Schols, F. W. J. M., 2018.

In some cases (upon beneficial acceptance, or at the request of an interested party/creditors or the Public Prosecution Service), the estate must be liquidated in accordance with the statutory regime (Article 4:202 BW). The liquidator must then follow a certain procedure, in which he/she organises the payment of the debts of the estate. Depending on the circumstances, a heavy or light settlement regime applies. The liquidator has the power to manage the estate and the court supervises the liquidation remotely. If the liquidation ends with a surplus, the heirs are then allowed to receive a distribution.

If persons who do not have free management of their assets are involved, for example minors, additional formalities apply and there is government supervision.

**3.1.5. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?**

If the inheritance is not, or not entirely, settled by means of a will, then the intestacy rules, as laid down in Article 4:10 et seq. of the Dutch Civil Code apply. If a will is made that covers the entire estate, then this excludes the applicability of the intestacy rules. If a testator, for example, has appointed a charity foundation as the heir to half the estate then that half is not available to be transferred to the heirs in intestacy. The charity and the heirs in intestacy are then joint heirs and are legally, and under general title, entitled to the as yet undivided inheritance. They will have to divide the inheritance among all of them.

**3.1.6. What happens with the estate of inheritance if the decedent has no heirs?**

If no valid last will and testament has been made and there are no heirs under the intestacy order of succession (legal relatives to the sixth grade/spouse/registered partner (Article 4:10 BW), then the property of the estate is acquired by the State under general title (Article 4:189 BW). The State is not an heir.

**3.1.7. Are there special rules or limitations concerning succession with reference to the deceased's (or heir's) culture, tradition, religion or other characteristics?**

No.

**3.2. Intestate succession.**

**3.2.1. Are men and women equal in succession? Are domestic and foreign nationals equal in succession? Are decedent's children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?**

In answer to all questions: Yes.

As far as the children are concerned, it should be noted that a natural child is not automatically an heir. After all, family law relationships are missing. There are, however, methods for establishing family law relationships with regard to purely biological children. For example, recognition (by father or mother) or the judicial determination of paternity or motherhood. See Article 1:198, Article 1:199 and Article 1:207 of the Dutch Civil Code. A mere donor/biological parent may be obliged to pay for maintenance. In addition, under certain circumstances a sum may be due by the testator for the care and upbringing (up to 18 years) and livelihood and study (up to 21 years) of his/her biological child. See Article 4:35 of the Code and no. 3.3.4.

### **3.2.2. Are legal persons capable of inheriting? If yes, on which basis?**

Yes, as far as property law and hence succession law are concerned, a legal person is equal to a natural person, unless the contrary is determined by the law (Article 2:5 BW). However, an association whose statutes have not been set out in a notarial deed (an informal association) cannot be an heir (Article 2:30 paragraph 1 BW).

### **3.2.3. Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.**

Yes, unworthiness is regulated in law (Article 4:3 BW). A person may be legally unworthy to benefit from an inheritance if:

- a. He/she has been found guilty of killing the deceased, attempted to kill the deceased or aided and abetted in the killing of the deceased.
- b. he/she has been found guilty of an offence committed intentionally against the testator for which, according to Dutch law, a custodial sentence has been imposed with a maximum of at least four years, or he/she has attempted to commit, prepared for, or participated in such a crime;
- c. the person in question has been found guilty of being slanderous against the testator accusing him/her of a crime, for which, according to Dutch law, a custodial sentence with a maximum of at least four years has been imposed;
- d. he/she has used force or threatening behaviour towards the deceased regarding the last will and testament;
- e. he/she has tampered with, destroyed or falsified the last will of the deceased.

A person who is unworthy cannot be a legitimate heir or forced heir or inherit under the intestacy rules (Article 4:63 BW et seq.) or be entitled to the 'other legal rights' (Article 4:28 BW et seq.). See no. 3.3.4.

The grounds for unworthiness are exhaustive. However, judges are also at liberty to determine in special circumstances that someone cannot invoke inheritance claims because, according to standards of reasonableness and fairness, this would be unacceptable. See Article 6:2 and Article 6:248 of the Dutch Civil Code. For an example see Hof Amsterdam 15 August 2002 ECLI:NL:GHAMS:2002:AF5771, NJ 2003/53.

Unworthiness will lapse if the testator has unconditionally forgiven the conduct of the person found to be unworthy, according to Article 4:3 paragraph 3 of the Dutch Civil Code.

### **3.2.4. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?**

In general terms, the following applies: Article 4:10 in combination with Article 4:12 of the Dutch Civil Code determines who inherits what. Four groups (a to d) are distinguished, which the law calls to inherit the estate in their own right, in succession, as follows:

- a) a spouse who is not legally separated from the deceased along with the children of the deceased;
- b) the parents of the deceased together with his/her brothers and sisters;
- c) the grandparents of the deceased;
- d) the great grandparents of the deceased.

If persons belonging to a group are alive at the time of succession, then persons in group b will not inherit anything and so on. The descendants of a child, brother, sister, grandparent or great-grandparent are not included in the various groups as themselves, but can take the place of someone in that group. Article 4:12 of the Dutch Civil Code regulates this 'right of representation'. This takes

place when a person who would otherwise be an intestate heir is no longer alive at the moment when the deceased's estate devolves, or if such intestate heir is unworthy, disinherited or chooses to reject his/her inheritance or whose right of inheritance has expired. Those who inherit by the right of representation are called to the deceased's estate for the equal share in the inheritance of the person whose place they have taken.

As stated above, only those who were in a family relationship to deceased (legal consanguinity) are counted among the blood relatives who can inherit it. See no. 3.1.3 and 3.2.3.

If the heirs are determined on the basis of this system, Article 4:11 BW determines the size of the inheritances. The main rule is that the emerging heirs inherit in equal parts. It should be noted here that those who take the place of an heir in accordance with the right of representation inherit jointly, in equal shares, as described above.

If there is an inheritance by group b (parents / brothers / sisters and those who may take their place under right of representation) then two special rules apply:

- The inheritance of a half-brother or half-sister is half of the inheritance of a full brother, a full sister or a parent.
- If the inheritance of a parent would be less than a quarter, it will be increased to a quarter and the shares of the other heirs will be proportionately reduced.

If there are several heirs, they must divide the estate by mutual agreement. See no. 3.1.4.

It is worth noting that if the spouse/registered partner becomes the heir together with one or more children of the testator, then the legislator not only determines the inheritance of these heirs, but the legacy is also 'legally divided'. This refers to the situation where there is an inheritance in group a. Article 4:13 of the Dutch Civil Code then provides that the spouse or registered partner legally obtains the property of the estate. The payment of the debts of the estate will also then be borne by the spouse or registered partner. Each of the children, as heirs, legally obtains a monetary claim at the expense of the spouse, corresponding to the value of his inheritance. However, this claim is only due and payable:

- a) If the spouse has been declared bankrupt or the debt rescheduling scheme for natural persons has been declared applicable to him/her;
- b) when the spouse has died.

The provision for the surviving spouse/registered partner is therefore very generous in comparison to that of the children. The survivor has full control over the property of the estate and can also dispose of it. The survivor can therefore continue to live undisturbed after the death of their spouse/partner. Only if the surviving spouse/registered partner remarries, do the children acquire some legal control over the estate (Articles 4:19 BW and 4:21 BW). But even then the position of the survivor is protected.

### **3.2.5. Are the heirs liable for deceased's debts and under which conditions?**

As explained above, heirs acquire by operation of law (i.e. become the debtor) the debts of the deceased which were not cancelled by his/her death (Article 4:182 BW). In addition, debts of the estate, which is a broader concept than the debts of the deceased (Article 4:7 BW), can be recovered from the assets of the heir (Article 4: 184 BW). Therefore, claimants have recourse not only to the inherited property, but also to any assets that the heir already had. This can be prevented if the heir accepts the inheritance 'beneficially' and not unconditionally, i.e. accepts under the privilege of inventory. This can be done by making a statement to the registry of the court in whose territory the deceased was living at the time of his/her death. (Article 4:190 BW and Article 4:191 BW). A court fee is due for this (2019: € 127). Once unconditional acceptance has taken place, beneficial acceptance can no longer be accepted unless creditors come forward who are not known to the heir and the heir cannot be expected to have known of them. (Article 4:194a BW). See also no. 3.1.2 and no. 3.1.3.

### **3.2.6. What is the manner of renouncing the succession rights?**

Rejection of the inheritance can be achieved by making a statement to the registry of the court on whose territory the deceased was living (Article 4:190 BW and Article 4:191 BW). A court fee is needs to be paid (2019: € 127).

### **3.3. Disposition of property upon death.**

#### **3.3.1. Testate succession.**

##### **3.3.1.1. Explain the conditions for testate succession.**

In general terms, the following applies: the starting principle is testatory freedom. However, there are a number of restrictions on that freedom. The most important restrictions are those of the 'legitimate portion' (Article 4:63 BW) and of the 'other legal rights' (Article 4:28 BW). See no. 3.3.4. These are rights in connection with the will and only arise if a person invokes them. This is not mandatory. The claims are only contractual in nature.

There is also the phenomenon of 'voidable disposition' for the benefit of, for example, professionals in the field of individual health care, guardians, etc. See Article 4:57 ff. of the Dutch Civil Code. It goes without saying that wills may not be in conflict with public order and good morals (inter alia Article 3:40 BW).

To inherit, one must exist at the time of the devolvement of the estate. There are a number of exceptions to this requirement (Article 4:56 BW).

The law only recognises a limited number of types of disposition as a last will (Article 4:42 BW). A last will has to be in the form recognised by law. It is not possible for the testator to create an unknown type of will. For example, of a legacy with a property law effect (damnation legacy). The Dutch system does not recognise such a legacy. The Netherlands has only one legacy that provides a right of action for the legatee, and that is the bequest.

The testator does have a large degree of freedom to tailor his/her own scheme by determining the inheritances, dispositions, legacies, testamentary charges, executions and administration, and conditions/time provisions to be linked to these, under his/her will. The closed system of the form a will must take, does not limit, or hardly limits, the testatory freedom.

A 'last will' is a unilateral judicial act, in which a testator makes a disposition that is only to be effective after his/her death and is always unilaterally revocable (Article 4:42 BW). Contractual succession law does not therefore exist in the Netherlands. Revocability cannot be excluded or 'contracted out' (Article 4:4 paragraph 1 BW).

It is possible, however, to set conditions (over inheritance property) under the suspensive time frame/condition of death or survival. In practice this happens regularly, especially between unmarried cohabitants in cohabitation contracts with regard to common goods. See no. 2.2.3. Agreements that extend to the estate in its entirety or a proportionate part thereof are, however, void (Article 4:4 paragraph 2 BW). Agreements on specific goods in the case of death are valid.

A testator cannot be represented during the making of a testament. A last will is made personally. For example, it is not possible to draw up a will by a proxy nor, for example, for a legal guardian to draw up a will on behalf of the person under his/her guardianship.

##### **3.3.1.2. Who has the testamentary capacity?**

In general, the following applies for testamentary capacity: the law provides as the starting point that every natural person is competent to perform legal acts, unless the law stipulates otherwise. An 18-year-old person is in principle legally competent. A person who is placed under guardianship is incapable of acting (Article 1:381 BW). Minors who have reached the age of sixteen years do however have testamentary capacity (without the permission of their legal representative).

A person who is placed under guardianship on grounds other than the state of his/her physical or mental condition also has testamentary capacity. A person who is placed under adult guardianship

because of his/her physical or mental condition may only make a last will with the authorisation of the Subdistrict Court. See Article 4:55 paragraph 2 of the Dutch Civil Code. In all these cases, the testator must be able to determine his/her own will (intention) (Article 3:33 BW).

### **3.3.1.3. What are the conditions and permissible contents of the will?**

See no. 3.3.1.

### **3.3.1.4. Describe the characteristics of will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a will?**

In general terms, the following applies: the last will, subject to the exceptions mentioned below, can only be made by a notarial deed (notarial will) or by a private deed given in safe custody to a notary (Article 4:94 BW). This last variant is called a 'Deposit Will'. A Deposit Will may be a handwritten or machine-made private deed signed by the testator, which is then deposited with the notary (Article 4:95 BW). Deposit Wills are not very common, in practice, in the Netherlands.

Without the intervention of the civil-law notary, clothing, specified personal jewelry, specified household effects and specified books can be left by the testator in a private, dated and signed document. This is called a codicil. (Article 4:97 BW).

In Article 4:98 of the Dutch Civil Code, provision is made for an 'emergency last will', for which other formal regulations apply in the event of extraordinary circumstances.

In the Act on the Office of Notary (WNA) more detailed instructions are given for the preparation of notarial deeds and therefore also for the notarial will.

### **3.3.1.5. Is there a (public) register of wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

The Netherlands has a Central Testaments Register (CTR) which is held in The Hague by the Royal Dutch Notarial Association (KNB). The law regarding the CTR requires the notary to include certain data in the CTR concerning, among other things, the notarial will or notarial deposit. The CTR therefore only records that a will has been made, not the content of the will. On the death of a person a search can be carried out to establish whether or not that person left a valid will.

### **3.3.2. Succession agreement (*negotia mortis causa*). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.**

No, disposal upon death can only take place with a unilateral and revocable last will. It is possible, however, to use contract law to set certain conditions that come into effect or continue in effect after death (such as time limits or conditions for inheritance). There are certain limitations, for example the contract may not refer to the entire estate or a proportionate part thereof. Acquisition on the basis of such a contract does not constitute inheritance under succession law, see also no. 3.3.1.1. If the contract on death concerns a gift, the contract must in principle be made personally and by notarial deed, on pain of forfeiture. A link has been made between these formalities and the testamentary formalities (see no. 3.3.1.4.).

### **3.3.3. Are conditions for validity of wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

Yes, the general property law applies to the disposition of the estate.

In general, the following applies: the disposition of the will is a legal act. Book 4 of the Dutch Civil Code is part of the multi-layered Dutch Civil Code. Sometimes special regulations apply to the disposition of the will. For an example see no. 3.3.1.2 regarding testamentary capacity. Also, by way of illustration, the doctrine concerning intention in Article 3:44 of the Dutch Civil Code, where it is determined that a legal act is voidable if it has been brought about by threat, fraud or by abuse of circumstances. Book 4 of the Code, however, stipulates that a disposition of property upon death is not susceptible to annulment on grounds of abuse of circumstances (Article 4:43 paragraph 1 BW). Another example from Book 4 of Code, Article 4:43 paragraph 2 has its own rules of error. The general provision of Article 6:228 of the Dutch Civil Code does not indirectly apply.

**3.3.4. Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

Yes, here the legitimate portion and other legal rights must be mentioned. In general terms, the following applies:

**Legitimate portion**

The legitimate portion of an heir (being a person who can lay claim to a share of the deceased's estate, whether or not he/she is actually named in the will) is the part of the value of the estate of the testator to which an heir can lay claim, in spite of donations and dispositions in the last will of the testator, according to Article 4:63 of the Dutch Civil Code. The legitimate portion is a mandatory legal entitlement and accrues to children, and in certain cases to grandchildren under a right of representation (Article 4:64 BW). The legitimate portion gives a right to act. An heir does not have to claim his/her legitimate portion. See also no. 3.3.1.1.

Broadly speaking, the legitimate portion of a child is half of what the child would have received under the intestacy laws. For example, if a child's intestate share would have been half, then the legitimate portion is a quarter.

This legitimate portion is calculated as a portion of the so-called legitimate estate: goods of the estate increased by (specified) gifts and reduced by (specified) debts of the estate.

The legitimate portion is a monetary claim. The legitimate portion does not give rise to property rights. A disinherited heir can also never be heir and does not therefore become the legal successor to the property of the estate (see no. 3.1.3). The heir is effectively only a creditor of the estate.

If the legitimate heir does receive something from the estate (as heir or legatee), the value of this is deducted from the calculated claim. A legitimate heir who receives from the estate can reject the acquisition and yet be a legitimate heir (Article 4:63 paragraph 3 BW). What could have been obtained under the legitimate portion, but is not obtained due to the rejection, will under circumstances be deducted from the claim of the legitimate heir (Article 4:71 BW - Article 4:75 BW).

The claim of the legitimate heir is due, as a rule, six months after the death of the testator (Article 4:81 BW). For the benefit of a surviving spouse, registered partner or other life companion (conditions: having a joint household and entering into a notarial cohabitation contract), it can be determined that the legitimate claim is only due if the survivor dies or is declared bankrupt (Article 4:82 BW). See no. 3.1.2.

**'Other legal rights'**

Besides the legitimate portion, 'other legal rights' exist. These claims are also mandatory in nature (Article 4:41 BW). Unlike the legitimate portion, which is fixed as a lump sum, these claims are tailored and the judge ultimately determines their actual extent. These 'other legal rights' are higher in rank than the legitimate portion.

There are various 'other legal rights'. For the surviving spouse/registered partner there are three other legal rights (Articles 4:28, 4:29 and 4:30 BW). These protect the spouse/partner against, for example, being disinherited. There is a temporary right of residence (six months) which also applies to someone with whom the testator has a joint household, a right to usufruct of the house and contents, and a more extensive usufruct to the property of the estate. The rights to usufruct apply

only if the surviving spouse/registered partner is in need of care. The latter rights therefore have an alimentary character.

In addition to these rights, children have a statutory right to a sum to cover the costs of care, upbringing (up to 18 years) and livelihood and study (up to 21 years). These rights may, subject to conditions, accrue to the deceased's children and take precedence over the aforementioned claims for usufruct of the estate. The sum is due and payable in full six months after the death of the testator (Article 4:37 paragraph 2 BW). Children (stepchildren, foster children, sons-in-law and daughters-in-law) who have worked in their household or in the company of their parent (testator) without having received a reasonable compensation, may be entitled to a one-off payment from the estate of that parent (Article 4:36 BW). The sum payable must be seen as a fair compensation for the work done.

The aggregate amounts of these 'other legal rights' together amount to no more than half of the value of the estate (Article 4:37 paragraph 4 BW).

The last 'other legal right' is a commercial/business right. Under certain circumstances, the person who promotes the profession/business of the testator is given the opportunity to take over the professional/business assets from the estate at a reasonable price (Article 4:38 paragraph 1 BW).

### **3.3.5. Cross-border issues.**

To answer these questions, the Royal Notarial Association (KNB) was consulted. Ms. S. Heijning responded on behalf of the KNB.

#### **3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?**

According to the KNB, notaries in the Netherlands are quite happy with the new rules. The outcome of the Oberle (ECJ EU 21 June 2018, ECLI:EU:C:2018:485) on the other hand created uncertainty for notaries, if they can use the internal certificate in international cases and the question if notaries fall strictly under the jurisdiction rules.

Our impression is that the scheme has generally been well received.

Issues regarding the amendment of Article 31 and the scope of Article 1 paragraph 2 under k and l will continue to occur in the future. See ECJ 12 October 2017, ECLI:EU:C:2018:16 (Kubica). It will also be interesting to see to what extent EU countries will use Article 35 to protect their own legitimate portion<sup>1183</sup> and in which cases the exception rule of Article 21 paragraph 2 will be applied in practice. The same applies to the application of the doctrine 'fraus legis' in international law of succession, see recital 26.

The renvoi-arrangement of Article 34 complicates the scheme.

#### **3.3.5.2. Are there any problems with the scope of application?**

Qualifying what falls under succession and what under matrimonial property, can be difficult in practice, see for an example the Mahnkopf case C-558/16 (ECJ 1 March 2018, ECLI:EU:C:2018:138), according to the KNB.

Other qualifying issues will also arise in the future, but that was also the case under the old private international law.

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<sup>1183</sup> See, for example Vonken, A. P. M. J., Ibili, F., Schols, F. W. J. M., 2016 (Schols, F., chapter 12).



**3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country have experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?**

According to the KNB, this is not really an issue in the Netherlands. What the last habitual residency consists of is well explained in the recitals. Did the authorities in your country have experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7? Not that we are aware of, according to the KNB. Problems can arise when two authorities both decline jurisdiction and both refer to each other as place of the last habitual residence of the deceased. That the choice of forum in Article 5 is limited to cases where there is a choice of law within the meaning of Article 22 is regrettable.<sup>1184</sup>

**3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?**

No. From 1996 to 2015 the Netherlands applied The Hague Convention on Successions of 1989, which also gave the possibility to choose the law of the habitual residence in the last will. According to the KNB we miss the choice of law for the habitual residence in the EU regulation on successions for people that live in the Netherlands for years and are not planning to move.

**3.3.5.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?**

We are not aware of issues on this subject, according to the KNB.

**3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?**

The certificate works well in practice and is used often by Dutch notaries in many cases, according to the KNB.

**3.3.5.7. Are there any national rules on international jurisdiction and applicable law (besides the Succession Regulation) concerning the succession in your country?**

We treat the EU Regulation on succession as the only binding regulation to decide on jurisdiction, see also the Oberle case. National procedural law is still important for determining the local national competent judge.<sup>1185</sup> Despite the fact that the EU regulation is exhaustive with regard to jurisdiction, Article 1 paragraph 6 under g of the Code of Civil Procedure remains as a safety net.<sup>1186</sup>

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<sup>1184</sup> See Ibili, F., 2014, 27.

<sup>1185</sup> Ibili, F., 2014, 21-34.

<sup>1186</sup> See also: Vonken, A. P. M. J., Ibili, F., Schols, F. W. J. M., 2016 (Schols, F., chapter 12).

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## Poland

Mateusz Wąsik

### 1. Social perspective.

**1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without *affectio maritalis*).**

According to the National 2011 Census in Poland, the following social types of living lifestyles/family formations are recognizable:

- Marriage without children,
- Marriage with children,
- Partners without children,
- Partners with children,
- Mother raising child alone;
- Father raising child alone
- Multi-generational families
- Families living separately.<sup>1</sup>

**1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.**

National 2011 Census in Poland<sup>2</sup>

Families in total		10,972,547
Marriages without children	25%	2,696,420
Marriages with children	50%	5,456,760
Partners without children	1%	145,182
Partners with children	2%	171,323
Mothers raising children alone	20%	2,174,283
Fathers raising children alone	3%	328,580

**1.3. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.**

In Poland only marriage and divorce are legally recognizable.<sup>3</sup>

<sup>1</sup> <http://stat.gov.pl/spisy-powszechne/nsp-2011/nsp-2011-wyniki/> (17.5.2019).

<sup>2</sup> <http://stat.gov.pl/spisy-powszechne/nsp-2011/nsp-2011-wyniki/> (17.5.2019).

<sup>3</sup> Demographic Yearbook of Poland, 2017, <https://stat.gov.pl/obszary-tematyczne/roczniki-statystyczne/roczniki-statystyczne/rocznik-demograficzny-2017,3,11.html> (17.5.2019).

Divorces

Year	1980	1990	2000	2010	2015	2016
Total	39,833	42,436	42,770	61,300	67,296	63,497
Cities	33,868	34,299	36,040	47,394	48,896	45,904
Rural areas	5,862	7,287	6,654	13,423	17,587	16,690
Abroad	x	x	76	483	813	903

**1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).**

Contracted Marriages in 2016	194,440	
Marriages dissolved in 2016	63,497	
Contracted Marriages with foreigners in 2016	5,038	2,59%
Marriages dissolved in 2016 abroad <sup>4</sup>	903	1,42%

## 2. Family law.

### 2.1. General.

**2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?**

Main source of the FL in Poland is the Family and Guardianship Code from the 25 February 1964 with further changes (hereinafter: the Family Code).

Additional sources of the FL are:

- The Constitution of the Republic of Poland from the 2 April 1997.
- The Civil Code from the 23 April 1964 with further changes.
- The Civil Procedure Code from the 17 November 1964 with further changes.
- The Law of Civil Status Registry from the 28 November 2014 with further changes.

**2.1.2. Provide a short description of the main historical developments in FL in your country.**

Principal rules of the FL matter were set in 1964 by adopting in the national legal system three complex decrees – the Family Code, the Civil Code and the Civil Procedure Code. Main source of the FL in Poland is the Family and Guardianship Code from the 25 February 1964 with further changes (hereinafter: the Family Code).

<sup>4</sup> Demographic Yearbook of Poland, 2017, <https://stat.gov.pl/obszary-tematyczne/roczniki-statystyczne/roczniki-statystyczne/rocznik-demograficzny-2017,3,11.html> (17.5.2019).

On 25 April 1998 the Concordat between the Roman Catholic Church and Poland was enacted. The agreement introduced a new type of marriage – concordat marriage which can be concluded in the catholic church without necessity to register it in the Civil Registry Office. The priest is responsible to send all documents, completed and signed by spouses, to the state authorities.

### **2.1.3. What are the general principles of FL in your country?**

Main principles of the Polish FL can be presented in the following order:

- Family and children under special protection of the state.
- Family welfare.
- Child welfare.
- Monogamy.
- Durability of a marriage.
- Equality of spouses in their relation.

### **2.1.4. Define “family” and “family member” in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

In Polish FL there is no straightforward and one legal definition of the family. According to the Article 18 of the Constitution of the Republic of Poland, *marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.* Other legal acts refer to this legal definition from the Polish Constitution, like the Family Code, the Civil Code or even the tax law which enables taxpayers to file joint tax return. Joint tax return may be however filed only by spouses in marriage (so only men and women which concluded a marriage).

There is no legal definition of the family in the Family Code but according to the Article 27 family is created once a man and a woman conclude a marriage. In line with other provisions of the Family Code, family is created by children as well.

In the Act of family benefits, family and family members are defined as: spouses (*the author's note: man and woman in the marriage*), parents of a child, actual child guardian and dependent children aged up to 25 years old, as well as a child older than 25 holding a severe disability certificate.

According to the Penal Code, a family member is understood as the closest person – spouse, ancestor, descendent, siblings, family members in the same line/degree, adopted child and his spouses, as well as a person remaining in cohabitation (*the author's note: this enable to apply for some rights by same-sex partners on a basis of the Criminal Procedure; partner can refuse to testify against his/her partner on a basis of this definition irrespectively of the fact whether they are under marriage or not*).

These definitions are recognizable for different purposes. For joint tax filing purposes, family (marriage) in the meaning described in the Polish Constitution is being applicable. For benefits purposes however definition from the Act of family benefits is being used while for the purposes of witness's rights on a basis of the Penal Code definition from this code is applicable.

### 2.1.5. Family formations.

#### **2.1.5.3. Define the “spouse” in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

In line with the provisions described in 2.1.4, spouse is considered as a sex-opposite partner being in a marriage. The term in Poland is not gender neutral so it means always husband or wife as civil unions partnerships between same-sex or different-sex partners are not recognizable. As a rule, only spouse can benefit from his status on a basis of tax law. Basically, there is one definition of *spouse* valid for the entire legal system in contrary to a definition of family or family member.

Marriage can be concluded only between a man and a woman. Legal age for marriage is 18 years with certain exceptions. Future spouses cannot be related by blood, marriage or adoption and cannot be in lasting marriage (monogamy rule). Two witnesses are required. Marriage can be concluded in the Polish Registry Office or in the church. In order to conclude marriage some documents are required (birth certificates, personal details forms etc.).

#### **2.1.5.4. What types of relationships/unions between persons are recognised in FL of your country? In particular, formal (registered) and informal (*de facto*) unions, heterosexual and same-sex unions, unions with and without *affectio maritalis*. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

Marriage as a relationship between a man and a woman is the only legally recognizable relationship between persons in the Polish FL. People of course can live in informal unions (heterosexual and same-sex unions) as they are not penalized, but from the legal point of view they are neutral.

Because of the changing courts judgements, some developments have been made in the course of last years in the FL for civil unions (which are not legally recognizable). For purposes of rights in regards to tenancy of a shared household, a court decided that being in cohabitation is sufficient for the tenancy irrespectively of the fact that partners were of the same sex. No direct changes of the FL law have however been made.

#### **2.1.6. What legal effects are attached to different family formations referred to in question 2.5.?**

No legal effects. On a basis of the Polish FL, only marriage is recognizable. Rights of the persons being in civil unions (cohabitations) depends on the courts judiciary which is developing and may increase rights of persons living in this informal relationships.

#### **2.1.7. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/*de facto* family formations? Explain briefly.**

At this stage there is no current works aiming to introduce civils partnerships into the Polish FL. The first legislative proposal to recognize these unions under the Polish law was proposed in 2002 but did not move to further proceedings. There was another attempt in 2004. However, the bill lapsed due to 2005 parliamentary election. Between 2005 and 2015 there were attempts for introduction of a civil partnerships (similar to the Scandinavian model or PACS). Two very advanced drafts have been jointly presented in 2012. All drafts were rejected on 2013 by the plenary session. Following the 2015

elections, a very conservative parliament was elected which is openly opposed to registered partnerships (both same- and different-sex) and no further works have been done from that time.

## 2.2. Property relations.

### 2.2.1. List different family property regimes in your country.

- Statutory community of property regime.
- Contractual property regime (by extending or restricting statutory community).
- Separation of property regime.
- Separation of property regime with equalization of gains accrued.

### 2.2.2. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?

The statutory community of property regime takes effect upon conclusion of the marriage. It includes assets acquired by the spouses during the marriage. Assets excluded from the community regime are treated as a personal property of each spouse. Whether a specific asset is attributed to community or personal property depends on to which of the statutory categories it belongs. No inventory of assets is required. Though it is recommended for evidence purposes, in practice nobody keeps it.

Community property includes, in particular (not limited list):

- Remuneration/salary.
- Income from the community property as well as from each of the spouses' personal property (e.g. rental income).
- Benefits from an open/employee pension fund.
- Household appliances used by the spouses if they were acquired by inheritance/donation unless the testator/donor decided otherwise.

The personal property of each spouse includes:

- assets acquired before the community of property regime took effect,
- assets acquired by inheritance or donation unless the testator or donor decided otherwise,
- assets which exclusively are being used for one spouse's personal needs,
- inalienable rights to which only one person may be entitled,
- assets received as a compensation for damages for a bodily injury or a health disorder or for harm suffered,
- claims for remuneration from work,
- assets obtained as a reward for a spouse's personal achievements and assets acquired in exchange for personal assets unless particular provisions provide otherwise,
- property rights resulting from a joint ownership of property subject to separate regulations,
- copyrights and related rights, intellectual property rights or other author's rights.

**2.2.3. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a “new regime just for them”?**

Abovementioned regimes are applicable only for spouses being in a marriage. There is no possibility to regulate property regime within civil partnership. From inheritance or tax perspective partners living in civil partnerships are considered as third persons and any regime, even regulated in a private agreement, does not have any legal effects. From the tax point of view, these agreements are not valid.

Spouses may extend or restrict the statutory community of property regime or establish a separation of property regime or a separation of property regime with equalisation of accrued gains by means of a marriage contract. These contracts must be concluded before a notary, otherwise they are null and void. They may be concluded before entering into marriage or during the marriage. These contracts may be changed (even several times) and adjusted to the current situation of the spouses. If terminated during the marriage, according the law, the statutory community of property regime applies between the spouses unless the spouses have decided otherwise.

There are however some legal limitations. The community of property cannot be extended to:

- assets that might be acquired in future by inheritance or donation;
- certain property rights resulting
- inalienable rights to which only one person may be entitled;
- claims for damages;
- the spouses’ non-due claims for remuneration from work;

There is no special register of marriage contracts. The property regime should be only revealed by entrepreneurs in the Central Registry for Business Activity (CEiDG). The data in the Central Register is public.

**2.2.4. Explain briefly the rules on the administration of family property and compare if there are difference for different property regimes.**

Both spouses have equal rights for possessing the property and its administration. During the statutory community of property regime, neither spouse may request the division of the community property. Moreover, spouse cannot dispose or try to dispose of a share of the community property or of a particular asset thereof that would fall to him/her when the statutory regime ceased. Spouses are obliged to cooperate in the management of their community property. As a rule, each spouse can manage the property alone. There are however some activities excluded, such as legal transactions concerning the disposal or equivalent transactions, legal transactions concerning the disposal, encumbrance or purchase of a right in rem on a building or premises; donations made from the community property, except for customarily accepted donations – e.g. for charity etc. Even more, spouse can object to the way of managing the property by the other spouse besides acts concerning everyday matters (e.g. shopping).

Above rules are applicable for contractual property regime.

If the spouses opted for a separation of property regime, each of the spouses preserves the rights for both the property acquired before the conclusion of the contract and the property acquired later. Each spouse manages his property by himself.

Rules for a separation of property regime with equalization of gains accrued are the same as for standard separation with some exception in terms of equalization.



**2.2.5. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

There is no special register of marriage contracts. The property regime should be only revealed by in the Central Registry for Business Activity (CEiDG). The data in the register is public.

**2.2.6. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

Where third parties are concerned, a spouse may refer to the marriage contract if its conclusion and content were known to them. Any agreement entered into by one spouse without the required consent of the other spouse is null and void, unless it is subsequently approved by the other spouse. A unilateral legal act by one spouse without the required consent of the other is also null and void.

If on the basis of a legal act performed by one spouse without the required consent of the other, the third party acquires the right or is released from the obligation, the provisions on the protection of persons who have made a legal action in good faith with a person not authorized to dispose of the law, are applicable.

Both spouses are jointly liable for debts incurred by either of them in order to fulfil the everyday needs of the family. If either of the spouses incurs a debt with the consent of the other spouse, third party may demand that the community property also be used to settle the debt. If either of the spouses incurs a debt without the consent of the other spouse, or if the debt does not arise from a legal transaction, or if the debt was incurred before the community of property regime took effect between the spouses, or if the debt relates to personal assets, third party may only demand that the debt be settled from the debtor's personal property or from specific assets belonging to the community property.

**2.2.7. Describe allocation and division of property in case of divorce, separation or dissolution of the union.**

Divorce and separation proceedings are different proceedings than procedure related to the division of community property. As a rule, division of property is not part of a divorce proceedings.

Community property may be divided by the court or by an agreement that should be concluded before the notary. As a rule, the spouses' shares in the community property are equal unless the marriage contract provides otherwise. The court may be requested to determine unequal shares. Each spouse should reimburse any expenses and expenditure made from the community property for personal property, with the exception of expenses and expenditure for assets that brought income. There are however some exceptions and none of the spouses can claim for reimbursement of expenses made to fulfil the family's needs.

Spouses remain responsible for existing debts after divorce/separation.

**2.2.8. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?**

There is no specific rule/limitation in terms of different cultures/traditions/religions. All rules stipulated in the Family Code have secular character and they do not relate to specific traditions. Hence, dowry is not regulated under the Polish legislation.

### **2.3. Cross-border issues.**

#### **2.3.1. Is your country participating in the enhance cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?**

No, Poland does not participate in the enhance cooperation with regard to 1103/2016 and 1104/2016. According to the author, the main reason of this decision is that both regulations refer to civil partnerships (which includes same-sex partnerships as well) which are not recognizable in Poland. Hence, according to the government, these regulations may be in contrary to binding Polish regulations. For this reason, joining the cooperation may be possible only after changing of the government (closest parliamentary elections are set up for Autumn 2019). This is in line with an official answer received by the Polish Ministry of Justice dated on 15<sup>th</sup> April 2019. According to the statement, Poland will not participate in the enhance cooperation because of cultural differences between Member States. Moreover, the government is of the view, the Treaties give the EU only a competence on judicial cooperation in civil cases with cross-border aspects. These competences do not include harmonizing Member States' FL provisions.

#### **2.3.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as "marriage", "matrimonial property agreement", "partnership property agreement" etc.?**

As mentioned above, Poland does not participate in the enhance cooperation with regard to 1103/2016 and 1104/2016. Possible problems with their application may be on a field of deifying marriage which in line with the current Polish provisions is the only union between a man and a woman.

Significant problems occur also on the field of civil partnerships who are not recognizable in Poland. It may create a situation where property of the partnership outside Poland is treated as taxable item in case of inheritance because of the lack proper provisions in this matter.

#### **2.3.3. Are you expecting any problems with the application of the rules on jurisdiction?**

Poland does not participate in enhanced cooperation regarding two Regulations.

#### **2.3.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

Poland does not participate in enhanced cooperation regarding two Regulations.

#### **2.3.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

Poland does not participate in enhanced cooperation regarding two Regulations.

#### **2.3.6. Are there any national rules on international jurisdiction and applicable (besides the Regulations) concerning the succession in your country?**

The Private International Law Act from the 4 February 2011 (with further changes) is applicable in the cross-border issues in terms of marriage. Marriage related matters are regulated in the chapter 11. Moreover, cross-borders aspects are also covered by bilateral agreements concluded between Poland and third countries (e.g. between Poland and Ukraine, Poland and Belarus).

### 3. Succession law

#### 3.1. General.

##### 3.1.1. What are the main legal sources of Succession Law (SL) in your country? What are the additional legal sources of SL?

The Civil Code from the 23 April 1964 with further changes (the Civil Code) and the Civil Procedure Code from the 17 November 1964 with further changes.

##### 3.1.2. Provide a short description of the main historical developments in SL in your country.

Principal rules in the SL were introduced in 1964 by adopting in the national legal system three complex decrees – the Family Code, the Civil Code, the Civil Procedure Code which statues on legal proceedings in inheritance. Inheritance law is comprehensively regulated in the Book IV of the Civil Code. In 2016, a major change has been implemented. Until this date, simple acceptance of the inheritance was considered as a default rule. It meant that heirs were liable for unlimited debts of the estate unless they accepted the inheritance with the benefit of an inventory (up to limit). If the heir did not act during this 6-month period, he/she was deemed to accept the inheritance without any limit of the inherited debts. As of 2016, the inheritance with the benefit of an inventory is a default rule. It means that no declaration should be made in order to limit the scope of heir's liability.

##### 3.1.3. What are the general principles of succession in your country?

According to the inheritance rules, everyone has right to succession and this right is equally protected by the law. There are two types of succession – testate and intestate. As a rule, at the moment of death, the property rights and duties are about to devolve to one or several persons. The inheritance does not however include the rights and duties strictly connected with the deceased. The inherited debts include the costs of the funeral, costs of the inheritance proceedings, duty to satisfy the claims for the legitim, duty to carry out the ordinary legacies and instructions. The spouse and other persons related to the deceased who lived with him/her until the day of his/her death are entitled to use, during three months from the opening of the inheritance, the living accommodation and its household equipment as before.

##### 3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.

The inheritance is being opened at the moment of death of the deceased. The heirs acquire the estate at the moment of the opening of the inheritance. As of 2016, the estate is being acquired by the heirs with the benefit of an inventory. An heir has a right to reject the inheritance within 6 months from the day he became aware of his title. If no statement has been submitted, the heir is deemed to have accepted the inheritance (with the benefit of an inventory). In a case of several heirs, all of them are jointly liable for debts. Their legal relations as co-heirs are regulated by the provisions of co-ownerships in fractional parts.

The heirs can divide the inheritance by a contract concluded before the notary or in court.

The rights of an heir to the inheritance can be declared either by the court or in a certificate of inheritance (a notarial deed of attestation of succession).

**3.1.5. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?**

Intestate succession is a default way of succession in Poland.

In the first place the statutory heirs are the spouse and descendants. The spouse's share cannot be less than 1/4 of the entire estate. In the second place – in the absence of the descendants – the spouse and parents of the deceased inherit, and if one of the parents is dead at the time of opening the estate, then that person's share of the estate falls to the deceased person's siblings, or their descendants. The share for a spouse who inherits along with the parents, siblings and descendants of the siblings of the decedent must amount to half of the estate. If there are no descendants, the parents inherit along with the spouse. The parents' shares amount to 1/4 of the entire estate. If there is no spouse of the deceased person, the entire estate will fall to his parents in equal parts. In the third place – in the absence of the spouse, or descendants, parents, siblings or siblings' descendants – the grandparents of the deceased or their descendants are about to inherit. In the fourth place come those children of the deceased person's spouse whose parents are dead when the estate is opened. Last of all inherits are the municipality or the State Treasury.

Testate succession is an alternative to the default method.

According to the Civil Code, only person with a full capacity for legal rights can prepare the will. It may be changed or terminated at any time. There are three regular types of will:

- Holographic will – written, signed and dated by the testator
- Notary will – written and signed in the form of a notarial deed.
- Oral will – declared before a local municipal officer in the presence of two witnesses.

Other types of wills include: an oral will be prepared in a case of sudden death (oral, with presence of three witnesses), a soldier will and a will made before the commander of a Polish ship/plane during a travel.

Cumulative application of both titles is not possible. If the will is not made, intestate succession is applicable.

**3.1.6. What happens with the estate of inheritance if the decedent has no heirs?**

In the absence of the heirs, the inheritance will fall to the place where the deceased's last place of residence was (municipal). If the last place of residence of a deceased in the Republic of Poland cannot be established, or if the last place of residence of a deceased was abroad, the inheritance will fall to the State Treasury as the statutory heir.

**3.1.7. Are there special rules or limitations concerning succession with reference to the deceased's (or heir's) culture, tradition, religion or other characteristics?**

No.

### 3.2. Intestate succession.

#### 3.2.1. Are men and women equal in succession? Are domestic and foreign nationals equal in succession? Are decedent's children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?

Men and women are equal in succession. Domestic and foreign nationals are equal in succession as well. A child from an extramarital relationship has the same rights of inheritance as a child born in marriage. Adopted children are equal in succession. A child conceived but not yet born also participates in inheritance. However, this is a conditional inheritance. The child must be born alive. To protect the rights of a conceived but unborn child, a guardian may be appointed. Spouses and extra-marital partners (including homosexual partners) are not equal in succession. Persons living in civil union partnerships (without marriage) are treated as aliens and they are not included in any intestate groups described in point 3.1.5. It means that only spouses (so partners in marriage) can inherit in line with regular rules from the Civil Code as they are included in first group of the heirs. Moreover, from the fiscal point of view, their inheritance is free of taxes as they are exempted from taxation as the closest person.

In contrary, partners (living in civil partnerships) as aliens are not included in any group of the heirs which means that in case of lack of the will, they have no rights to inheritance according to the Civil Code. Inequality exists also on a basis of tax law as if a partner is appointed to the inheritance on a basis of the will and accept it, he/she is obliged to pay inheritance tax as a person belong to the third group of taxpayers (aliens) which means about 20% of tax. Spouses are exempted from inheritance tax in both – intestate and testate succession.

#### 3.2.2. Are legal persons capable of inheriting? If yes, on which basis?

As a rule, legal persons do not inherit by law (with exceptions for the municipal and State Treasury). They can however inherit on a base of the will.

#### 3.2.3. Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.

Yes, unworthiness of succession exists on a basis of the Civil Code. On the grounds of a court ruling an heir can be deprived the right to inherit after a testator. The grounds to consider someone unworthy are of moral and ethical character. The heir may be considered unworthy, if:

- He/she committed a crime (intentionally) against the testator.
- He/she persuaded the testator with the use of deception or threat to make or cancel the will, or in the same way hindered him from doing one of these activities.
- He/she intentionally hid or destroyed the will, forged or altered the will or knowingly used the will that had been forged or altered by a third person.

#### 3.2.4. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?

See 3.1.5.

### **3.2.5. Are the heirs liable for deceased's debts and under which conditions?**

Yes. At the moment of death, the property rights and duties are about to devolve to one or several persons. It includes also debts. Heirs have six months to accept or refuse an inheritance. During that time the heir's liability for debts is restricted to inherited assets. Depending of the way of acceptance (or its lack), the heir may have limited or unlimited responsibility. The heir may choose between simple acceptance of an inheritance and acceptance with the benefit of an inventory. Simple acceptance of an inheritance, i.e. without limitation of a liability, means that that a successor is liable for all inherited debts proportionally to his share in an estate. Acceptance of an inheritance with the benefit of an inventory reduces the successor's liability for debts only to the amount of his share in the value of assets established in the estate inventory.

As described in 3.1.2, as of 2016, the inheritance with the benefit of an inventory is a default rule. It means that no declaration should be made in order to limit the scope of heir's liability.

### **3.2.6. What is the manner of renouncing the succession rights?**

An heir has a right to reject the inheritance, within 6 months from the day he became aware of his title. An heir may, by contract with the future testator, renounce his inheritance after him. Such an agreement should be concluded in the form of a notarial deed.

## **3.3. Disposition of property upon death.**

### **3.3.1. Testate succession.**

#### **3.3.1.1. Explain the conditions for testate succession.**

Instead of intestate succession, testate succession may apply. As a rule, cumulative application of both titles is not possible. If the will is not made, intestate succession is applicable.

#### **3.3.1.2. Who has the testamentary capacity?**

Only person with full capacity for legal rights can prepare the will. For a will to be valid, testator must be of a sound mind and body and capable of free decision making to express his/her intent. The person may have not been acting under the influence of threat or duress.

#### **3.3.1.3. What are the conditions and permissible contents of the will?**

There are no specific conditions. The will should be made personally. There is no possibility to appoint a proxy to prepare a will on a behalf of the testator.

The testator may appoint one or several persons to all or part of the inheritance. If the deceased appointed several heirs without determining their inheritance shares to inherit or to the specific share of the inheritance, they inherit in equal shares. If the testator has allocated to the designated person in the will the individual property items that cover almost the entire estate, the person is considered in the event of doubt as an heir appointed to the entire estate. If such a testamentary disposition has been made for a few persons, these persons are deemed to be in doubt if they are called to the entire estate in fractional parts. The testator may, by disposition revealed in the will, oblige an heir to give a specific property benefit for a designated person (ordinary entry).

**3.3.1.4. Describe the characteristics of will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a will?**

There are no specific characteristics for will system in Poland. There are three regular types of will:

- a holographic will – written, signed and dated by the testator
- a notary will – written and signed in the form of a notarial deed.
- an oral will – declared before a local municipal officer in the presence of two witnesses.

Other types of will include: an oral will be prepared in a case of sudden death (oral, with presence of three witnesses), a soldier will and a will made before the commander of a Polish ship/plane during a travel.

**3.3.1.5. Is there a (public) register of wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

There is no register of wills established in the Polish system.

**3.3.2. Succession agreement (*negotia mortis causa*). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.**

No, as a rule, besides intestate succession, will is the only way to dispose a property of the deceased person. The testator may however, by a disposition included in the will, order the heir to fulfil of property benefits to a specified person (legatee). Moreover, in a will in the form of a notarial deed, the testator can decide that a specified person will acquire the object of legacy upon opening of the inheritance (vindication legacy). The object of a vindication legacy may be:

- 1) thing designated as to its identity;
- 2) transferable property right;
- 3) enterprise or agricultural farm;
- 4) establishment for the legatee's benefit of usufruct or servitude.

Finally, a testator may in his will impose upon an heir or a legatee a duty to perform a specified act or omission without making anyone a creditor (instruction).

**3.3.3. Are conditions for validity of wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

Yes, all conditions are described in the Civil Code. Only person with a full capacity for legal rights can prepare the will. For a will to be valid, testator must be of sound mind and body and capable of free decision making to express his/her intent. The person may not act under the influence of threat or duress. Moreover, the will should be prepared in line with conditions for oral/written/notary will. If it is prepared in different way than included in the Civil Code, it will be null.

**3.3.4. Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

Yes. SL in Poland protects family member in terms of a succession. If a testator writes a will which deprives his/her family members who would have inherit on a basis of intestate succession, those individuals have the right to demand a certain proportion of assets by way of legitim from those who received all or most of the assets of the deceased under the will.

In order to claim rights to the inheritance, family members are obliged to file a claim for legitim in a court.

Family members entitled to these claims include descendants, the spouse and the parents of the testator. They are entitled to receive an equivalent of a half of the share of inheritance that they would have received under intestate inheritance. If the entitled person is a minor or is permanently incapacitated, he/she may claim an equivalent of two-thirds of such a share.

### **3.3.5. Cross-border issues.**

#### **3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?**

The EU's Succession Regulation (650/2012) went in force on 17 August 2015 and according to the best knowledge of the author, there are no major issues or experiences in application the EU law.

#### **3.3.5.2. Are there any problems with the scope of application?**

Not problems have been already recognized with the scope. The EU's Succession Regulation is very similar to rules which were in force before its implementation.

#### **3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country have experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?**

As mentioned above. All rules from the Regulation are applicable – including habitual residence and rules on prorogation of jurisdiction. As far as the author knows, there were no known declines of the appropriate jurisdiction under Article 6/7.

#### **3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?**

As far as the author knows, there are no problems with determining the applicable law. However, they may be problems in a situation where foreigner living in registered partnership which is not recognizable in Poland will have habitual residence in Poland which determine the Polish law as applicable for intestate succession. In this scenario, his inheritance will not be inherited (in a case of lack a will) by his long-life partner but by the other groups of heirs which would not happen if the law of other Member State would be applicable where registered partnerships are recognizable.

#### **3.3.5.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?**

Some academics envisage that the Regulation may lead to the situation that because of the recognition of the applicable law, testator may exclude from inheritance members of closest family who could not apply for legitim on its basis<sup>5</sup>. The Polish Civil Code is based on the rules that members of the closest family cannot be deprived from the inheritance rights (with some exceptions). The Regulation represents however different approach.

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<sup>5</sup> Impact on the EU Succession Regulation on Statutory Inheritance, Zalucki, M., Comparative Law Review 23/2017, <http://apcz.umk.pl/czasopisma/index.php/CLR/article/viewFile/CLR.2017.010/14206> (17.5.2019).



### **3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?**

European Certificate of Succession is being issued by the notary or by the court. The procedure is similar to the two modes already in force in Polish law. The interested party may obtain the certificate of inheritance in a court or visit a notary public based on the procedure for issuing the national certificate of inheritance.

Judicial and notarial certificate of inheritance have the same significance. The choice of court or notarial belongs to the heir. If he or she decides to do this in a notary's office, the fee will amount to PLN 400. The amount of the court fee from the application for the issuance of the European Certificate of Succession is PLN 300.

### **3.3.5.7. Are there any national rules on international jurisdiction and applicable (besides the Succession Regulation) concerning the succession in your country?**

The Private International Law Act from the 4 February 2011 (with further changes) was applicable in the cross-border issues in terms of inheritance. These provisions have been however repealed and currently Succession Regulation 650/2012 is applicable in these cases. It should be noted that for inheritance opened before 17<sup>th</sup> August 2015, the Private International Law Act are still valid.

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## Portugal

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### 1. Social perspective.

#### **1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without *affectio maritalis*).**

The largest Portuguese family made up of married couples with children is at the base of the normative and social configuration, although the demographic, economic and social reality has given way, in the last two decades, to new paradigms of coexistence that deserve the attention of the legislator and the courts<sup>1</sup>.

Traditionally, emigration has conditioned this family reality, since the number of Portuguese living abroad is very high, and although the most common model is the transfer of the entire family nucleus abroad, the situations are not unknown, mainly in emigration to European countries closer geographically, in which one of the members of the family, father or mother, emigrates and leaves the children in the care of the parent who remains in Portugal, or even emigrates the couple, married or not, and leaves the children in the care of the extended family, mainly the grandparents or uncles of the minors. However, statistics show that emigration has decreased significantly in recent decades, and that it is immigration - within whose sociological concept we can include the return of descendants of Portuguese emigrants - that is beginning to transform the configuration of the Portuguese family.

In any case, family groups in Portugal today are significantly smaller than they were twenty years ago. Marriage is still a predominant form of family organization, but its statistical weight has decreased significantly, particularly in its form of marriage with children.

In a context of worrying reductions in fertility rates and a considerable increase in the life expectancy of the population, couples, whether married or not, cohabiting or not, without children, as well as single-parent families or people living alone, are gaining space. The increase in the number of divorces, de facto unions and reconstituted families complete the portrait of new forms of coexistence between people.

With these premises, Portuguese legislation and jurisprudence provide shelter for different forms of family and social coexistence, in response to the evolution of their family law. Thus, there is a normative protection for civil marriage regardless of the sex of the bride and groom, and also domestic partnership by simple cohabitation, in a manner analogous to conjugal cohabitation, without the need for any type of registration, and also independently of the sex of the cohabitants.

To this, it must be added that from 2001, within the framework of a so-called Common Economy Law, the coexistence of two or more persons, regardless of their gender, without the need for an *affectio maritalis*, but rather presided over by the will to form a common economy, is also protected, with a smaller extension than that proportionate to de facto unions. It is a new form of recognition of

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<sup>1</sup> Pinheiro, J., 2016.

cohabitation, although it has been considered that it is not an authentic family, but a parafamily institution that regulates situations of cohabitation<sup>2</sup>.

### 1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.

In 2018, 34,637 marriages were celebrated in Portugal, of which 34,030 were between people of different sex, and 607 between people of the same sex<sup>3</sup>. Regarding the form of celebration of those 34,030 marriages between people of different sex, 21,803 were formalized in the civil modality, 11,043 in the Catholic religious form, and in 161 the form is ignored or otherwise<sup>4</sup>.

The gross marriage rate (marriages per 1,000 inhabitants) was 3.3%, illustrating a constant drop in the number of marriages since official statistics are available. Specifically, in 1960, the referred rate was 7.8%<sup>5</sup>.

Another data of interest in this type of study is the average age of the first marriage, which, in 2018, was 33.6 years old for men and 32.1 years old for women<sup>6</sup>.

Insofar as there is no model of registered partnerships, there are no official statistics on the actual number of domestic partnerships, although we can find jurisprudential studies that refer to the significant litigiousness relating to the rupture of de facto relationships.

On this last matter, however, it is interesting to bring some data provided by the National Statistics Institute (INE) on the size of families, since this allows us to intuit that the number of forms of coexistence other than marriage increases significantly. Thus, the average size of families has been significantly reduced in 50 years, going from 3.8% people per cohabitation nucleus in 1960 to 2.6% in 2011 (last year analysed)<sup>7</sup>.

The number of members of Portuguese households in 2018 is significant. Of 4,144,619 households, 938,839 have a single person, 1,007,681 are childless couples, 1,410,116 are couples with children, 460,315 are single-parent families, and 327,669 are in the "others" category<sup>8</sup>. It can also be added that of the 460,315 single-parent families<sup>9</sup>, 400,762 are female; and of the 938,8 people living alone, 508,1 are over 65 years of age<sup>10</sup>.

<sup>2</sup> Coelho, F., Oliveira, G., 2016, 115.

<sup>3</sup> PORDATA (2018), online

<https://www.pordata.pt/Portugal/Casamentos-16> (20.5.2019).

<sup>4</sup> PORDATA (2018), online

<https://www.pordata.pt/Portugal/Casamentos+entre+peoos+do+sexo+oposto+total+e+por+forma+de+celebracao-1933> (20.5.2019).

<sup>5</sup> PORDATA (2018), online <https://www.pordata.pt/Portugal/Taxa+bruta+de+nupcialidade-530> (20.5.2019).

<sup>6</sup> PORDATA (2018), online <https://www.pordata.pt/Portugal/Idade+m%C3%A9dia+ao+primeiro+casamento++por+sexo-421> (20.5.2019).

<sup>7</sup> PORDATA (2018), online <https://www.pordata.pt/Portugal/Dimens%C3%A3o+m%C3%A9dia+das+fam%C3%ADlias+segundo+os+Censos+-+908> (20.5.2019).

<sup>8</sup> PORDATA (2018), online <https://www.pordata.pt/Portugal/Agregados+dom%C3%A9sticos+privados+total+e+por+tipo+de+composi%C3%A7%C3%A3o+-+19> (20.5.2019).

<sup>9</sup> PORDATA (2018), online <https://www.pordata.pt/Portugal/Agregados+dom%C3%A9sticos+privados+monoparentais+total+e+por+sexo+-+20> (20.5.2019).

<sup>10</sup> PORDATA (2018), online <https://www.pordata.pt/Portugal/Agregados+dom%C3%A9sticos+privados+unipessoais+total+e+de+indiv%C3%ADduos+com+65+e+mais+anos-822> (20.5.2019).

### 1.3. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.

According to data provided by the National Statistics Institute (INE), as far as divorce is concerned, 21,577 have been registered in 2017, meaning 3.8% less than the previous year. In the same period 2017, the gross divorce rate (divorces per 1,000 residents) was 2.1%, a percentage that remains fairly stable, with similar figures since 2003<sup>11</sup>. The average age at the time of divorce was 46.7 years for men<sup>12</sup> and 44.5 years for women<sup>13</sup>.

Regarding informal unions, to the extent that there is no model of registered common-law couples in Portugal, and consequently any type of registration, there is no official statistic on the real number of common-law unions and less on their ending, although we can find sociological and legal studies that refer to the important litigiousness regarding the rupture of de facto relationships, mainly referring to parental responsibility when couples had children and on assets acquired during cohabitation.

### 1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).

The data published by the National Statistics Institute (INE) indicate, as far as marriages are concerned, that of the 33,634 marriages celebrated in Portugal in 2017, in 27,676 the two spouses were Portuguese, in 4,700 one of the spouses was Portuguese, and in 1258 the two were foreigners. A study elaborated by the "Observatório da Emigração", on the evolution of the profile of divorces of binational marriages in Portugal, between 1995 and 2013, provides interesting conclusions on the value of marriage in the social integration of immigrants, an approximation to the called complacent marriages, and some legal distortions (greater economic vulnerability, problems of parental responsibility) after the rupture<sup>14</sup>.

As an emigration country, it would also be relevant to have data on marriages of Portuguese citizens living abroad, but as shown by the studies carried out by the "Observatório da Emigração", the approximations to the social phenomenon of emigration are made with a series of estimated variables, in that the data they handle come from institutions responsible for immigration statistics in the countries of destination of Portuguese emigration. This is because, due to the right to leave the country of residence, there are generally no administrative records of departures (emigration), but only of entries (immigration).

In any case, it is of interest -mainly for the questions of inheritance law that will be dealt with- to point out that the studies of the aforementioned Observatory, based mainly on data provided by the UN, point out that Portugal is the European Union country with the highest number of emigrants in proportion to its population (considering countries with more than one million inhabitants). The number of emigrants born in Portugal exceeded 2,300,000, that is to say, 22% of the Portuguese reside abroad. Of these, the majority, 62%, reside in Europe<sup>15</sup>.

This section reveals the same difficulties as described in 1.3 supra, with regard to non-marital cohabitation.

<sup>11</sup> PORDATA (2018), online <https://www.pordata.pt/Portugal/Divórcios-323> (20.5.2019).

<sup>12</sup> INE (2017) online [https://www.ine.pt/xportal/xmain?xpid=INE&xpgid=ine\\_indicadores&indOcorrCod=0008284&contexto=bd&seITab=tab2](https://www.ine.pt/xportal/xmain?xpid=INE&xpgid=ine_indicadores&indOcorrCod=0008284&contexto=bd&seITab=tab2) (20.5.2019).

<sup>13</sup> INE (2017) online [https://www.ine.pt/xportal/xmain?xpid=INE&xpgid=ine\\_indicadores&indOcorrCod=0008285&contexto=bd&seITab=tab2](https://www.ine.pt/xportal/xmain?xpid=INE&xpgid=ine_indicadores&indOcorrCod=0008285&contexto=bd&seITab=tab2) (20.5.2019).

<sup>14</sup> Gaspar, S., Ferreira, A.C., Ramos, M., 2017.

<sup>15</sup> Pires, R., Pereira, C., Azevedo, J., Vidigal, I., Veiga, C., 2017, 23.

## 2. Family law.

### 2.1. General.

#### 2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?

The Constitution of the Portuguese Republic dedicates the following precepts to the family:

-Article 36 "Of the family, of marriage and of filiation": 1. Everyone shall have the right to constitute a family and to enter into marriage in conditions of full equality; 2. The law shall regulate the requirements and effects of marriage and its dissolution, by death or divorce, regardless of the form of celebration; 3. Spouses shall have the same rights and responsibilities with respect to civil and political capacity and the maintenance and education of children; 4. Children born out of wedlock (*fora do casamento*) may not, by this fact, be the object of any discrimination and neither the law nor official agencies may use discriminatory designations in matters of filiation; 5. Parents have the right and the obligation to educate their children; 6. Children may not be separated from their parents, except when the parents do not fulfil their fundamental duties to them and always by virtue of a court order".

-Articles 67 ("Of the Family"), 68 ("Of Motherhood"), and 69 ("Of Childhood"),

The main source of family law rules is Book IV of the Civil Code devoted to "Family Law", articles 1576 to 2023.

Additional sources may be cited:

Civil Registry Code. Decree-Law 131/1995, of 6 June 1995, as subsequently amended.

Law 7/2001, of 11 May, amended by Law 23/2010, on the protection of *de facto* unions (last version given by Law 71/2018, of 31 December).

Law 6/2001 of 11 May on the protection of people living in a common economy.

Law 32/2006, of 26 June, on Medically Assisted Reproduction (last amended by Law 49/2018, of 14 August). Of all its reforms, the one produced by Law 25/2016 that regulates access to substitution gestation stands out, which had some precepts annulled by the Sentence of the Constitutional Court 225/2018 of 24 April<sup>16</sup>.

Law 103/2009 on foster care ("*apadrinhamento civil*"), modified, among others, by Law 141/2015.

Law 29/2013 of 19 April laying down the general principles applicable to mediation conducted in Portugal, as well as Normative Office number 13/2018 of the State Secretariat of Justice, on the Family Mediation Service (in development of articles 1774 of the Civil Code and 273 of the Code of Civil Procedure on family mediation).

#### 2.1.2. Provide a short description of the main historical developments in FL in your country.

The current Portuguese Civil Code was adopted on 25 November 1966 and entered into force on 1 June 1967, repealing the well-known "Seabra Code" of 1867 (in force from 1868).

As far as family law is concerned<sup>17</sup>, it points out that until the entry into force of the Civil Code of 1966, the first-degree supplementary regime, following the historical tradition of Portuguese law marked by the Manueline Ordinations, was the general communion of property, characteristic of a conception of marriage as the moment when a woman left the extended family of her parents to join the extended family of her husband, then considered the head of the family. One of the arguments used to maintain the validity of the supplementary regime of general communion of goods was a better protection of the widowed spouse.

<sup>16</sup> DRE online <https://dre.pt/home/-/dre/115226940/details/maximized> (20.5.2019).

<sup>17</sup> Pinheiro, J., 2016, 125.

Also remarkable is the existence of a duality of divorce regimes, depending on whether the marriage was Catholic or civil, present in the Seabra Code and which was initially maintained in the 1966 Code. In fact, there was a duality of divorce regimes, so that the Divorce Law approved by the Decree of November 3, 1910, regulated only the dissolution of civil marriage, since the then in force Article XXIV of the Concordat between Portugal and the Santa Sede, of May 7, 1940, determined that with the celebration of the canonical marriage, the spouses would renounce the civil faculty to request divorce, which therefore could not be applied by civil courts to Catholic marriages. The 1996 Civil Code maintained the prohibition of divorce in Catholic marriage until Decree Law 261/1975 of 27 May introduced divorce based on objective and subjective grounds in both civil marriage and Catholic marriage, a system that has been maintained until the reform by Law 61/2008 which abolished guilt in divorce, based on the rupture of life in common, eliminated the bond of affinity as a consequence of divorce, determined the joint exercise of parental responsibilities together with the strengthening of sanctions for non-compliance, created the figure of compensatory credits, and proclaimed the principle of self-subsistence of spouses.

In any case, the first in-depth reform of Portuguese family law as a whole took place in 1977, in the light of the constitutional principles contained in the Constitution of the Portuguese Republic, amending the Civil Code to establish full equality of rights and duties between spouses - in particular, eliminating limitations on the civil capacity of women and abolishing the dotal regime - enshrining non-discrimination against children born out of wedlock, recognizing adoption as a source of family legal relations, setting the age of majority at 18 and the public age at 16. Likewise, and for the first time, express reference is made to domestic partnership, in that case, in order to recognize, in succession, a right to maintenance for the surviving member of a domestic partnership. On this last aspect, the first law that systematically regulated unregistered domestic partnership was Law 135/1999, of 28 August, repealed by the current Law 7/2001 of 31 May.

Subsequently, more significant reforms were made to the Civil Code and special laws have been enacted with special impact on family law, of which we can highlight:

-Law 9/2010, of May 31 allowing civil marriage between people of the same sex, altered articles 1577, 1591 and 1690 of the Civil Code. It was considered constitutional by the Constitutional Court ruling of 192/2010 of 8 April<sup>18</sup>. The original wording equated same-sex marriage to civil marriage between people of different sex, except for the possibility of adoption, which was also forbidden to domestic partnership of people of the same sex. More recently, Law 2/2016, of 29 February, eliminates discrimination in access to adoption, civil sponsorship and other family legal relations by altering Laws 7/2001, of 11 May, 9/2010, of 31 May, the Civil Registry Code and Decree-Law 121/2010, of 27 October, in such a way that the equalization of the effects of marriage is now full.

-Law 7/2001 of 11 May 2001, as amended by Law 23/2010, on the protection of domestic partnership (last version given by Law 71/2018 of 31 December).

-Law 6/2001 of 11 May on the protection of people living in a common economy.

-Law 32/2006, of 26 June, on Medically Assisted Reproduction (last amended by Law 49/2018, of 14 August). In this matter has special interest for the regulation of filiation, Law 25/2016 regulating access to gestation substitution, proceeding to amend the Law of Medically Assisted Reproduction. This law of substitution gestation had some precepts annulled by the Sentence of the Constitutional Court 225/2018 of 24 April<sup>19</sup>.

-Law 61/2008, of 31 October, which alters the legal regime of divorce.

-Law 143/2015 of 8 September on the legal status of adoption (national and international), which amended the Civil Code and the Civil Registry Code.

-Law 48/2018, of August 14, amending the Civil Code, recognizing the possibility of reciprocal renunciation of the status of legitimate heir in the antenuptial convention.

<sup>18</sup> DRE online <https://dre.pt/application/conteudo/2897033> (20.5.2019).

<sup>19</sup> See note 16 supra.

-Law 49/2018, of August 14, which creates the legal regime of the accompanied major, eliminating the institutes of interdiction and disqualification, provided for in the Civil Code (will enter into force on February 10, 2019).

### **2.1.3. What are the general principles of FL in your country?**<sup>20</sup>

The constitutional principles related to family law contained in the Constitution of the Portuguese Republic are the right to marry, the right to constitute a family, the principle of equality between spouses and non-discrimination on grounds of birth, the dissolubility of the marital bond, the protection of childhood, the attribution to parents of the power to educate children and the inseparability of children from their parents. The principle of free development of the personality, which is important for the future of the configuration of the institutions of the law of the individual and the family, can also be cited.

From ordinary legislation, one can highlight the principle of freedom of choice of the matrimonial property regime before the celebration of the marriage, and the immutability of the same once it has been celebrated. In the absence of a prenuptial agreement or its invalidity, the supplementary legal regime is that of the community of acquired property (marital property).

Divorce is not culpable and is decreed essentially to recognize the rupture of cohabitation, by mutual agreement or in a contentious manner.

The regulation of domestic partnership is done in a special law on the basis of the recognition of some effects limited to the coexistence of two people in a relationship analogous to the conjugal, without the need for registration, even because no registration is created for this purpose.

### **2.1.4. Define “family” and “family member” in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

The Portuguese Civil Code offers a concept of family linked to the marital relationship. It presents a nuclear family structure, eventually extended through the lines of kinship and affinity, up to certain limits<sup>21</sup>.

In this regard, article 1576 of the Civil Code establishes marriage, kinship and adoption as sources of family legal relations. But to this must be added other realities such as the civil sponsorship created by Law 103/2009, and domestic partnership regulated by Law 7/2001, although on these last ones an important Portuguese doctrinal sector continues to attribute the condition of a parafamily relationship. Sociologically, it seems that domestic partnership cannot continue to be denied the status of family situation, and from a legal point of view, the Constitutional Court, while maintaining that domestic partnership does not share the same nature of the family, does not prevent the ordinary legislator from providing effects to the conversion characterized by affection and the duties of respect and cooperation among its members.

Neither is a family relationship that established by the cohabitants within the framework of Law 6/2001, of 11 May, on the common economy, although the legislator recognises labour tax rights and other rights related to common housing (rent and real right of habitation).

In view of the foregoing, it cannot be said that there is a single concept of family for all sectors of the legal system<sup>22</sup>.

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<sup>20</sup> For the Portuguese Family Law principles see Campos, D., Campos M., 2018; Pinheiro, J. 2016; Coelho, F., Oliveira, G., 2016, González, J.A., 2014.

<sup>21</sup> Coelho, F., Oliveira, G., 2016, 35.

<sup>22</sup> Pinheiro, J., 2016, 42.

### 2.1.5. Family formations.

#### **2.1.5.1. Define the "spouse" in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

Spouses are those who marry in the terms of article 1577 of the Civil Code which considers it the contract concluded between two persons who intend to constitute a family through a full communion of life. It does not require, as in its original version of 1966, the diversity of sex of the contracting parties.

It is a formal legal transaction and, as noted in 2.1.2 at the present stage of the evolution of the marriage institution, duality in the regulation of civil and Catholic marriage means only that the validity of the religious form of civil marriage is recognized.

With respect to absolute diriment impediments, article 1601 of the Civil Code indicates: a) age under sixteen; b) notorious insanity, even during lucid intervals, and the accompanying decision, when the respective sentence so determines; and c) previous marriage not dissolved.

This concept of spouse is generally applicable to the entire legal system.

#### **2.1.5.2. What types of relationships/unions between persons are recognised in FL of your country? In particular, formal (registered) and informal (*de facto*) unions, heterosexual and same-sex unions, unions with and without *affectio maritalis*. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

In Portugal, Law 7/2001 of 11 May 2001 recognises certain civil effects of domestic partnership, but far from being equated with marriage. It defines partnership as the legal status of two persons who, independently of sex, have been living in conditions analogous to marriage for more than two years (article 1).

In a formulation similar to article 1601 of the Civil Code for marriage, it determines that it prevents the formation of a domestic partnership, for the purposes of the benefits of the Law, the age below sixteen years, notorious insanity, even during lucid intervals, and the accompanying decision, when the respective sentence so determines, and the marriage not dissolved, unless the separation of people or property has been decreed.

There is no record of domestic partnership. When it is necessary to prove their legal status (for employment, tax purposes, rent, adoption, etc.), all means of proof admitted in law are valid, highlighting the possibility that cohabitants can make a sworn statement before a local administration, the "junta de freguesia" (article 2 of the Law).

With regard to cohabitation relations, it is also necessary to refer to Law 6/2001, of 11 May, which adopts measures for the protection of people living in the Common Economy. Article 2 defines the "common economy" as the situation of people who live in communion of table and room for more than two years and have established a common coexistence of mutual aid or pooling of resources. It applies to households made up of two or more persons, provided that at least one of them is of legal age. As regards the scope of application, Article 1 clarifies that this is a system of protection for people living in a common economy, but that it does not prejudice the application of other legal provisions dedicated to the protection of domestic partnership, nor does the application of Law 6/2001 prevent the fact of cohabitation in a domestic partnership.

#### **2.1.6. What legal effects are attached to different family formations referred to in question 2.5.?**



The recognised effects for domestic partnerships in the terms of Law 7/2001 are quite limited. For the time being, an economic regime is not regulated for goods acquired during the cohabitation and for liability for debts, even the possibility of a conventional regime is mentioned, which if desired should be achieved by the instruments available to the cohabitants in the general theory of obligations and contracts (for example, a joint sale of goods or donations)

Doctrine and jurisprudence agree that the rules of matrimonial property regimes cannot be applied analogously to economic relations between de facto cohabitants. In any case, it is worth mentioning the jurisprudential current that, in cases of rupture of de facto couples, in order to compensate the cohabiting member whose patrimonial capacity has been diminished by the time dedicated to the family during the cohabitation, applies the rules of enrichment without cause. This is the case of the Sentence of the Superior Court of Justice of October 24, 2017.

Law 7/2001 recognizes the effects of domestic partnership in the areas of adoption, asylum and immigration, taxation, social benefits, social security and the right to work.

In the interest of substantive family law, the protection afforded to the family home is important. Thus, article 4 of Law 7/2001, in the case of co-ownership of family housing, orders the application of article 1793 of the Civil Code and, consequently, any of them may request the Court to grant him the lease of the house, if the conditions of the precept are met. The same possibility exists if the property is owned by one of them. Likewise, in the path already marked by the Constitutional Court of equality of marriage and conjugal relationship in matters of leases, if the cohabitants lived in a leased house, the two may reach an agreement to transfer the use to the non-tenant or if the two were tenants, that this condition is concentrated in one of them. If there is no agreement, the Judge will decide.

The application of article 1793 of the Civil Code to divorce cases - and the problem may be extended to de facto unions - has already given rise to some doubt as to its constitutionality, in that it opens the door to imposing a lease contract when the dwelling is exclusively owned, a possible "expropriation of use". However, the Constitutional Court in its Sentence 127/2013, of 27 February<sup>23</sup>, did not consider the precept unconstitutional, since it is based on the interest of protecting the family, also subject to constitutional protection in article 67 of the Constitution of the Portuguese Republic.

It is also necessary to take into account article 2020 of the Civil Code, which regulates a right to maintenance that the surviving partner may claim from the deceased partner's estate. It is worth remembering that, however, there is no civil maintenance obligation between de facto cohabitants during the cohabitation. (see 3.2.1.)<sup>24</sup>.

However, with regard to the effects of Law 6/2001, of 11 May, which adopts measures for the protection of persons living in the Common Economy, its Article 4 contains a series of benefits in the fiscal and labour field, and from a substantive perspective, Articles 5 and 6 refer to rights to common housing (see 3.2.1).

**2.1.7. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/*de facto* family formations? Explain briefly.**

I have no knowledge of ongoing reforms.

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See [http://www.pgdlisboa.pt/jurel/cst\\_busca\\_palavras.php?buscajur=%BA&ficha=822&pagina=31&exacta=&nid=1100](http://www.pgdlisboa.pt/jurel/cst_busca_palavras.php?buscajur=%BA&ficha=822&pagina=31&exacta=&nid=1100) (20.5.2019).

<sup>24</sup> Dias, C., 2014, 70.

## 2.2. Property relations.

### 2.3.2. List different family property regimes in your country.

The Portuguese Civil Code provides for three types of matrimonial property regimes:

-Communion of acquired assets. This is the supplementary legal regime. Its basic description indicates that after the date of the marriage the gains or benefits obtained indistinctly by either of them become common to the spouses, which will be attributed to them by half when the community is dissolved. In this way, the community's patrimony is made up of the product of the spouses' work and the assets acquired for valuable consideration in the marriage certificate, which are not exempt by law, while the assets of each of the spouses are considered to be those that each of them has at the time of the celebration of the marriage, those that they receive free of charge (donation or succession) and the assets acquired in the marriage certificate by virtue of their own right prior to the date of the same.

-General community of assets. In this regime of assets, the common patrimony is constituted by all the present and future assets of both spouses, regardless of whether they are acquired for a fee or free of charge, before or after marriage. It should be noted that, in the event of divorce, neither spouse may receive in the distribution more than he or she would receive if the marriage had been celebrated under the communion of acquired regime. The general communion of property regime cannot be chosen for marriage when the bride and groom already have uncommon children.

-Separation of assets. In this property regime there is no communion of any property, whether acquired for valuable consideration or free of charge, before or after marriage. Each retains control of all his property, present or future. The law imposes the imperative regime of separation of property when the marriage has been celebrated without organization of the preliminary marriage process or when one or both of the spouses have already reached the age of 60. Likewise, in order to make use of the possibility introduced by Law 48/2018 of 14 August to establish reciprocal renunciation of the status of legitimate heir in the antenuptial convention, it is obligatory to agree on the separation of property.

-Finally, in addition to the three regimes described above, the freedom to establish antenuptial pacts allows the creation of atypical property regimes, with the characteristics of the three models described above, provided that the imperative norms are respected, mainly with a view to not harming third parties and other interests protected by the legislator<sup>25</sup>.

### 2.3.3. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?

The supplementary regime under Portuguese civil law is the community of acquired assets, i.e. a community of property. Thus, unless there is a prenuptial agreement to the contrary, or in the event of the expiration or ineffectiveness of such an agreement, the regime of community of acquired assets (art. 1717 CC) applies, with the exception of the cases described in article 1720 CC, for which the separation of assets is imposed.

Under the acquired regime, marital property includes, but is not limited to, the following assets: a) income received from the work of the spouses and b) property acquired by the spouses during their marriage that is not excluded by law (art. 1724 of the CC).

These acquired assets form a common patrimony, in which both spouses participate equally, in both assets and liabilities (article 1730.1 of the Civil Code).

The exclusive rights of each spouse are the following: a) the property that each one has at the time of the celebration of the marriage; b) the property that a spouse acquires during the marriage by

<sup>25</sup> See Dias, C., 2017, Enriques, S., 2010 and Coelho, F., Oliveira, G., 2016, 559.

succession or donation; c) the property acquired in the record of the marriage by virtue of a previous right of one's own (article 1722.1 CC). In particular, the following are considered to be acquired by virtue of a prior right, without prejudice to any compensation due to the common patrimony: a) property acquired on unliquidated patrimony and awarded after marriage, as a consequence of rights prior to marriage; property acquired by usucapion based on possession which began before marriage; c) property acquired before marriage with reservation of ownership; and d) property acquired in the exercise of a pre-emptive right based on a situation already existing on the date of marriage /(article 1722.1 CC).

Likewise, article 1723 CC lists the assets subrogated in the place of the own assets, in such a way that they keep this condition: a) the assets subrogated in the place of the own assets of one of the spouses, by means of direct exchange; b) the price of the alienated assets; and c) the acquired assets or the improvements made with money or values of one of the spouses, since the origin of the money or values is duly mentioned in the acquisition document, or in equivalent document, with intervention of both spouses.

Those assets acquired by virtue of the ownership of own assets that are not their results, without prejudice to the compensation eventually due to the common patrimony, are also considered own. In particular: a) accessions; b) materials resulting from the demolition or destruction of property; c) part of the treasure acquired by the spouse as owner; and d) repayment prizes for credit titles or other securities owned by one of the spouses.

When assets are acquired partly with money or own property and partly with money or common property, article 1726 of the CC establishes that they will be considered own or common, according to the nature of the most valuable contribution. In any case, the compensation due for the common patrimony to the own patrimony of the spouses, or vice versa, at the moment of the dissolution and partition of the community of acquired assets, is exempt.

Article 1725 of the CC establishes a presumption of communicability, in such a way that, unless the contrary is proven, it is presumed that the movable property is common.

**2.3.4. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a “new regime just for them”?**

Only antenuptial agreements are allowed. Article 1714 of the Civil Code enshrines the principles of immutability and prenuptiality with regard to matrimonial property regimes and their covenants. Legislative option with historical roots that remained unchanged with the reform of the Civil Code of 1977. Commentators of Portuguese law usually indicate three reasons for maintaining the principle of immutability: to promote the stability of the economic rules of the basic conjugal family, to avoid that the influence of one spouse on another could lead to unfavourable agreements, and finally, the protection of third parties. One of the few exceptions to the immutability of the regime are the alterations admitted in article 1715 of the Civil Code, when for example there is a judicial separation of persons and assets.

When signing a marriage contract, spouses can stipulate<sup>26</sup>:

a) A universal community of property, although this cannot be chosen if one or both spouses already have children who do not belong to both spouses. In accordance with this economic regime, all present and future assets belonging to the spouses are part of the marital assets, except those excluded by law (art. 1732 of the CC). For example, donated or bequeathed assets, if it is stipulated that they are to be excluded from community property, personal rights and family souvenirs of low economic value are excluded from community property (art. 1733 of the CC).

<sup>26</sup> See Dias, 2017 and Coelho, F., Oliveira, G., 2016, 570.

b) A separation of property, which is obligatory when the marriage was celebrated without having carried out the preliminary matrimonial procedures or when either or both of the spouses are 60 years of age or older. In accordance with this economic regime, each spouse retains control and rights over all his present and future property, which he may freely dispose of (art. 1735 of the CC).

c) An atypical regime, which means that the spouses can select a regime that has the characteristics of two or even three matrimonial economic regimes.

In addition to the matrimonial property regime, it is possible to agree on other matters available to future spouses by way of contractual succession. Recently, Law 48/2018, of August 14, altered the Civil Code to recognize the possibility of reciprocal renunciation of the condition of legitimate heir in the antenuptial convention.

**2.3.5. Explain briefly the rules on the administration of family property and compare if there are difference for different property regimes.**

Firstly, the Portuguese Civil Code presents a series of basic rules, known as the primary economic matrimonial regime, which work for all property regimes, and which contain, among others, rules for the administration of family property.

Article 1678 of the Civil Code deals with the administration of spouses' property. It contains rules for the administration of each spouse's own property and common property, regardless of the applicable matrimonial property regime. The precept is reproduced below, but, in general terms, it establishes that one's own property is administered by the spouse who owns it, while the common property is differentiated according to whether it is an act of ordinary or extraordinary administration.

Thus things, in the terms of Article 1678 "1. Each of the spouses has the administration of its own property. 2. Each of the spouses also has the administration: a) the income he receives from his work; b) his copyright; (c) the common property taken by him to marriage or acquired free of charge after marriage, or subrogated in their stead; (d) of assets donated or left to both spouses other than the administration of the other spouse, except for assets donated or left for the legitimate account of that other spouse; (e) of movable property belonging to the other spouse or common property used exclusively by the other spouse as a working tool; f) those of the other spouse, if the latter is unable to exercise administration due to being in a remote or unknown place or for any other reason, and since not enough power has been granted for the administration of the goods; (g) the other spouse's own property if he or she has been mandated by the other spouse to do so. (3) Apart from the cases provided for in the previous number, each of the spouses has legitimacy for the practice of acts of ordinary administration relative to the common property of the marriage; the remaining acts of administration may only be practiced with the consent of both spouses.

In addition to these general rules, which are common to all matrimonial property regimes, there are some special rules which will apply in the cases provided for in the Civil Code<sup>27</sup>.

**2.3.6. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

For the validity of the antenuptial conventions it is necessary that they are formalized in a declaration before the Registrar of the Civil Registry or in notarial public deed. In any case, they are subject to compulsory registration in the Civil Registry. This is deduced from Articles 1710 and 1711 of the Civil Code and Articles 1.1. e) and 190 of the Civil Register Code.

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<sup>27</sup> González, J. A., 2014.

**2.3.7. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

The antenuptial pacts must be registered in the Civil Registry, but as it could be explained, there are few marriage contracts celebrated in Portugal, due to the principle of the immutability of the matrimonial regime, so that the third creditors who negotiate with married people have a high security that they will answer in the terms of a community of acquired.

In any event, Articles 1690 to 1697 of the CC contain the primary matrimonial property regime, i.e. a set of rules on rules of administration, disposition of property, and liability for debts, which are applicable irrespective of the economic regime in force for the matrimonial relationship in question. They are mandatory rules that form a guarantee of third party credits, a genuine protection of the legitimate trust of the creditors who, when negotiating with either spouse, are acting on behalf of and for the benefit of the family community.

Article 1690 of the CC is a reflection of the principle of equality between spouses and determines that any of the spouses has legitimacy to contract debts without the consent of the other. Thus, the third creditor is protected by the presumption of legitimacy of either spouse to incur debts for the conjugal society.

In the internal relationship of the conjugal society, it is different to determine which debts are the responsibility of both spouses and which are the exclusive responsibility of one of them, a topic of special importance at the moment of the liquidation of the matrimonial economic regime, in its dissolution by rupture of the conjugal relationship or by the death of one of the spouses.

In any case, the following debts, due to the principle of communicability are the responsibility of both spouses, under the terms of Article 1691 of the Civil Code: a) debts contracted prior to or during marriage by both spouses or by one of them with the consent of the other; b) debts incurred by either spouse prior to or during marriage to meet the ordinary expenses of family life; c) debts incurred during the marriage by the managing spouse for the common benefit of the couple and within the limits of their management powers; d) debts incurred by either spouse in the course of trade, unless it can be proved that the debts were not incurred for the common benefit of the couple or if the regime of separation of property is in force for the spouses; e) debts which, under the terms of Article 1693.2, encumber donation, inheritances or legacies, in the event that the assets involved have become part of the community property.

With regard to the regime of universal community of property, the second paragraph of Article 1692 determines that debts contracted prior to marriage by either spouse are included in the marital property, but only if they are for the benefit of the spouses. Common benefit of the spouses that is not presumed.

The economic regime chosen or taxed for marriage may also affect the issue of debts that are burdens for donations, inheritances or legacies. In such cases, article 1693 of the Civil Code enshrines the general principle that such debts are the sole responsibility of the spouse who has accepted the donation, inheritance or bequest, in line with the legal supplementary regime of the communion of acquired that understands the spouse's own property as that acquired gratuitously. Precisely for this reason, there is the aforementioned exception to the second paragraph of article 1693, which refers to the fact that the force of the adopted matrimonial property regime may determine that property acquired free of charge is considered common, which will occur when the spouses opt for the general property communion regime (article 1732 of the Civil Code) or even for an atypical regime in which they have agreed on this consequence.

They are the only responsibility of one of the spouses, in the terms of article 1692 of the Civil Code: a) debts contracted with before or after the celebration of the marriage, by either spouse without the consent of the other and which are not listed in article 1691.1. b) and c) of the Civil Code; b) debts for crimes and compensation, restitutions, legal costs or fines due for acts attributable to one of the spouses, except if these acts, implying merely civil liability, are covered by numbers 1 and 2 of

article 1691 of the CC; c) and debts that cannot be included in the community property according to the provisions of article 1694.2 of the Civil Code.

Finally, the property management system described above is quite extensive, even though the managing spouse is not required, in principle, to account for his or her administration, and his or her administrative powers may go beyond ordinary management. For this reason, and in a completely different context from legal separation or divorce, Articles 1767 to 1772 contain a provision on the possibility of requesting a "simple legal separation of property". This is a mechanism which, while maintaining the matrimonial bond intact, seeks to prevent patrimonial losses due to the bad or deficient administration of one of the spouses. Indeed, article 1767 of the Civil Code determines that either spouse may require the simple judicial separation of property when he or she is in danger of losing what is his or her own due to the bad administration of the other spouse. The burden of proof of danger and bad administration shall rest with the plaintiff spouse.

### **2.3.8. Describe allocation and division of property in case of divorce, separation or dissolution of the union.**

Divorce implies the necessity of liquidating the matrimonial property regime, a procedure whose guidelines will be determined by the property regime that governs the marriage.

For the community acquired regime, in the event of divorce, the marital property of the spouses is divided. First, the personal assets of the spouses are separated, and then compensation and debts are paid. Finally, each spouse receives half of the community property. The rule of equal shares is mandatory, which implies that any agreement to the contrary is annulled (art. 1730 of the CC). Even if the spouses have stipulated that the regime of universal community of goods be applied to their patrimony, in case of divorce, the spouses only receive what they would be entitled to according to the legal community of goods (art. 1790 of the CC).

If the spouses do not agree on the division of their marital property, it will be divided by the court. If the spouses agree on the division of their marital property, this will be done in the presence of a Notary or in the Civil Registry.

In the course of the liquidation of the community property, the common debts are also divided. Such a division, however, is only effective for creditors if they give their consent.

If the value of the property that a spouse has received through the division of assets exceeds the part to which he is entitled, the spouses may agree to equalization in kind or in the form of payment. In such a case, the amount of the equalization payment is calculated by a notary according to the value of the assets, the debts and each spouse's share of the marital property. If the spouses cannot reach an agreement, the court will decide on the values.

Portuguese law does not contain any special provisions on property relations between unmarried couples. The general provisions of the Civil Code on obligations apply.

### **2.3.9. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?**

No, there are no special rules or limitations with respect to property regimes between spouses or partners by reference to their culture, tradition, religion or other characteristics. No, dowry is not provided for or regulated by Portuguese law.

### 2.3. Cross-border issues.

#### 2.3.1. Is your country participating in the enhance cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?

Yes, Portugal is a participating State.

#### 2.3.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as “marriage”, “matrimonial property agreement”, “partnership property agreement” etc.?<sup>28</sup>

As regards Regulation 1103/2016, no problems are to be expected as regards its material scope. The inclusion of matters of primary matrimonial regime (debts, illegitimacy, protection of the family home), under the terms of Articles 3.1, 27.c), 27.d), Recitals 18 and 20 of the Regulation, constitutes a significant improvement in relation to the internal PID rules (Articles 52 and 53 of the Portuguese Civil Code), creating a property status of the single marriage that goes beyond problems of qualification, delimitation and detainment. However, there are still doubts as to the qualification of some of the rules of Portuguese law that regulate patrimonial family relationships, such as, for example, the transmission to the spouse, by death or divorce, of the right to rent (articles 1105 and 1106 of the Civil Code), the preferential inheritance attributions to the spouse in relation to the family home and its contents (articles 2103A of the Civil Code), the sharing according to a different regime from that in force during the marriage (article 1719).

On the other hand, the exclusion from the material scope of the Regulation (article 1, no. 2, b)) of the question of the validity of the marriage, leaving it, as a preliminary question, to the DIP of the MS of the forum, will not have major relevance, since in Portugal the marriages of people of the same sex are valid and recognized. Even so, and given the universal nature of the Regulation, other similar problems may arise in relation to polygamous marriages or marriages without marriageable age that violate the International Public Order of the Portuguese State, without prejudice to a case-by-case assessment that may even consider an attenuated version of this IPO given the exclusively patrimonial nature of sub iudice issues.

As far as Regulation 1104/2016 is concerned, its material scope restricted to registered partnerships will determine, in the Portuguese forum, a residual application since Portuguese law does not provide for the registration of unmarried couples, pursuant to Law 7/2001, of 11 May, and as such, the majority of unmarried couples resident in Portugal are not registered<sup>29</sup>.

#### 2.3.3. Are you expecting any problems with the application of the rules on jurisdiction?

The rules of jurisdiction of courts and other tribunals in matters of matrimonial property regimes in the Regulations are generally simpler and clearer than the rules on domestic international jurisdiction which, given the universal character of the Regulation also in jurisdictional matters, will, within the time frame of the Regulation, have residual application. It should be noted that this universal character in jurisdictional matters is not a complete novelty given the previous experience of the Regulations of International Succession, without prejudice to the fact that it is a characteristic that will have to be well assimilated by the jurisprudential practice that tends to understand the international instruments with territorial and/or subjective limitation.

In the Portuguese Code of Civil Procedure, the international jurisdiction of the Portuguese courts (articles 59, 62, 63, 72, 80 and 94 of the Code of Criminal Procedure) has been established. In the case

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<sup>28</sup> Mota, H., 2017, (a).

<sup>29</sup> Mota, H., 2017, (b).

of divorce proceedings, for example, the Plaintiff's domicile or habitual residence is located in Portugal), causality (the fact on which the action is based having been committed or occurred in Portugal), necessity (the right cannot become effective if the action is not brought in Portugal or if there is considerable difficulty in bringing the action abroad) and also agreements on jurisdiction, under well-defined conditions.

With the Regulation, such jurisdiction may also result from a number of factors (mandatory forum for divorce, mandatory forum for succession, alternative forums, forum for the appearance of the defendant, residual forums, elected forums and forum necessitatis). The system is also complex but it is more systematic, more objective, clearer and will rely on the case law of both the other courts and the CJEU to assist in the interpretation and application of its rules, which is always a positive aspect.

There are, however, a number of problems: compulsory and automatic forums for succession and/or divorce, if any, do not necessarily imply coincidence between forum and ius; the surviving spouse may not reside in the same State as the last domicile of the de cuius where the action will be brought; the cases of admissibility of a choice of court are limited, particularly by the existence of automatic and mandatory forums, which may not be known to the spouses, especially in the case of succession.

#### **2.3.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

No. The exercise of conflict autonomy is already a well-known and applied solution in the field of international private relations and is very positive because it allows greater flexibility and adaptation to the specific living conditions of the spouses, greater legal certainty and the possibility of planning and managing the property aspects of their married life consciously and without surprises. In the case of Portuguese nationals residing abroad or who have property abroad or who marry foreigners, it may also mean the possibility of changing their property regime freely, through the choice and change of applicable law, which would not be permitted, as a rule, under Article 1714 of the Civil Code if Portuguese law were competent under Portuguese private international law (Articles 52 ex vi art. 54 of the Civil Code).

Problems may arise in relation to third parties. Although the Regulations provide for various rules on the protection of third parties (Articles 22(3), 26(3) and 28), their wording is confusing and difficult to apply<sup>30</sup>.

As regards the supplementary applicable law, there will be doubts as to the application of the law of the spouses' first common habitual residence after the conclusion of the marriage (Article 26 a)), in particular where the spouses do not move to a common residence until some time after the conclusion of the marriage and the facts on which the dispute is based occurred before, since that law may not be the closest, in which case the law of the common nationality, for example, would be better applied. And even if there is the adoption of a common residence soon after the marriage, but the spouses have meanwhile changed residence without having had the opportunity to change the law by agreement, the application of that law may not prove to be the closest to the spouses' current living conditions; it will also be different from that which will be applied to the issue of succession or divorce or to the contractual or real status of assets; and it will imply the application of a foreign law by the Portuguese Court, given the criteria of jurisdiction of the courts defined in the Regulation (article 6, no. 1, a))<sup>31</sup>.

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<sup>30</sup> Mota, H., 2018, 45.

<sup>31</sup> Mota, H., 2013.



**2.3.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

From the point of view of the spouses' property status, there will not be frequent cases in which the applicable foreign law violates the OPI of the Portuguese State, except for the questions already referred to regarding the validity of the marriage.

**2.3.6. Are there any national rules on international jurisdiction and applicable (besides the Regulations) concerning the succession in your country?**

Yes, the conflict rules in the Portuguese legal system that determine the law applicable to succession to death are set out in the Portuguese Civil Code: Articles 62, 63 and 65. With regard to the criteria of international jurisdiction of the Portuguese courts, Articles 59, 62, 63, 94 and 80 of the Portuguese Code of Civil Procedure apply.

### *3. Succession law*

#### **3.1. General.**

**3.1.1. What are the main legal sources of Succession Law (SL) in your country? What are the additional legal sources of SL?**

The Portuguese Constitution of 1976 enshrines in Article 62.1 the right to succession mortis causa as a manifestation of the right to private property, establishing that everyone is guaranteed the right to private property both in its transmission in life and by cause of death. It is also a transfer of any type of property and rights, since, as stated in Constitutional Court Decision 491/2002<sup>32</sup>, the constitutional concept of private property is not exhausted in the real right of ownership, but extends to all economic rights.

Still in the constitutional sphere, it is necessary to cite article 13, which recognizes the principle of equality, insofar as it has allowed the elimination, in the 1977 reform of the Civil Code, of discrimination referring to the sex of spouses, as well as of non-marital filiation as opposed to matrimonial filiation. It has also made it possible to amend the Civil Code by Act No. 9/2010 of 31 May 2010, which allows for civil marriage between persons of the same sex.

The main source of Portuguese inheritance law is Book V of the Civil Code dedicated to Inheritance Law, articles 2024 to 2234. With the exception of some modifications introduced in the regime of undignified inheritance in 2013 (Law approving the legal regime of the inventory process), and the reform on the inheritance rights of widowed spouses by Law 48/2018, Portuguese inheritance law has remained unchanged since the 1977 reform.

It is necessary to cite, still within the Civil Code, but outside Book V, some precepts with successive or interpretative transcendence. This is the case of pacts of succession regulated by family law (articles 1700 et seq.), or donations due to death (article 946, and even the general rules of interpretation of legal transactions that can be applied, as appropriate, to wills.

In addition, the rules of the Code of Civil Procedure relating to inheritance lying for the benefit of the State must be taken into account.

The Notarial Code regulates in its articles 82 to 88 the public deed of habilitation of heirs, as well as the approval, deposit, restitution, and opening of closed wills and international wills, in addition to other rules relating to wills or affecting the renunciation of inheritances or legacies.

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<sup>32</sup> DRE online <https://dre.pt/home/-/dre/2634001/details/maximized> (20.5.2019).

The Civil Registry Code, articles 201 A to 201 R which regulate the simplified procedures of hereditary succession.

In addition, the Land Registry Code ("Registro Predial") provides for the registration of the acquisition of succession of real estate or movable property subject to registration, and the registration of the burden of the eventual reduction of donations subject to collation.

Of course, for transnational successions there is Regulation (EU) 650/2012 of 4 July 2012.

**3.1.2. Provide a short description of the main historical developments in SL in your country.**

In matters of inheritance law, the Portuguese Civil Code of 1867 ("Seabra Code") was characterized by combining its essentially individualistic spirit, described by many as extreme, with the historical tradition of the Portuguese family organization.

The 1977 reform was marked by the acceptance of the principles of equality between spouses and equality of matrimonial and non-matrimonial filiations. One of the most outstanding elements of the succession reform was the special protection of the widowed spouse, in particular its consideration as legitimate. It also improved their position in intestate succession. The general prohibition of pacts of inheritance was maintained, but the doors have been opened to a more important role of private autonomy.

At present, the most debated issue is precisely whether it would not be appropriate to rethink the inheritance system, mainly the position of the widowed spouse and the scope of the legitimate as a limitation of the freedom to test. In this line, the last reform in the seat of successions is framed by means of Law 48/2018, of August 14, which modified the Civil Code to consecrate the possibility that the spouses renounce, in a reciprocal way, to the condition of legitimate heir one of the other, in an antenuptial convention in which the regime of separation of goods is agreed (or already imposed by law).

**3.1.3. What are the general principles of succession in your country?**

The phenomenon of succession is intimately connected with the recognition of the right to private property recognized constitutionally in Article 62.1 of the Constitution of the Portuguese Republic. As for its basic principles, it is a system that combines individualistic and family aspects. Thus, testamentary succession and contractual succession, respecting the mandatory limits contained in the Civil Code, are a clear expression of the principle of private autonomy and freedom of disposition, while legitimate or intestate succession, as well as legitimate succession involving a significant limit to testamentary succession, denote a concern for the care of the family, along the lines that inheritance must ensure its protection, regardless of the will of the deceased<sup>33</sup>.

**3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.**

We can say, with general character that with death the succession is opened (article 2031 of the Civil Code), proceeding to the vocation or call for succession (article 2032 of the Civil Code). The inheritance becomes recumbent ("herança jacente"), article 2046 of the Civil Code, until there is an acceptance of the call. The term for acceptance expires ten years from the date of knowledge of the call, article 2059 of the Civil Code, which also applies to legacies ex article 2249 of the Civil Code.

Once accepted, the inheritance is considered acquired. These are, therefore, the key moments of the succession phenomenon: the opening of the succession, the vocation or call and the acceptance of the inheritance.

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<sup>33</sup> A description of the general principles of Portuguese Succession Law in Amaral, J. 2018, Pinheiro, J., 2017, Dias, C., 2016, Corte-Real, C., 2012, Fernandes, L., 2008.

The procedure for the adjudication of assets will depend on whether the succession is litigious or not.

In the event of litigation, the legal regime of the inventory process, within the framework of Law 23/2013 of 5 March, has the following objectives: to carry out the division with a view to putting an end to the hereditary community, to make a list of the assets subject to the succession in case it is not necessary to carry out the division and to proceed to the liquidation of the inheritance in case it is necessary.

The competent authority is the Notary, and the intervention of the courts is limited to the final phase of the process, in which the territorially competent civil judge dictates the homologous decision of division, although he has the possibility of intervening in the initial phase of the process to appoint the administrator of the inheritance when all the persons foreseen in the law to carry out this function have been refused or have been discarded. On the other hand, the intervention of a lawyer is only obligatory if questions of law are raised and discussed, or if an appeal is lodged.

The inventory process consists of the following phases: a) initial requirement and administrator statements; b) citations and notices; c) oppositions; d) administrator responses; e) debts; f) preparatory meeting; g) stakeholder meeting; h) determination of irrelevance; i) division; j) amendment and annulment of division.

When the succession is not litigious, the interested party may appear before the Notary or before one of the Registries authorized within the single window system, to manage all matters relating to a succession, from the authorization to the final registration of the goods coming from the division in the competent Registries.

Therefore, the qualification and division may be carried out before any of these institutions.

Likewise, the interested parties may, after making the qualification of heirs in a Notary or Registry, carry out the division of the assets that make up the inheritance by means of an authenticated private document, before any lawyer or solicitor<sup>34</sup>.

**3.1.5. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?**

Death succession may be legal or voluntary, as long as it is based on law or on legal business (art. 2026.º), which may be a will (testamentary succession) or a donation by death (contractual succession). The legal succession may be legitimate (intestate) or legitimate (forced), depending on whether or not it can be removed by the will of its author (article 2027 of the Civil Code).

In the absence of forced heirs or, if there are any, within the limits of the available quota, the author of the succession may freely dispose by will or by contract (where the law allows donations by death - articles 2028 and 1700 et seq. of the Civil Code). If the author of the succession does not dispose of all or part of his property, the intestate (legitimate) succession is opened, under the terms and in accordance with the order established in article 2133 of the Civil Code.<sup>35</sup>

**3.1.6. What happens with the estate of inheritance if the decedent has no heirs?**

If a person dies had not disposed, in whole or in part, with validity and effectiveness, of the property which he could dispose of after death, his legitimate heirs are called to the succession of such property. This is called intestate succession. It is a form of legal succession that the author of the succession can discard if it is his will.

The legitimate heirs are the spouse, relatives and the State in the following order: a) spouse and descendants; b) spouse and ascendants; c) siblings and their descendants; d) other collateral up to the fourth degree; e) State.

<sup>34</sup> A description of the inventory process in Neto, A., 2017 and Paiva. E., Cabrita, H., 2013.

<sup>35</sup> Coelho, C., 2017, 937.

Therefore, in the case where the causer has no heirs, the State inherits. Its position as a legitimate heir is the same in rights and obligations as that of the other heirs, however, it does not require it to accept the inheritance, operating ipso iure, nor can it repudiate it (articles 2153 and 2154 of the Civil Code)<sup>36</sup>.

**3.1.7. Are there special rules or limitations concerning succession with reference to the deceased's (or heir's) culture, tradition, religion or other characteristics?**

The Portuguese inheritance system does not have discriminatory rules based on culture, tradition, religion or other characteristics.

**3.2. Intestate succession.**

**3.2.1. Are men and women equal in succession? Are domestic and foreign nationals equal in succession? Are decedent's children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?**

The principle of equality between men and women applies in Portuguese inheritance law.

In article 2033 of the Civil Code dedicated to the capacity of succession, paragraph 2 a) of the Civil Code considers that unborn nasciturus, who are children of a given person, alive at the time of the opening of the succession, have the capacity to succeed. What the precept means is that, in legal succession, only conceived nasciturus have inheritance capacity. Something different is the testamentary or contractual succession in which the nasciturus can be designated heir or legatee even if not conceived.

Adopted children (articles 1979 to 1991 of the Civil Code) are on an equal footing with biological descendants of the same grade, since by adoption the adopted child acquires the status of child of the adopter (article 1986 of the Civil Code).

As mentioned in section 2.1.2 above, the 1977 reform of the Civil Code introduced into Article 2020 a maintenance right which may be claimed by the surviving partner from the inheritance of the deceased partner. The inclusion of the de facto partner in the legitimate (intestate) succession of the deceased partner was discussed at that time, but the proposal did not succeed. Therefore, even after the entry into force of Law 7/2001 of 11 May, the surviving partner is not the legal heir, although nothing prevents him from being the testamentary heir of the deceased.

However, article 5 of the aforementioned Law 7/2001 recognizes the rights of the surviving partner, namely, rights in the allocation of common housing and in the transfer of the right to rent.

With regard to family housing, a legal legacy is attributed, consisting of a real right of habitation over the dwelling and furnishings.

In the event that the deceased was the owner of the family dwelling and its furnishings, the surviving partner may remain in the dwelling for a period of five years as the holder of a right in rem to the dwelling and a right to use the furniture. In the case that the de facto union began more than five years before the death of one of the members, the rights indicated will be granted for a period equal to the duration of the cohabitation.

If the cohabitants were co-owners of the family dwelling and of their trousseau, the surviving cohabitant shall have the aforementioned exclusive rights.

Exceptionally, and for reasons of equity, the court may extend the periods provided for in the preceding paragraphs, considering, in particular, the assistance provided by the surviving member to

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<sup>36</sup> Coelho, C., 2017, 1100.

the person of the deceased or his family, and the state of need in which the surviving member is, for any reason.

The rights provided for expire if the person concerned does not live in the house for more than one year, except for reasons of force majeure, and the real right to housing shall not be granted to the surviving partner if he has his own house in the area of the respective municipality of the family's house of residence.

Once the period of benefit of the right to housing has expired, the surviving tenant has the right to remain in the property as a tenant and will have preference in the event of alienation of the property, during the time in which he lives in it under any title.

### **3.2.2. Are legal persons capable of inheriting? If yes, on which basis?**

Yes, with regard to inheritance, in particular, article 2033(2) of the Civil Code, under the heading of inheritance, recognises in testamentary succession and in contractual succession the capacity of "collective people and companies".

### **3.2.3. Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.**

Inheritance capacity is the suitability to be the recipient of a hereditary vocation in relation to a particular causer and Article 2033.1 of the Portuguese Civil Code adopts a general principle of passive inheritance capacity. However, at the same time, it contemplates two figures that generate inheritance incapacity: on the one hand, the indignity to succeed is a cause of exclusion of a particular inheritance, while on the other hand, disinheritance applicable only to legitimate heirs in the terms of Articles 2166 and 2167 of the Civil Code.

With regard to indignity, article 2034 of the Civil Code lists the following grounds for indignity: a) Acts committed against the life of the author of the succession and certain close relatives (spouse, descendant, ascendant, adopter and adopted); b) Acts against the honour of the same persons; c) Acts against the freedom to test; d) Actos practicados contra el propio testamento (sustracción, ocultación, inutilización, falsificación o supresión, antes o después de la muerte del testador).

Since this is a restriction on a person's inheritance capacity, it was maintained that the list of causes of indignity in article 2034 of the Civil Code is exhaustive and must also be interpreted restrictively. However, judicial decisions can be found that have broadened the spectrum of causes of indignity, based on the figure of abuse of the right. This is the case of the Sentence of the Supreme Court of Justice of January 7, 2010, in which an unworthy father is considered to succeed his deceased daughter, since he had been condemned for raping her and forcing her to abort when she was 15 years old. Although the only crime described in article 2034 of the Civil Code is intentional homicide or attempted homicide, the Court has considered that it would be intolerable for good customs and the economic and social purpose of the right to succeed and, therefore, illegitimate for abusive.

For a cause of indignity to have the effect of restricting a person's capacity to succeed, a declaratory action of indignity must be promoted. This must be proposed within two years of the opening of the succession or within one year, counting either from the conviction for the crimes that justify it or from the knowledge of the occurrence of the causes of indignity<sup>37</sup>.

Once the indignity has been declared judicially, the inheritance capacity is lost. If the deceased had already died and goods had been delivered to the declared unworthy, these must be returned to the inheritance, since from the sentence he is considered, to all intents and purposes, a possessor of bad faith.

Article 2038 of the Civil Code provides for the possibility that the testator may rehabilitate the unworthy in a will or in a public deed.<sup>38</sup>

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<sup>37</sup> Amaral, J., 2018.

<sup>38</sup> Pinheiro, J., 2017.

**3.2.4. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?**

If a person dies had not disposed, in whole or in part, with validity and effectiveness, of the property which he could dispose of after death, his legitimate heirs are called to the succession of such property. This is called intestate succession. It is a form of legal succession that the author of the succession can discard if it is his will.

The legitimate heirs are the spouse, relatives and the State in the following order:

- a) spouse and descendants;
- b) spouse and ascendants;
- c) siblings and their descendants;
- d) other collateral up to the fourth degree;
- e) State (see 3.1.6)

Legitimate succession is subject to three basic principles. Article 2134 of the Civil Code establishes the rule, which does not admit exceptions, of class preference. Another principle, enshrined in article 2135 of the Civil Code, is the preference of degree of kinship, so that within each class of relatives, those of closest degree prefer those of farthest degree. Finally, succession by head is observed, in the sense that, except for the exceptions provided for, the relatives of each class succeed by head or in equal parts (article 2136 of the Civil Code).

**3.2.5. Are the heirs liable for deceased's debts and under which conditions?**

If the inheritance is accepted for the benefit of inventory, only the inventoried inheritance assets are liable for the deceased's debts and other inheritance burdens, unless creditors or legatees prove the existence of other assets. If there is inventory, the burden of proving that assets other than inventories exist rests with creditors or legatees.

If the inheritance is accepted purely and simply, the responsibility for the debts and other burdens of the inheritance also does not exceed the value of the inherited assets, although in this case it is up to the heir or legatee to prove that there are not sufficient assets in the inheritance for the payment of the debts or the fulfillment of the legacies.

The inheritance is responsible for the following burdens: funeral expenses and suffrages of the deceased; burdens related to the attestation, administration and liquidation of the inherited patrimony; payment of the deceased's debts; fulfillment of the legacies.

Assets of the undivided inheritance are collectively responsible for the liquidation of the aforementioned charges. Once the division has been made, each heir is only responsible for the burdens in proportion to his share of the inheritance.

**3.2.6. What is the manner of renouncing the succession rights?**

Repudiation of inheritance is subject to the same form required for alienation of inheritance (article 2063 of the Civil Code). Therefore, he must observe one of the following forms: public deed or particular authenticated document if there are assets for the alienation of which the law requires one of these forms; particular document in all other cases.

The acceptance or renunciation of the inheritance or of the legacy are unilateral legal transactions and not receptive, that is to say, either of the two is carried out through a declaration of will of the holder of the right of succession that does not have to be directed or brought to the knowledge of a certain person.

In the event that the inheritance is lying, that is, it is in the period in which it has not yet been accepted or declared vacant in favor of the State, the interested parties or the Public Ministry may

request the courts to notify the heir to accept or renounce the inheritance. In this case, the courts are the authority that receives the declaration of acceptance or resignation.

### **3.3. Disposition of property upon death.**

#### **3.3.1. Testate succession.**

##### **3.3.1.1. Explain the conditions for testate succession.**

The foundation of the testamentary succession is private autonomy, and in a system such as the Portuguese system that restricts contractual succession to very specific cases, it is the ideal instrument for fulfilling the real will of the deceased with respect to the destination of his assets after his death. It is closely linked to testate succession, insofar as they limit each other<sup>39</sup>.

It is regulated in Title IV of Book V, articles 2179 to 2307 of the Civil Code, on the basis of a legal transaction of a formal nature: the will<sup>40</sup>.

##### **3.3.1.2. Who has the testamentary capacity?**

All individuals that the Law does not declare incapable of doing so can be tested, says article 2188 of the Civil Code.

Unemancipated minors and accompanied adults lack active testamentary capacity only in cases where the accompanying sentence so determines (article 2189 of the Civil Code). A will made by a person incapable of testing is null and void, and the time to determine capacity is the date of the will.

##### **3.3.1.3. What are the conditions and permissible contents of the will?**

The freedom to test, respecting the limits of legitimate succession is very broad.

The testament is a unilateral and irrevocable act by which a person disposes, after his death, of all or part of his property, but which may contain provisions of a non patrimonial nature permitted by law for the testamentary form (article 2179 of the Civil Code). For example, it may make a confession in the terms of article 358.4 of the Civil Code, acknowledge paternity (articles 1853(b) of the Civil Code), appoint a guardian (article 1928.3 of the Civil Code), or rehabilitate an unworthy successor (article 2038.1 of the Civil Code).

##### **3.3.1.4. Describe the characteristics of will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a will?**

The Civil Code outlines the will as a unique legal transaction (article 2181), personal, as it cannot be carried out through a representative (article 2182), formal (articles 2204 et seq.) and freely revocable (articles 2311 et seq.)<sup>41</sup>.

Thus, joint wills are prohibited, that is to say, in the same act two or more persons may not be tested, either for reciprocal benefit or for the benefit of a third party. Similarly, a will consists of a declaration of the will of a single party and need not be addressed or brought to the knowledge of a particular person. It is freely revocable and the transfer of goods to the instituted only occurs after the death of the testator.

There are common and special forms of testament.

Common forms of wills are public testaments and closed testaments.

<sup>39</sup> Sousa, R., 2002, Ascensão, J., 2000, Telles, I., 1991.

<sup>40</sup> Coelho, C., 2017, 1150.

<sup>41</sup> Sousa, R., 2002, 167.

The public testament is drawn up by a Notary in his notarial protocol (article 2205 of the Civil Code), signed by the testator, and its eventual revocation must also be carried out in public deed.

The closed testament (article 2206 of the Civil Code) is drafted and signed by the testator or by a third party at his request, but must be approved by a Notary. It can be kept by the testator, by a third party, or deposited in a notary's office. Anyone who holds a closed will is obliged to submit it within three days from the date on which he became aware of the death of the testator. If he fails to do so, he will be liable for any loss or damage caused and, if he is the owner of inheritance rights, he will lose his capacity for inheritance due to indignity.

In the common forms of testament the law imposes the intervention of two witnesses (article 67 of the Code of Notaries. In case of urgency or difficulty in obtaining them, the notary can dispense with the intervention of witnesses, but must mention the incidence in the will. He can also intervene at the request of the notary or of the testator himself, a medical expert to certify the mental state of the drafter of the will.

Among the special forms of testament the law foresees (articles 2210 to 2223 of the Civil Code) the military will, the will made on board ship or aircraft and the will made in case of public calamity. It is only possible to grant a will through one of these special forms when there are certain exceptional circumstances provided by law. The testament loses its validity two months after the cessation of the cause that prevented the testator from doing so according to the common forms.

Similarly, Portuguese law provides among the special forms of testament for a will drawn up by a Portuguese citizen abroad in accordance with the foreign law and which is valid in Portugal provided that a solemn form has been followed in its granting or approval.

**3.3.1.5. Is there a (public) register of wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

In accordance with article 187 of the Notarial Code, in Portugal notaries must send to the "Conservatória" of the Central Registers information on the identification of public instruments, instruments of approval, deposit or opening of closed testaments and international testaments, deeds of revocation of testaments and deeds of repudiation of inheritance or legacy, as well as the identification of the respective testators or grantors. This communication does not reveal the content of the provisions, but rather the performance of the act and the identification of the parties involved.

In this way, an archive is organized with the general index of testaments, deeds of revocation of the same, as well as renunciations and repudiations of inheritances and legacies, organized by alphabetical order of the names of the testers and grantors, based on the files sent from the notaries. This allows, after the death of a person, any interested person to request information from the aforementioned "Conservatória".

**3.3.2. Succession agreement (*negotia mortis causa*). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.**

In principle, inheritance agreements are prohibited under penalty of nullity in article 2028 of the Civil Code. The precept states that there is contractual succession when, by contract, someone renounces the succession of a living person or has his own succession or the succession of a third party that has not yet been opened.

However, the same rule refers to the exception represented by the inheritance contracts provided for in the law<sup>42</sup>.

This is the case of designating agreements inserted in antenuptial conventions in the terms provided for in articles 1700 and ff of the Civil Code.

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<sup>42</sup> Sousa, R., 2000, 48.



The antenuptial convention may contain:

a) the institution of heir or legatee in favor of any of the grantors, made by the other or by third parties. The particularity of this donation is that the donee is always one of the future spouses or both.

b) the institution of heir or legatee in favour of the third party by either of the future spouses. Here, the beneficiary is a third party, and the author of the release either of the contracting parties.

c) the reciprocal renunciation of the condition of legitimate heir of the other spouse. This paragraph was introduced by Law 48/2018, of 14 August, amending the Civil Code, which requires for its validity that the conventional regime or imperative applicable to the marriage in question be that of separation of property.

Article 1700(2) of the Civil Code provides that reversion or trustee clauses relating to the donations made are also permitted in antenuptial conventions.

Finally, it should be mentioned that article 2029 of the Civil Code admits the partition of inheritance in life, although the generality of Portuguese doctrine, despite recognizing the special nature of the figure, rejects its classification as a pact of succession. Specifically, it is understood that it is a donation contract in which all existing legitimates must participate, and in which the attribution of goods to one or several of them generates the obligation to deliver to the rest the value of the part that would correspond to them in the donated goods.

### **3.3.3. Are conditions for validity of wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

As an eminently formal legal transaction, the requirements for guaranteeing the validity of a will are governed by specific articles of the Civil Code for each form of will described in section 3.3.1.4. Likewise, the case law on the matter highlights the importance of the application of the rules relating to vices of consent (articles 2199 to 2203 of the Civil Code).

### **3.3.4. Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

A significant number of authors consider the surviving spouse to be the member of the family most protected by the Portuguese inheritance regime. For the time being, marriage necessarily implies that the spouses become the legitimate heirs of each other, regardless of the agreed property regime, that is, upon the death of one of them, the widowed spouse concurs with the descendants, with the ascendants or alone.

The surviving spouse receives the same share of the estate as the children; however, the spouse's share cannot be less than one quarter of the inheritance (art. 2139 CC). If there are no descendants and the deceased has left only one spouse and ascendants, the surviving spouse receives two-thirds of the estate. If the deceased leaves neither descendants nor ascendants, but only one spouse, the latter receives the entire inheritance.

In any case, it should be noted that in addition to having the right to the legitimate, in the field of forced succession, the surviving spouse can be contemplated within the scope of testamentary and/or contractual succession (where permitted), can be beneficiary of partition in life, assumes the position of administrator of the inheritance and has the right to demand partition, benefits from preferential rights provided in the arts. 2103-A to 2103-C, has the right of subrogation in the rental contract of the dwelling, is entitled to the survivor's pension and the death grant and benefits from a favorable regime in donations in relation to the institute of collation. And if they were married in a community property regime, the surviving spouse is entitled to receive his or her share in the community property beyond his or her share of the inheritance.

The tendency is to make that regime more flexible. Along these lines, Law 48/2018 amended the Civil Code to allow spouses, in an antenuptial agreement, to renounce the status of legitimate heir,

provided that the regime of separation of property is agreed or applied. This reform responds to the desire of many couples who, wanting to marry, did not want their personal wealth to be inherited by the surviving spouse, especially in the case of formerly constituted families.

### **3.3.5. Cross-border issues.**

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#### **3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?<sup>43</sup>**

Portugal is a country of emigration. According to data provided by the Portuguese Emigration Observatory, the number of Portuguese emigrants exceeds two million, so that about 20% of Portuguese people live outside the country where they were born. It is a community of residents abroad who maintain, even second and third generations, economic and family ties with the country of origin, as evidenced by the high volume of capital remittances and the acquisition of goods, mainly real estate, in Portuguese territory. Likewise, the Portuguese emigrated population is aged.

This reality coexists with the fact that in recent years, Portugal is the destination of many European pensioners who decide to move, due, among other reasons, to a series of tax and social incentives promoted by the Portuguese authorities.

This strength of the Portuguese diaspora combined with the installation of foreigners in Portugal means that the cross-border dimension fully covers the phenomenon of succession, specifically the need to implement the European Succession Regulation 650/2012.

The legal operators who are developing the most outstanding practical experience are notaries. Their intervention in public deeds of qualification of heirs, wills and acting as jurisdictional organs in the litigious process of inventory, are conforming an important of technical knowledge on the application of the Regulation 650/2012 in the international successions in Portugal. In particular, they are obliged to study the determination of the applicable law, as well as the concretization of functional competence to hear matters related to inheritance.

#### **3.3.5.2. Are there any problems with the scope of application?**

Portuguese notaries familiar with the application of Regulation 650/2012 consulted for this report stated that the greatest difficulty they encounter, after determining which law is applicable, is the knowledge of the rule applicable, especially when, by force of the factor of habitual residence connection of the *cuius*, the same is from a State not bound by Regulation 650/2012.

The demographic situation described in the previous section obliges Portuguese notaries to apply a law other than the law of nationality. It is true that, in relation to the Member States of the European Union, there are support structures that facilitate secure knowledge of the applicable legislation, such as, for example, the Council of Notaries of the European Union; however, when it comes to dealing with the application of a law of third countries, analysis can be a complex task. When the notary acts under the principle of free choice of the parties, he can ask the interested parties for proof of the content of the applicable law, but when the field of inventories acts, in their function as courts for the purposes of the Regulation, they have the duty, *ex officio*, to know the foreign law.

#### **3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country had experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?**

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<sup>43</sup> See Mota, H., 2014.

The general rule contained in article 4 of the Regulations enshrines the international jurisdiction of the courts (notaries in the Portuguese legal system) of the Member State of the last habitual residence of the author of the succession. Jurisdiction that is attributed for the whole succession, i.e. a unitary jurisdiction is established, extendable to all the assets of the inheritance, regardless of their nature and location.

Determining this connecting factor is an interpretative task which is carried out independently of the law of each of the Member States, ensuring greater legal certainty, since the opposite would be to have as many concepts of habitual residence as there are Member States bound by the Regulation. This implies greater complexity for the delimitation of the concept, which is why the notary must make an overall assessment of the circumstances of the deceased's life during the years prior to his death and at the time of death, with particular attention to the duration and regularity of the deceased's stay in the State in question, as well as the conditions and reasons for that stay. The aim is to reveal a close and stable relationship with the State in question, taking into account the specific objectives of the Regulation.

The notaries consulted for the preparation of this report stated that they had no direct or indirect knowledge of declarations of incompetence in the cases provided for in Article 6, nor of an assertion of competence in the cases provided for in Article 7 of the Regulation.

**3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?**

In reading this reply, it should be borne in mind that the European Succession Regulation has three essential notes. The primacy of the legal system of the habitual residence of the deceased; the consecration of the *professio iuris*, although limited to the choice of the law of nationality; and the creation of a European Certificate of Succession. With these premises, the Portuguese notary's office is involved in raising the awareness of the people who come to its services in the sense of the possibility and necessity of choosing the law (although limited to the law of nationality) that should regulate the entire phenomenon of succession, with a view to, in advance, optimizing the process of forecasting and planning the distribution of assets after their death.

One of the specialists consulted for this report stated that, in his experience, there is a growing awareness of the issue of the choice of applicable law, although he highlights the problem that every day means encountering a large number of processes that involve the application of laws with institutions alien to the Portuguese legal reality, such as some inheritance pacts that, in general, and with the exceptions described in section 3.3.2 *supra*, are not admissible in Portuguese law.

**3.3.5.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?**

There have been some difficulties in issuing the forms provided for in Commission Implementing Regulation (EU) number 1329/2017 of 9 December 2014, although I am unaware of any decision of Portuguese courts. As it deals with a subject related to the issue, the Judgment of the Court of Justice (Sixth Section) of 17 January 2019 may be of interest, which in a preliminary ruling indicates that:

"Article 65(2) of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of authentic instruments in matters of succession and the creation of a European Certificate of Succession and Article 1(4) of Commission Regulation (EU) No 1329/2014 of 9 December 2014, laying down the forms referred to in Regulation No 650/2012 must be interpreted as meaning that, for the application for a European Certificate of Succession, the use of form IV, set out in Annex 4 to implementing Regulation No 1329/2014, is optional for the acceptance of Article 65(2) of Regulation No 650/2012."

### 3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?

In compliance with the duty of notification provided for in Article 78 of the European Inheritance Regulation, the Portuguese authorities informed that, in Portugal, in addition to the Registrar responsible for inheritance proceedings, the Civil, Property and Commercial Registry Offices, the notaries would also be competent to issue the European Inheritance Certificate.

However, it is true that much of the information that must be verified by the CSE is concentrated in the Registries of Notaries ("Cartórios Notariais"), in particular, the quality and/or rights of each heir or legatee, the respective shares in the inheritance, the attribution of a specific asset or assets and the certification of the powers of certain persons to execute the testament or administer the inheritance, due to the special competence of Notaries to draw up testaments, instruments of approval, deposit or opening of closed or international testaments, public deeds of revocation of testaments and of renunciation or repudiation of the inheritance or legacy, notarial habilitations of heirs and also by the knowledge, with exclusive character, of the Legal Regime of the Partition Process ("Inventory").

### 3.3.5.7. Are there any national rules on international jurisdiction and applicable (besides the Succession Regulation) concerning the succession in your country?

On the basis of article 4.3 of the Notarial Code, it is determined that unless otherwise provided, the notary may perform, within the area of his registered office, all the acts of his competence that are required of him, even if they refer to domiciled persons or assets located outside that area, and by analogy with article 62 a) of the Code of Civil Procedure, it may be maintained that a Portuguese notary will have international competence to draw up a public deed of qualification of heirs, even if the author of the succession did not have his last domicile in Portugal.

On the other hand, under the terms of article 3.1 of the Legal System of the Inventory Process, notaries located in the municipality of the place of opening of the succession are competent to carry out the processing of the acts and terms of the process of inventory and qualification of a person as successor, by death of another, being the place of opening of the succession, the last domicile of the causer, according to article 2031 of the Civil Code.

In the event that the opening of the succession takes place outside the country, since this was the last domicile of the deceased, number 5 of the aforementioned article 3, the following points shall be observed with regard to the inventory and (judicial) qualification process provided for therein: a) if the deceased has left property in Portugal, the notary's office of the municipality where the property is located or most of it will be competent; b) if the deceased has not left property in Portugal, the notary's office of the domicile of the qualified person will be competent.

As a general rule, the international jurisdiction of the courts (also notaries) of the Member State of the last habitual residence of the author of the succession is enshrined. In accordance with Article 4 of the Regulation, jurisdiction is attributed to the entire succession.

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## Romania

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### 1. Social perspective.

#### **1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without *affectio maritalis*).**

The basic classification into unipersonal families, nuclear families and complex families applies to Romanian society as well.

In Romania the marriage continues to be an essential element in the life of the individual. It is a preferred way to start a family, given that cohabitation is not as widespread as in the other EU Member States. It is worth noting that the percentage of people who decided to cohabit remained practically unchanged from the 2002 census to the 2011 census.

On the other hand, people are getting married at older age, after completing the education process, settling in the labour market, and acquiring the material resources necessary for a decent living standard as a couple. The increase in the average age of first marriage leads to a higher age at which couples decide to have children. Implicitly it leads to a reduction of the number of years in which the birth of additional children is possible, with negative effects on the short-term fertility index.

Number of children born outside the marriage is increasing. It indicates that the decision of having children is less dependent on status of married person or societal approval. On the contrary, it is determined by criteria such as finding a suitable life partner, receiving an adequate income, having the material resources necessary for properly raising and educating children

Consensual unions and marriages between persons of the same sex are not legally recognized in Romania.

The urban/rural divide<sup>1</sup> still remains very much relevant and affects also the percentage of married people. The share of married persons is close to 50 % in the Bucharest area, while this percentage is only 46.9 % in the rural areas, mainly due to the migration of young people into the cities. There are more divorced persons in the capital area than in the rural areas. There are also more widows and widowers in the rural areas (11.2% of the total rural resident population compared to 8.0% in the urban areas).

These demographics have been largely affected by the migration flows which have affected the country for the past 15 years.

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<sup>1</sup> Radu Baetica, National Statistical Office of Romania, *Romania between modernism and traditionalism*, June 2015, available at: [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Marriages\\_and\\_births\\_in\\_Romania&oldid=400404](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Marriages_and_births_in_Romania&oldid=400404) (20.5.2019).

**1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.**

Marriage is considered to be a union between a man and a woman, who have freely consented to its celebration according to the relevant legislation.

The last territorial breakdown for marriages, carried out by registration place, dates back to June 2018.

Considering the country as a whole, the number of registered marriages has decreased from 192652 in 1990 to 142613 in 2017.

In detail, in the rural North East we have witnessed to a decline of registrations from 32696 in 1990 to 24102 in 2017. But in the Bucharest-Ilfov urban area there has been an increase in marriages from 21168 in 1990 to 27605 in 2017. The rationale behind these trends seems to lie in high emigration flows from rural areas into the capital region.

The age of the marrying parties has been rising. In 1990, 5562 marriages were registered between people below the age of 20; this number has dropped to 451 in 2017. The number of marriages between people aged 20-24 has also dropped: from 61465 in 1990 to 8723 in 2017. The highest variation was noticed in the 25-29 year old cohort: from only 6394 couples in this age group marrying in 1990, the figure rose to 22539 in 2017. 10340 couples aged 30-34 got married in 2017 compared to 3021 in 1990. The number of marriages between people aged 35-39 has seen a slight increase, from 1747 in 1990 to 4587 in 2017. These trends can be explained by the widespread social model that incentives youth to study, travel and look for a good job before settling. The number of marriages between people aged 55-59 has gone from 317 in 1990 to 515 in 2017. Marriages between parties older than 60 have dropped from 1237 in 1990 to 115 in 2017.

Less single people have decided to get married: in 1990 170567 single men got married, while this figure dropped to 122732. Similarly, only 112456 single women got married in 2017 compared to 163247 of 1990. 1131 widowers got remarried in 2017, while they had been 4072 in 1990. The widows who got remarried went from 4522 of 1990 to 1876. At the same time, we witnessed to an increase (though slight) of divorced people getting remarried: previously divorced men who remarried went up to 18750 in 2017 from 18010 of 1990. Somewhat more significant the figure for divorced women getting remarried: they were 16078 in 1990 and 19764 in 2017.

In general, the main age at marriage for men arose from 26.9 of 1990 to 33.3 of 2017, while for women it has gone from 23.7 to 30.1.

In 2017 main age at marriage remains higher for both men and women in urban areas: males tend to get married at age of 34 in urban areas and of 32 in rural ones, while women at 31 in urban and at 28.2 in rural areas. Even to this day in rural areas the social support net is stronger and allows for people to get married earlier even if they have not reached economic independence.

Romanian law does not account for same-sex marriages, nor registered partnerships, so there are no statistics about those forms of union.

**1.3. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.**

In 2016 in Romania the crude divorce rate, as to say divorces per 1,000 population per year, was 1.5, while the crude marriage rate was 6.8. In the EU-28 in 2015, according to the most recent data available for all EU Member States, the crude marriage rate was 4.3 and the crude divorce rate 1.9. Compared to EU-28, in Romania the crude marriage rate is higher, the crude divorce rate is lower. Divorce-to-marriage ratio, that compares the number of divorces in a given year to the number of marriages in that same year, in Romania was 22 in 2016.

A Civil Code reform that introduced the possibility of divorce by using a much simplified procedure was adopted in Romania in 2010. This led to an increase in the number of divorces in 2011, an



increase which, as in the case of marriages, was based on couples who had postponed divorce; subsequently, the number of divorces dropped again.

The number of divorces has not changed significantly between 1990 and 2017, although about 50000 less marriages were celebrated in 2017 (142613) compared to 1990 (192652). In 1990 there were 32966 instances of divorce, while in 2017 31147.

A similar number of previously-divorced men (about 18000) got remarried in 1990 and 2017, while the number of divorced women getting married for a second time has increased from 16078 in 1990 to 19764 in 2017.

There are no available statistics on the dissolution of other formal/informal unions, as the laws of Romania do not provide for registered partnerships.

**1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).**

As indicated above, the number of divorces in Romania has increased lately. One of the main reasons of such a trend is the split families with one spouse working abroad. Romania has an extremely high proportion of families split due to the fact that one of the spouses works abroad, it is the second country in the world right after Iran.

## *2. Family law.*

### **1.1. General.**

**2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?**

The main source of Family Law in Romania is the Civil Code (Law 287/2009, published in the official Gazette no 511 of 24 July 2009, and subsequently amended and supplemented by Law 71/ 2011, published in the official Gazette no 409 of 10 June 2011). The additional legal sources are found in law No. 273/2004 Law regarding adoptions, No. 272/2004 Law regarding children's rights protection. Rules on civil procedure are regulated by Civil Procedure Code (Law no. 134/2010, implemented through Law no. 76/2012, entered into force in February 2013).

**2.1.2. Provide a short description of the main historical developments in FL in your country.**

Until 2011, when the Civil Code was implemented, Romania followed the family code from 1954 which had not been revised for several decades. The Family Law undergone several changes between 1991 and 2011.

**2.1.3. What are the general principles of FL in your country?**

The general principles of the Family Law in Romania are:

- the principle of sheltering the family;
- the principle of freely consented marriage;
- the principle of equality between spouses;

- the principle of sheltering the superior interest of the child;
- the principle of monogamy.

**2.1.4. Define “family” and “family member” in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

(1) The family is based on the freely agreed marriage between spouses, on their equality, as well as on the right and duty of parents to ensure the raising and education of their children.

(2) The family has the right to protection from society and the state.

(3) The State is obliged to support, through economic and social measures the act of marriage, as well as the development and consolidation of the family.

(4) For the purposes of the Criminal Code, spouses are men and women united by marriage and the definition of “family member” is:

1. A member of the family represent

a) the ascendants and descendants, brothers and sisters, their children, and persons who have been adopted according to the law;

b) the husband;

c) persons who have established relationships similar to that of the spouses or that between parents and children if they live together.

(2) The provisions of the criminal law concerning a family member, within the limits provided in paragraph (1) lit. a) apply, in case of adoptions, also to the adopted person or to his / her descendants in relation to the natural relatives.

There are several different definitions for both terms, valid for different purposes, such as family law, criminal code etc.

**2.1.5. Family formations.**

**2.1.5.1. Define the “spouse” in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

In Romania, “family formation” means the spouses (man and wife) and their children.

Spouse is the woman or man united through marriage. The requirement is that spouses are of different sex. There is a single definition valid for the entire legal system.

**2.1.5.2. What types of relationships/unions between persons are recognised in FL of your country? In particular, formal (registered) and informal (*de facto*) unions, heterosexual and same-sex unions, unions with and without *affectio maritalis*. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

The only legal relationship or union between persons is marriage. The informal union does not produce legal effects. Any other formal union is not recognized.

**2.1.6. What legal effects are attached to different family formations referred to in question 2.5.?**

No effects. The informal union lasting for several years and publicly acknowledged produces the effect of parenthood in case of the father.

**2.1.7. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/*de facto* family formations? Explain briefly.**

There have been some proposals to reform the present legislation in the context of marriage and informal/*de facto* family formations, such as an initiative of recognizing same-sex partnerships.

**1.2. Property relations.**

**2.2.1. List different family property regimes in your country.**

In the Romanian system the articles 307-327 of the Civil Code<sup>2</sup> provide how the spouses can choose to adopt the communion of the assets, the separation of the assets or conventional communion. The last hypothesis is not must damage the equality between spouses, parental authority and legal inheritance. The conventional communion is an alternative to the communion of assets and it is editable. The purpose of the conventional communion is to derogate at the communion of assets or to decide about the hypothesis of divorce and so on.

**2.2.2. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?**

The ordinary patrimonial regime is the one of the legal communion of the assets. The goods acquired during the marriage will be included in the patrimonial communion as stated in article 354 of the Code Civil. Assets which are not included in the communion are disciplined in article 355; they are: the goods acquired as donation, except if it is explicitly stated that are in the communion; the goods used for personal use; the goods useful for professional purposes, the patrimonial rights derived from intellectual property and its creations and distinctive signs that he or she has registered; goods that he or she has taken as prize or reward, scientific or literary publications, projects, designs and other similar goods; insurance benefits and the restoration deriving from a patrimonial damage suffered by one of the spouses; the goods and the amount of money or of any value that substitutes the good nor the good acquired as exchange from one of those; the profits deriving from the property owned by one of the spouses. However, article 356 states that the profits derived from intellectual property are common goods, regardless of the date of acquisition and only if requested for their collecting during the marriage. At the same time, article 358 states that is important to make an inventory of all the goods, otherwise they will be included in the communion of assets.

**2.2.3. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a “new regime just for them”?**

Spouses have to choose between existing patrimonial regimes. With the conventional communion they can derogate the general discipline with the exception of acts concluded previously with the other spouse. The convention has to be done in front of a notary. If the convention is based on a secret stipulation made by the spouses, this cannot be opposed to third parties. It is also possible to

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<sup>2</sup> <http://www.dscllex.ro/coduri/civ.pdf> (20.5.2019).

stipulate a convention before marriage but its effects will be produced only upon the celebration of the marriage.

**2.2.4. Explain briefly the rules on the administration of family property and compare if there are differences for different property regimes.**

Regarding the common assets, each spouse has the right to use it, administer and purchase it independently without the consent of the other spouse (Article 345 Civil Code). Legal transactions related to the sale or imposition of weights and burdens on common assets can be concluded only with the consent of both. However, each spouse can independently dispose of the assets whose alienation is not subject to formal advertising requirements (Article 346 Civil Code). Otherwise, it is possible to cancel the legal transaction concluded without the explicit consent of the other spouse. The legal transaction related to the family house or in common between the spouses or to the house of the spouse in which the children live, are governed by a special regime. A spouse cannot independently dispose of the rights to the family home or conclude actions that affect his use, even if he is the sole owner. However, if the consent of the other spouse is refused in an unjustified manner, the family Court may authorize the conclusion of the act. The non-consenting spouse can request the cancellation of the deed if the dwelling is registered in the property registers as a family home. Cancellation may also be requested without such a requirement if the third party, the buyer, was aware of it for other reason.<sup>3</sup> Otherwise, the other spouse can only request compensation for damages (Article 322 Civil code).

**2.2.5. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

Marriage conventions must be registered in the National Registry of Marital Regimes held by the National Union of Romanian Notaries (Uniunea Națională a Notarilor Publici din România). In parallel, civil status register is kept at the institution where the marriage was celebrated, and others public registers are kept as well, depending on the nature of the assets (commercial register, real estate). A copy of the marriage agreement must also be kept at the National Registry of Marriage Regimes, at the Civil Status Register as well as at the other registries mentioned above.<sup>4</sup> A marriage agreement can be challenged by third parties only if it has been registered. The marriage agreement with which a regime other than legal communion is chosen must be authenticated by a notary, under penalty of nullity.<sup>5</sup>

**2.2.6. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

The spouses are responsible through the common assets of the common debts contracted as established by article 351 of the Civil Code. However, if the value of common assets is not sufficient to cover common obligations, the spouses are jointly and severally liable through their separate assets. The spouses are jointly and severally liable through their separate assets and the paying

<sup>3</sup> More information in: <http://www.coupleseurope.eu/it/romania/topics/2-C-%C3%A8-un-regime-patrimoniale-legale-del-matrimonio-ed-in-caso-affermativo-cosa-prevede> (23.5.2019).

<sup>4</sup> More information in <http://www.coupleseurope.eu/it/romania/topics/4-II-regime-patrimoniale-del-matrimonio-pu%C3%B2-o-deve-essere-registrato> (23.5.2019).

<sup>5</sup> More information in <http://www.coupleseurope.eu/it/romania/topics/3-Come-possono-organizzare-i-coniugi-il-loro-regime-patrimoniale> (23.5.2019).

spouse can appeal against the other spouse as well as enjoy a right of retention until compensation is granted.<sup>6</sup>

**2.2.7. Describe allocation and division of property in case of divorce, separation or dissolution of the union.**

In case of divorce the patrimonial regime is dissolved, starting from the divorce application, unless the spouses request to the Court or the authority that releases the sentence to declare the dissolution starting from the *de facto* separation (Art. 385 Romanian Civil Code). In this case, common assets are divided based on the marriage convention or, in absence, from the Court. The division can be made through a sentence or a public act by the notary (Article 320 Romanian Code Civil). In case there is a legal communion or a legal convention, the assets are divided as follows: each of the spouse receives his personal assets, the communion will be divided by the spouses and debts will be solved. The share for each part of the assets part of the communion assets and on the respect of the common obligations (Article 357 Civil Code). The job made by each of the spouses for family care and the education of the children is considered as part of the contribution of the marriage expenses (Article 326 Civil Code).

If during the division of the communion, one spouse has more assets than the other one, based on the economic impact he or she gave on their purchase, the other spouse has the right to be asked for a compensation payment. Also, if the spouse which is not responsible for the divorce is damaged from the ending of the marriage, he may ask a compensation from the other spouse. If divorce causes a serious decline of the life condition of the claimant spouse, in conjunction with the facts that marriage lasted at least 20 years and that divorce is caused only by the responsibility of the other spouse, the claimant spouse has a right to receive bigger restoration.<sup>7</sup>

**2.2.8. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation.**

In the Romanian legal system dowry is not included. Each spouse, with his/hers assets will contribute to the economic formation of the family.

**2.3. Cross-border issues.**

**2.3.1. Is your country participating in the enhance cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?**

The attitude of Romania towards the regulations adopted under the enhanced cooperation umbrella is diverse. Romania adopted the Rome III Regulation no. 1259/2010<sup>8</sup> at its birth, but it does not take part in the enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and the property consequences of registered partnerships.

The main obstacle to acceptance of the Property regulations set in Romani is in the fear that same-sex marriages would effect automatic recognition on their ground, irrespective of the fact that in

<sup>6</sup> Article 352 Civil Code. More information in <http://www.coupleseurope.eu/it/romania/topics/2-C-%C3%A8-un-regime-patrimoniale-legale-del-matrimonio-ed-in-caso-affermativo-cosa-prevede> (20.5.2019).

<sup>7</sup> Article 388 and 390 Civil Code. More information in <http://www.coupleseurope.eu/it/romania/topics/5-Quali-sono-le-conseguenze-del-divorzio-separazione> (20.5.2019).

<sup>8</sup> Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III Regulation), OJ 2010 L 343/10.

national system marriage is strictly confined to opposite sex couples. Thought the regulations do not touch upon national family law, the CJEU practice in recent Coman Hamilton judgement clarified that national concept of the “spouse” loose in cross-border cases.<sup>9</sup>  
It is not likely it would join.

**2.3.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as “marriage”, “matrimonial property agreement”, “partnership property agreement” etc.?**

Romania does not participate in enhanced cooperation concerning these Regulations.

**2.3.3. Are you expecting any problems with the application of the rules on jurisdiction?**

Romania does not participate in enhanced cooperation concerning these Regulations.

**2.3.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

Romania does not participate in enhanced cooperation concerning these Regulations.

**2.3.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

Romania does not participate in enhanced cooperation concerning these Regulations.

**2.3.6. Are there any national rules on international jurisdiction and applicable (besides the Regulations) concerning the succession in your country?**

Choice-of-law rules are part of the new Romanian new Civil Code (Arts. 2557 to 2663). Rules on the conflict of jurisdictions and international civil litigation are part of the Book VII of the new Civil Procedure Code of 2013 (Arts. 1064 to 1132).<sup>10</sup>

The connecting factors applied are rather modern. Pursuant to Art. 2589 personal and patrimonial effects of marriage are governed by the law of the state of the spouses’ common habitual residence. In the absence of common habitual residence, common nationality of the spouses is used as a subsidiary connecting factor. Al ultima, the law of the place of the celebration of the marriage is applied. Spouses are free to choose the applicable law regarding the matrimonial regime (Art. 2591). If they fail to make choice, the law applicable to the effects of marriage would apply.

International jurisdiction of Romanian authorities is prescribed by Arts. 1065 to 1081 of the Civil Procedure Act. General jurisdiction lies with Romanian courts if the defendant is domiciled in Romania when the claim is lodged (Art. 1065(1)). Exclusive jurisdiction is granted to Romanian courts in matters related to immovable property if the property is located in Romania. In terms of special jurisdiction rules over the claims in relation to rights in property arising out of a matrimonial relationship, Art. 1080(2)(2) exclusive jurisdiction to Romanian courts in matters related to legal proceedings between spouses, when both spouses are domiciled in Romania at the time of the claim, or one spouse is a Romanian citizen or a stateless person.

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<sup>9</sup> Cross-border matrimonial rights in the EU: how the notion of the supranational citizen alters the conflict of family laws, TEPSA Briefs – January 2019. <http://www.tepsa.eu/wp-content/uploads/2019/01/Maria-Breskaya-Brief-Final-1.pdf> (20.5.2019).

<sup>10</sup> Moura Vicente, D., Cotiga-Racca, A., 2017, 2442.

### 3. Succession law.

#### 3.1. General.

##### 3.1.1. What are the main legal sources of the Succession Law (SL) in your country? What are the additional legal sources of SL?

The main legal source of the Romanian succession law is the Romanian Civil Code. Succession is regulated in the fourth book of the Civil Code at articles 953 -1.163 and its existence is being protected by the Romanian Constitution at article 46.

There are also additional legal sources, but they only concern some categories of goods. Some of them regulate who is entitled to obtain the remedies due for the loss of property during the communist era (e.g. Law on the land resources No. 18/1991, Law No 112/1995 for regulating the legal situation of some dwelling buildings, which have been transferred to state ownership, Law no. 10/2001 regarding the legal regime of some immobile properties taken over by the state from 6 March 1945 to 22 December 1989) and some other regulate the unpaid wage rights due up to the date of the death of the employee or retiree or other rights arising from social security (e.g. Labour Code, Framework Law No. 284/2010 on the Unitary Salary of Paid Staff from Public Funds, Law No. 263/2010 on the Unitary Public Pension System etc.).

The Law of civil-law notaries and notarial activity No 36/1995 regulates the notarial succession procedure which is complete when the notary does issue the heir certificate which states the mode of establishing the extent of rights and serves as a proof of the capacity of heir and of the property right.

Romania is not part of any international conventions concerning succession law.

##### 3.1.2. Provide a short description of the main historical developments in SL in your country.

The law of succession contained in the Romanian Civil Code 2009 is based on those in the previous Civil Code 1864, which was largely modeled on the French Civil Code 1804.

Since the new Code has been in force only a few years from 1.10.2011, there haven't been any reforms yet.

The most important reform of the Civil Code 1864 has been the adoption of the Law No 319/1944 concerning the Inheritance Rights of the Surviving Spouse.

##### 3.1.3. What are the general principles of succession in your country?

The Romanian legal system is based on the principles of the *mortis causa*, universality, indivisibility transfer and unitary transfer of inheritance.

There're two types of succession in Romania: the intestate succession (articles 963 et seq. of the Civil Code) as succession of relatives with the possibility of succession by representation (see articles 965 et seq. of the Civil Code), and the testamentary one (articles 1.094 et seq. of the Civil Code). The rules on the intestate succession only apply, if there's no Will or if the testator didn't regulate his entire estate. However, the disposition autonomy is limited in favor of the forced heirs, which necessarily have to get a part of the estate (articles 1.086 et seq. of the Civil Code).

The succession is a *mortis causa* transmission, in the sense that successions open by the death of the natural person, and the heirs can be natural or legal persons. The rules on the transmission of inheritance patrimony apply only to the application of a *mortis causa* transmission and cannot apply to *inter vivos* transmissions.

According to the new Civil Code, the notion of inheritance is defined as the transmission of the patrimony of a deceased natural person to one or more persons in being (art. 953).

Regarding the opening of the inheritance, according to art. 954 the NCC inheritance of a person opens at the time of death.

The state collects the residuary estate of the intestate, but the legal substantiation of its right (legal or sovereign heir) remains uncertain in the NCC as well.

The succession shall be triggered by death and the inheritance shall be transmitted to the heirs who will accept the inheritance even from the date of the individual's death and as a result thereof, not from the date of acceptance.

The succession transfer is a universal transmission in the sense that the object of the inheritance is the deceased's heritage, regarded as a legal universality as a whole. The inheritance shall be passed on with the duties and obligations of the deceased's as long as they are of patrimonial nature.

The rights that are part of the inheritance are transmitted in their entirety, as parts constituting a heritage, and not in the individuality of each of them.

The acts of transmission between the living may not have as object a patrimony, while the holder of patrimony is alive, but the succession may only be transmitted after death. If a contract is concluded whereby a universal or the universal heir sells its inheritance rights, the contract shall have as its object the right of inheritance regarded in isolation, although this right is on a universality or an individual share.

The succession transmission is an indivisible transmission, in the sense that the acceptance or renunciation of inheritance by the successor must, as a matter of urgency, have as its object the entire succession or the entire part of the share that is appropriate or the whole right/good transmitted.

The indivisible character of the succession transmission derives from the indivisibility of the succession heritage which is passed on to the heirs and explains why in the event of renunciation of inheritance by one or more successors or in case of inefficiency or ineffectiveness of the Will (nullity, revocation, caducity) it will benefit the accepting successors whose vocation was removed or diminished by this Will.

By way of exception to the indivisible nature of the succession transmission, the debts of the deceased are, in relation between the heirs and their holders, divided by law between the heirs from the date of the opening of the inheritance.

Inheritance transmission is a unitary transmission in the sense that the entire patrimony of the deceased is transmitted according to the same rules regardless of the nature, provenance, origin or manner in which the rights and obligations that make up are affected, and a natural person leaves a unique inheritance and no other.

The fact that the entire patrimony of the deceased is transmitted according to the same rules regardless of the nature of the rights and obligations constituting the patrimony, means that no distinction is made as to real or debt rights, movable or immovable property.

Inheritance transmission is a unitary transmission in the sense that the same rules apply without the relevance of the origin of the rights and obligations constituting the patrimony, ie regardless of whether they come from the father line or the mother line.

The unitary character of the succession transmission also means that the origin of the rights and obligations that make up the patrimony does not matter, ie there are no special rules as they are either inherited or acquired.

The fact that the succession transmission is a unitary transmission also means that the entire patrimony of the deceased is transmitted according to the same rules regardless of the manner in which its rights and obligations are affected, ie regardless of whether they are affected by the term, condition or duty.

By way of exception to the unitary character of the succession transmission, there are situations involving the application of particular rules concerning the determination of the succession, the share of the shares, the assets constituting the quota of an heir, etc. These exceptions are known as "anomalous inheritance". Thus, the anomalous inheritance must be regarded as a legal succession to which special rules apply, by way of exception to the unitary character of the succession transmission, and this is when the succession devolution, i.e. the establishment of persons, order,



the quotas in which the transfer of inheritance takes place, shall be based on the nature, provenance, origin or modalities of which the rights and obligations constituting it are affected (we include here examples such as the right of the surviving spouse to inherit certain goods in the absence of heirs from the first class – descendants).

**3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines etc.**

The competent bodies for non-contentious succession procedures are civil law notaries, while courts of first instance are responsible for carrying out contentious succession procedures.

The heir or any other interested person may directly refer the case to the court.

The right of succession must be exercised by the heir within one year from the date of the opening of the succession.

An heir expressly accepts the inheritance when they explicitly take on the title/capacity of heir. This acceptance is tacit when it is done through a deed/action which can only be carried out in the capacity of heir (Art. 1.108 of the Civil Code).

The declaration of waiver of succession is made before a civil law notary, or before a diplomatic mission or consular representation of Romania [Article 1.120(2) of the Civil Code].

All notarial instruments referring to the acceptance or the waiver of succession are registered in the National Notarial Register for the evidence of successional options.

The notarial succession procedure is opened on request. The request is registered in the succession registry of the notary, following the registration in the succession registry in the chamber of civil law notaries. The commissioned notary verifies their territorial jurisdiction and orders the summoning of those entitled to the inheritance, and where there is a Will, it summons the legatee, executor of the Will, legal representative of the legally incapable heir, supervisory body, public administration representative (in the event of a vacant succession). The notary establishes the capacity of the heirs and legatees, the extent of their rights and the composition of the estate of the deceased person.

The number and capacity of heir and/or title of legatee is established by means of civil status acts, by will and with the assistance of witnesses. Assets are proven through official documents/any other means of proof recognized by the law.

The heir/other interested person may directly commission the competent court after submitting a notarized certificate on the verification of the succession registries. Judicial division may be carried out by agreement between the parties, or, if this is not the case, the court must establish the assets, the status of heir, share of estate, receivables, debts and obligations. The court may give a ruling concerning the restriction of excessive liberalities and the report of donations. The division of assets is carried out in kind, by means of forming lots or by conferring an asset to one of the heirs under the condition of payment of the due amounts to the rest of the heirs. The court may order the selling of the property, with the consent of the parties or by an enforcement officer through a public auction. The court decides in a ruling, and the amounts deposited by one of the heirs for the others and those resulting from the sales are divided by the court.

The notary can proceed with the liquidation of the succession liabilities with the approval of all heirs, as well as with the collection of receivables; payment of debt and liabilities; selling of movable property; execution of particular legacies.

The division of the estate between heirs is carried out after issuing the heir certificate following liquidation. The division of the estate may be voluntary. The report of donations is the obligation of the surviving spouse and the descendants of the deceased who are entitled to the legal inheritance to bring back to the inheritance the assets donated without being exempt from reporting.

The universal heir/heir under universal title who overpaid a share of the common debt has a right of recourse against the others, but only for the part of the common debt corresponding to each of the heirs, even if it had been subrogated in the rights of the creditors.

In the cross-border successions there's also the possibility to issue the European Certificate of Succession, which can be used as a proof of the quality of heir. In Romania, this certificate shall be issued by a public notary or by the court if there is a controversy.

**3.1.5. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?**

In Romania, the inheritance can be intestate (article 963 of the Civil Code) or testamentary (article 1.034 of the Civil Code). On the contrary, the succession cannot be regulated by a contract. In fact, there's a prohibition of succession agreements. Article 956 of the Civil Code provides that any agreement by which one disposes or promises to dispose of eventual succession rights or disposes of rights that can belong to him by a succession not yet opened, or renounced, such right is void.

The article 955 of the Civil Code provides that the inheritance is distributed in accordance with the legal provisions only if there's no Will or the deceased left a Will without regulating his entire inheritance. Therefore, a cumulative application of the two legal titles is possible.

The intestate succession is therefore admitted to be the norm and the testamentary succession the exception. This has important consequences concerning the interpretation and the application of Wills. At the same time, testamentary succession knows some limitations by the law. In fact, in accordance with article 1.075 of the Civil Code, the deceased cannot overrule the rights assured by the law to the forced heirs. If the deceased overrules the rights recognized to these subjects, they can bring the action of reduction, in order to get their reserved portion.

**3.1.7. Are there special rules or limitations concerning succession with reference to the deceased's (or heir's) culture, tradition, religion or other characteristics?**

The Romanian legal system doesn't follow discrimination rules based on the abovementioned criteria (culture, tradition, religion and sex).

**3.2. Intestate succession.**

**3.2.1. Are men and woman equal in succession? Are domestic and foreign nationals equal in succession? Are decedent's children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?**

A person may inherit if they exist at the moment of opening the succession procedure and/or have the capacity to receive liberalities; are entitled to a succession; are not unworthy; are not disinherited.

The person called to receive an inheritance may accept/waive the inheritance.

The Romanian Civil Code imperative conditions the right of inheritance of a person to its existence at the time of the opening of the inheritance. Thus, according to article 957 Civil Code in order to succeed the heir must necessarily be alive at the time of opening the succession. In the word of the law the heir must have inheritance capacity.

The inheritance capacity is a person's ability to be subject to the rights and obligations involved in succession, being distinct from both the ability to use and exercise capacity. Evidence is made with civil status documents.

In the case of inheritance by representation, the heir with legal vocation claims succession rights of his ascendant, deceased at the date of the inheritance. He is bound to prove not only his existence at the time of the opening of the succession, but also the fact that his ascendant did not exist at that

time. Evidence will be made of the heirs' civil status and the death certificate or the declaration of death of the representative's ascendant. The Civil Code 2009 also permits representation to be applied in the case of unworthiness of a heir, but not in the case of the heirs that have waived the succession.

In the case of inheritance by retransmission, the heir with legal or testamentary vocation survives the *de cuius* and, acquiring the succession of the latter, leaves it to his own heirs, confused with his own. In this case, the person claiming rights to succession by retransmission is required to prove both the successor capacity of their author at the time of the opening of the first succession and their own successor capacity at the time of their author's death.

The following persons have legal inheritance capacity:

a) natural persons in life at the date of the inheritance - the law does not condition the inheritance capacity of the life of the heir after the date of the inheritance; even though the heir would die immediately after the inheritance was opened, his inheritance rights are not extinguished but transmitted to his own heirs;

b) natural persons who were conceived but not born on the date of the inheritance – the Romanian Civil code (article 36) expressly assigns the inheritance capacity of the unborn child but conceived conceived but not yet born at the date of the inheritance, provided that it is born alive and in a maximum period of 300 days after the death of his parent (relative presumption of the conceiving period 180-300 days).

Man and woman are equal in succession.

Domestic and foreign nationals equal in succession – article 44 para. 2 of the Romanian Constitution. The decedent's children born in or out of wedlock are equal in succession, as are the adopted children.

Extra-marital (registered and unregistered) partners do not receive any rights in succession. At this moment, Romanian law doesn't recognize any form of registration for partners.

At this moment, according to Romanian law homosexual couples cannot marry or register so the surviving partner does not receive any right of succession.

### **3.2.2. Are legal persons capable of inheriting? If yes, on which basis?**

Currently, according to the Romanian legal system, legal persons (both approved and not approved establishments) are capable of inheriting only by a Will [article 205 para. (3), 208 of the Civil Code].

### **3.2.3 Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.**

In the Romanian legal system, the unworthiness of succession constitutes the downfall of a legal heir from the right to reap a determined inheritance, including the reserve portion of that inheritance to which he would have been entitled, as well as the revocation of the right to reap the testamentary inheritance, because he was guilty of committing a serious act, provided by law, to the one who leaves his inheritance or his memory.

The Civil Code 2009 operates a distinction between

1) *De jure* unworthiness (article 958 Civil Code). It is rightfully unworthy to inherit:

a) The criminal convicted for committing a crime with intent to kill the one who leaves the inheritance;

(b) The criminal convicted person for committing, before the opening of the inheritance, of a crime with the intention of killing another successor who, if the inheritance had been opened at the time of the offence, would have been removed or restricted the vocation to Inheritance of the perpetrator.

2) Judicial unworthiness (article 959 Civil Code). It may be declared unworthy to inherit:

(a) The convicted criminal person for committing, intentionally, against the one who leaves the inheritance, serious physical or moral acts of violence or, where appropriate, acts which have resulted in the death of the victim;

- b) The person who, in bad faith, hid, altered, destroyed or falsified the Will of the deceased;
- (c) The person who, by violence, prevented the one who leaves the inheritance to draw up, amend or revoke the will.

According to the article 961 of the Civil Code, the future deceased may release a person from his condition of unfitness.

**3.2.4. Who are the heirs ex lege? Are there different classes of heirs ex lege? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?**

Pursuant to article 963 of the Romanian Civil Code, in intestate succession the inheritance devolves on the spouse, descendants, ascendants, collaterals, in the order and according to the rules established in the articles 970 et seq. of the Civil Code:

The inheritance passes to the legal heirs, namely the surviving spouse and relatives of the deceased in the following order:

- 3.1. descendants – first order of heirs;
- 3.2. ascendants and privileged collateral relatives – second order of heirs;
- 3.3. ordinary ascendants – third order of heirs;
- 3.4. ordinary collateral relatives – fourth order of heirs.

Descendants and ascendants are entitled to the inheritance regardless of their degree of relationship to the deceased, while collateral relatives are entitled thereto up to the fourth degree.

Only descendants of the children of the deceased and descendants of the siblings of the deceased may take part in the inheritance by right of representation. In case of representation, the inheritance is distributed according to parental line. If a line has more than one branch, subdivision takes place within the line, equally dividing the due portion of the inheritance.

The surviving spouse participates in the succession together with any of the orders of legal heirs according to the following proportion:

- 3.5. 1/4 of the estate, if the remainder passes to the descendants;
- 3.6. 1/3 of the estate, if the remainder passes to the privileged ascendants and privileged collateral relatives;
- 3.7. 1/2 of the estate, if the remainder passes either to the privileged ascendants, or the privileged collateral relatives;
- 3.8. 3/4 of the estate, if the remainder passes either to the ordinary ascendants, or to the ordinary collaterals.

The surviving spouse is entitled to the right to reside in the marital home and may also inherit the household furniture and common household appliances.

Descendants, the children of the deceased and their direct descendants exclude any other type of heirs and are entitled to the inheritance in the order of the proximity of the degree of relationship. If the surviving spouse stands to inherit, descendants collectively receive 3/4 of the inheritance.

The privileged ascendants are the father and the mother of the deceased, with the inheritance due to them to be divided equally.

The privileged collateral relatives are the siblings of the deceased and their descendants, up to the fourth degree.

If the surviving spouse participates in the inheritance together with both privileged ascendants and privileged collateral relatives, the portion due to the second order of heirs is 2/3; the portion due to the second order of heirs is 1/2 if there are privileged ascendants or privileged collateral relatives, but not both.

The inheritance due to the privileged ascendants and privileged collateral relatives is divided between them depending on the number of privileged ascendants. If there is a single parent, they will collect 1/4, while privileged collateral relatives are entitled to 3/4. If there are two parents, they will jointly collect 1/2, while the privileged collateral relatives are entitled to the remaining 1/2.

The inheritance of the privileged collateral relatives is equally divided between them or, if they take part in the inheritance by right of representation, between parental lines. In the case of different collateral relationships, the inheritance shall be divided equally between the maternal and paternal line, with the application of the previous rules. Collateral relatives who are related to the deceased on both lines shall receive cumulated portions.

### **3.2.5. Are the heirs liable for deceased's debts and under which conditions?**

According to article 1.155 para. (1) and (2) of the Civil Code, universal heirs and universal title heirs shall contribute to the payment of the debts and duties of the inheritance proportionately to the inheritance quota which rests with each other.

Acceptance of the succession strengthens the transmission of the inheritance made right at the time of death. Legitimate heirs and universal or universal title heirs answer for the debts and tasks of the inheritance only with the assets of the succession heritage, in proportion to the share of each.

Prior to the succession, creditors whose claims originate from the preservation or administration of the assets of the inheritance or were born before the opening of the inheritance may ask to be paid from the assets in the indivision. They may also request seizure proceedings of these goods.

As a rule, the transmission of liabilities takes place within the universal or universal title transmission. By way of exception, the legatee (a particular successor in title) may be obliged to contribute to the cover of the liabilities in the following cases:

- a) The legatee with obligation (which has patrimonial content) – in the event that it accepts the legatee, is obliged to execute the task;
- (b) The legatee which has as its object inheritance rights on a patrimonial universality of an open, but unbound inheritance;
- c) The legatee which has as its object a mortgage property – by paying the mortgage, it shall be subrogated to the payer of the paying creditors, and by means of the regression action he may recover the payment made for the universal succession required to bear the liabilities;
- (d) The legatee of *usufruct* (life interest) with universal or universal title -the legatee shall be obliged to pay the debts and duties relating to the patrimony or heritage fractions which are the subject of its right as a owner, and not as heir.

The succession debts are distributed by law between the co-heirs corresponding to each person's hereditary share since the opening of the succession.

### **3.2.6 What is the manner of renouncing the succession rights?**

The Romanian Civil Code confers a choice of whether or not to accept an inheritance.

Renunciation of inheritance is not presumed, except for the assumption of renunciation. The declaration of renunciation shall be made in authentic form to any public notary or, as the case may be, to the diplomatic missions and consular offices of Romania under the conditions and limits provided by the law. For informing third parties, the waiver declaration shall be entered, at the expense of the renouncer, in the notarial national register, kept in electronic format, according to the law – article 1.120 para. (3) Civil Code.

The successor who renounces is considered to have never been a heir. His part benefits the heirs he would have removed from the inheritance, or those whose part would have diminished if he accepted the inheritance.

It is presumed, until the contrary evidence, that it renounced the inheritance the successor who, although he knew the opening of the succession and his quality, did not exercise his right of succession, by accepting his inheritance or by express renunciation to inheritance within the one-year period referred to in article 1.103 Civil Code.

### **3.3. Disposition of property upon death.**

### 3.3.1. Testate succession.

#### 3.3.1.1. Explain the conditions for testate succession.

According to art. 1.034 Civil Code, the Will is defined as the unilateral, personal and revocable act whereby a person, called testator, disposes, in one of the forms required by law, for the time when he will no longer be alive.

According to the Romanian legal system, a Will can only be drawn up in ways expressly regulated by the Civil Code.

The Romanian system is characterized by a rigorous formalism, necessary to guarantee the origin of the document by the testator, in order to ensure the authenticity of the origin of the declaration by the *de cuius*.

In this context of strict testamentary formalism, other forms of the Will like the oral Will or the digital Will have no place.

Joint Will and an agreement as to succession are prohibited by Romanian law.

A Will may be of the following types: authentic Will and holographic Will.

#### 3.3.1.2. Who has the testamentary capacity?

The condition of the capacity to dispose by liberalities must be fulfilled on the date on which the holder expresses his consent. The condition of the capacity to receive a legate must be fulfilled at the time of opening the testator's inheritance.

The devoid of exercise capacity (less than 14 years old/or under court order) or having restricted exercise capacity (between 14 and 18 years old) may not dispose of its goods by means of liberalities [art. 988 para. (1) Civil Code]. Under the penalty of relative nullity, even after acquiring the full capacity of exercise, the person may not dispose by liberalities for the benefit of his or her lawful representative or legal guardian before he has received discharge for its management from Guardianship Court. Exceptions are the situation where the representative or, where applicable, the legal guardian is the ascendant of the disposition [art. 988 para. (2) Civil Code].

#### 3.3.1.3. What are the conditions and permissible contents of the Will?

According to the dispositions of article 1.035 Civil Code the Will contains provisions relating to the inheritance patrimony or to the goods belonging to it, as well as to the direct or indirect designation of the legatary. Together with these provisions, or even in the absence of such provisions, the Will may contain provisions relating to the settlement, revocation of previous testamentary provisions, disinheritance, appointment of executors of wills, tasks imposed to legataries or legal heirs and other provisions which produce effects after the death of the testator.

The Will contains provisions concerning the designation of the (in)direct legatee, partition, disinheritance, appointment of executors of the will, responsibilities, revocation of legacies etc.

The provisions regarding the transfer of the estate/assets of the deceased are called legacies. Legacies are universal or under universal/particular title. The universal legacy confers rights to the whole inheritance, while legacy under a universal title confers rights to a fraction thereof.

The testator can also provide the disposition with regard to the ordinary substitution. The testator can in fact substitute another person for the instituted heir in case the latter cannot or will not accept the estate. The fiduciary substitution is allowed, but only the one that is not gradual (articles 994 et seq. of the Civil Code).

Romanian law also allows for the Will to cover non-patrimonial matters. A Will is valid even when the content is entirely non-patrimonial.

**3.3.1.4. Describe the characteristics of Will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a Will?**

A holographic Will is written, dated and signed by the testator, and before execution, it is presented at a civil law notary in order to be duly stamped and validated.

An authentic Will is executed by a civil law notary or by another person vested with public authority. The testator dictates it to the civil law notary, who will write it down and read it out to them, mentioning these formalities. In the event that the Will has been already drafted by the testator, it is read out by the civil law notary, and after reading, the testator declares that it represents his last Will. The Will is signed by the testator, while the conclusion of authentication is signed by the civil law notary. During the authentication, the testator may be assisted by one or two witnesses.

Privileged wills made in special situations by certain serving officers, assisted by two witnesses, have the evidentiary effect of the authentic instrument.

In case of amounts of money to be bequeathed to specialized institutions, the specific formal conditions established by the relevant special acts must be met.

**3.3.1.5. Is there a (public) register of Wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

According to article 1.046 of the Civil Code for the purpose of informing persons justifying the existence of a legitimate interest, the notary who authenticates the Will has the obligation to register it immediately in the national Notarial Register held in electronic form, according to the law. Information on the existence of a testament may be given only after the death of the testator.

**3.3.2. Succession agreement (negotia mortis causa). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.**

In principle, no other ways to dispose of property upon death are permitted by Romanian law (article 956 of the Civil Code). As an exception, article 333 of the Civil Code statutes that by matrimonial convention, it may be stipulated that the surviving spouse shall take over without payment, before the division of the inheritance, one or more of the common properties held in deed or co-ownership. The „preciput” clause may be stipulated for the benefit of either spouse or only in favour of one of them.

**3.3.3. Are conditions for validity of Wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

There is a mix of conditions regarding both the Will as a legal act and specific articles of the Civil Code which cover inheritance, especially article 1.034 of Civil Code et seq.

**3.3.4. Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

The law protects certain categories of family members (forced heirs), guaranteeing them a fixed proportion of the inheritance even if this goes counter to the wishes of the deceased. These forced heirs are the spouse, the heirs form the first class and, in the absence of the above, the privileged ascendants (only the parents).

According to art. 1.088 of the Civil Code the inheritance reserve of each forced heir shall be half of the inheritance quota which, in the absence of liberalities or disinheriting, would be due to him as a legal heir.

### **3.3.5. Cross-border issues.**

#### **3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?**

There are no relevant Court decisions concerning the Succession Regulation (EU) No. 650 of July 2, 2012.

#### **3.3.5.2. Are there any problems with the scope of application? Are there any problems concerning the application?**

As to this date, there are no relevant questions concerning the application of the Regulation.

#### **3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country have experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?**

There are no known court decisions concerning the application of the rules on jurisdiction.

#### **3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?**

As to this date, there are no relevant questions concerning the applicable law. Moreover, getting to know the content of the foreign applicable law seems to be the problem for the public notary.

#### **3.3.5.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?**

There is no information available. Public policy could be invoked *e.g.* if the applicable law has foreseen a discrimination based on various reasons such as same sex marriage.

#### **3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?**

There is no information available concerning this type of problems.

#### **3.3.5.7. Are there any national rules on international jurisdiction and applicable (besides the Succession Regulation) concerning the succession in your country?**

The Civil Code disposes in article 1.633 and seq. rules on the applicable law concerning the succession.

Thus, inheritance is subject, in the case of movable goods, wherever they may be, to the national law of the deceased person at the time of death; in the case of immovable property and the fund of commerce, the laws of the place where each of these goods is located. The testator may submit the inheritance of his property to another law without having the right to remove his imperative provisions.



The law applicable to the inheritance establishes in particular:

1. the moment of opening the inheritance;
2. the persons with the vocation to inherit;
3. the quality required to inherit;
4. the exercising possession of the assets remaining from the defunct;
5. the conditions and effects of the succession option;
6. the extent of the heirs' obligation to bear the liability;
7. the rights of the state over the succession.

The making, modification or revocation of the will shall be deemed to be valid if the act complies with the applicable form conditions either at the time when it was drawn up, modified or revoked or at the time of the testator's death under any of the following laws:

1. the testator's national law;
2. the law of his / her domicile;
3. the law of the place where the act was drawn up, modified or revoked;
4. the law of the status of the building that is the object of the Will;
5. the law of the court or body performing the procedure for the transfer of inherited property.

However, these provisions shall apply only in so far as they are not incompatible with the Succession Regulation (EU) No. 650 of July 2, 2012.

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## Slovakia

Bronislava Pavelkova

### 1. Social perspective.

**1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without affectio maritalis).**

- I. Nuclear Family
- II. One Parent Family
- III. Step Family
- IV. Multi-Generational family
- V. Single-Person Household
- VI. Common household of non-married people
- VII. Childless Couples
- VIII. Family where one or more members are living separately

**1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.**

(**Dependent children** – aged 16 or less and students of high schools, universities and people living in the same household aged 25 or less who defined their relationship to the family breadwinner as son/daughter). We have to mention that gay marriages and adoption are not supported by Slovak legal system and therefore are not included in this list as there is no way of getting statistics on gay people households and they are not able to raise children

**Total amount of households in Slovak Republic: 2 064 635**

Divorced – 9618 in 2017, overall (7,6% of the population)

Widowed – 7,2% of the population

Single people (non-married) (42,3%)

Married – (41%)

- I. Nuclear Family with dependent children (Including step-family) – 576 828
- II. Nuclear Family without dependent children (Including step-family) - 503 030
- III. One Parent Family with dependent children- 163 749
- IV. One Parent Family without dependent children – 167 775
- V. Grandparent Family – even though we don't know the exact number of multi-generational families in Slovakia we can assume that it is quite low based on the statistics of amount of people living in one household, if we expect that multi-generational families will most likely have 4+ people living in one household (ca. 25%) and there is a big percentage containing families of 2 parents and two or more children, if we take only households with 5+ members (less than 9%) which still doesn't include only multi-generational families.

**1.3. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.**

Divorced – 9618 in 2017, overall (7,6% of the population)

Widowed – 7,2% of the population.

**1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).**

No such data found available.

## **2. Family law.**

### **2.1. General.**

#### **2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?**

The very first internal source of family law is **the Constitution**, specifically Article 41, dedicated to the protection of family. Under this article is marriage “an unique community of one man and one woman”. Marriage, parenthood and the family are under the protection of the law. The special protection of children and minors is guaranteed. Children born in and out of wedlock enjoy equal rights. Child care and upbringing are the rights of parents; children have the right to parental care and upbringing. Parents’ rights can be restricted and minors can be separated from their parents against their will only by a court ruling on the basis of law. Parents caring for children are entitled to assistance from the state.

For family law, in particular Article 125 of the Constitution is important, which regulates the competence of the Constitutional Court on the field of constitutionality of laws.

**The Act on the Family** (Act No. 36/2005 Coll.) is effective from 1 April 2005. Relationships between spouses and between parents and children are the topics that Slovak family law focuses on. Other family relations are marginalized. The Act has got five parts:

- Relationships between spouses (§§ 1–27).
- Relations between parents, children and other relatives; including substitute care (§§ 28–61).
- Maintenance (§§ 62–81).
- Filiation and Adoption (§§ 82–109).
- Final, Common and Repealing Provisions (effectivity and relation with other civil sources of law – §§ 110–120).

**The Act on the Socio-legal Protection of the Children and the Social Tutorship (Act No. 305/2005 Coll.)**

**The Act on the Name and Surname No. 300/1993 Coll.**

**The Act on the Civil Registries No. 154/1994 Coll.**

#### **2.1.2. Provide a short description of the main historical developments in FL in your country.**

Slovakian family law has its origins in the law of Kingdom of Hungary, which was mostly unwritten law. Until 1949 it has not been changed at all. Sequentially since 1918 some questions on the field of family law were united in the whole newly formed Czechoslovak Republic. The first Family Law Act made in the whole republic was an Act known as the Marriage Act (No. 320/1919 Coll.) Adoption Act No. 56/1928 was adopted as well. The second stage of Slovak family law history started in 1949, after the change in political system of the country. New Family Law Act (No. 265/1949 Coll.) was adopted. Family law became a new department in law.

After the changes in Constitution in 1960 was made the new Act on the Family (No. 94/1963 Coll.). In 1963 the issue of property relations inside a marriage was taken out from family law. As (for family

law) unacceptable property relations were moved to the Civil Code, where (mainly) under the 2nd Part called 'Rights in rem' represent a form of co-ownership. The Family Law Act No. 94/1963 Coll. does not apply anymore, because it was changed by the new Family Law Act in 2005.

Under No. 36/2005 Coll. a new Act was accepted. It completed the forms of substitute care for the child by considering foster care in the law-book as well. This new Family Law Act has been changed many times in the past 13 years. It was changed four times by the law because it was considered to be against the Constitution, especially an exact international convention. In such a case, the Constitutional Court decides on the petition within the period laid down by law; if the Constitutional Court by its decision expresses that the international treaty is not in compliance with the Constitution or a constitutional law, such international treaty may not be ratified. If this six-month term is unnecessary, the Act which is against the Constitution loses its validity. The Family Law Act was changed seven more times (201/2008 Coll.; 217/2010 Coll., 125/2013 Coll.; 124/2015 Coll.; 160/2015 Coll.; 175/2015 Coll.; 125/2016 Coll.). Last changes were related to the new procedure codes (CDPC, CNPC, APC), which come into force on 1 July 2016.<sup>1245</sup>

The only one Constitutional change regarding to family law matters (Art. 41) was made in 2014. Former form of Constitution in its Art. 41 Sec.1 only described, that matrimony, parenthood and family shall be protected by the law. Special protection of children and minors shall be guaranteed. Like this, our supreme law, has existed since its establishment (1.9.1992) until 1 September 2014<sup>1246</sup>, when the definition of marriage, as a legal unique relationship between one man and one woman, was amended to Art. 41. It was a reaction on evolvement in European Union, mostly within the context of decision of the European Court of Human Rights, known as X and Others v. Austria.

### 2.1.3. What are the general principles of FL in your country?

1. Marriage is an unique community of one man and one woman, whose main purpose is foundation of family and proper upbringing of the children.
2. Both parties are free to decide whether to enter into marriage and to choose their partner.
3. Both spouses have equal rights and duties.
4. The society protects marriage and helps in its good.
5. Family founded by marriage is a basic cell of the society. But the society is obliged to protect all the forms of families, not only those, based on marriage
6. Marriage, parenthood and the family are under the protection of the law.
7. The special protection of children and minors is guaranteed. The best interest of the child is the main principle of family law
8. Children born in and out of wedlock enjoy equal rights.
9. Child care and upbringing are the rights of parents; children have the right to parental care and upbringing. Parents are entitled to educate their children in accordance with their own religious and philosophical beliefs and consider it their duty to keep their family peaceful and safe.
10. Parents' rights can be restricted and minors can be separated from their parents against their will only by a court ruling on the basis of law.
11. Parents caring for children are entitled to assistance from the state. Parenthood is an extremely appreciated mission of man and woman, so the society guarantees to the parents not only protection, but also needed assistance, especially by material support and help by their exercise of parental rights and duties.
12. Solidarity - all the family members are obliged to help each other and with their personal possibilities and abilities provide for the increasing of the family's material and cultural standard of living, according to his/her options, capabilities and financial status

<sup>1245</sup> Pavelková, B. Slovakia (Family and succession law). Alphen aan den Rijn, The Netherlands : Kluwer Law International, 2014. ISBN 978-90-654-4888-0.

<sup>1246</sup> Act. 161/2014

13. The care for household and children upbringing is made equal to ensuring material welfare of the family.

**2.1.4. Define “family” and “family member” in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

There is no definition of family or family member(s) in Slovakian family law and in Slovakian law as well. Civil Code as the main source of Civil law contains only how to determine degrees of affinity between relatives and the definition of close persons, which are stated in the §§ 116, 117. Especially the definition of close people is often used in laws (e.g. § 140 CC). Close people are considered all the direct relatives (ascendants and descendants), a sibling and husband; other people in a family or parallel relationships are considered as close one to another, if one person would be harmed as if one person suffered a harm the other person took as his own. Succession law uses also the term “cohabitants of the legator”, defined as persons who lived with the deceased in the same household and who for that reason, took care of the common household or were depended on the legator.

**2.1.5. Family formations.**

**2.1.5.1. Define the “spouse” in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

Marriage in Slovakia is, explicitly understood in the Constitution, as a legal relationship between one man and one woman. Relationship between spouses are created by a free decision of a man and a woman made in the form stipulated by statute.<sup>1247</sup> The purpose of marriage is to create a harmonious and permanent community, guaranteeing a due upbringing of the children. There are no other definitions of spouses or marriage in Slovak legal order.

**2.1.5.2. What types of relationships/unions between persons are recognized in FL of your country? In particular, formal (registered) and informal (de facto) unions, heterosexual and same-sex unions, unions with and without *affectio maritalis*. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

Slovak legal order does not know yet a similar legal institute, which would in some way legalize legal relationship like marriage for two people of the same gender. Similarly, it does not specifically protect cohabitation (regardless of gender of the cohabitants). Certain partial rights can be found in the legislation of some private law relations, but not for public law reasons.

**2.1.6. What legal effects are attached to different family formations referred to in question 2.5.?**

Cohabiting persons (regardless their gender) have some rights (succession, transition of the tenancy of the flat), but when comparison with their position spouses, then are cohabitants always less protected. Adjustment of their relations law leaves to the will of the parties (e.g., adjustment of the Civil Code about innominate contracts or the will by succession). Content of rights and duties of the spouses, however, is clearly given by law mainly in terms of their personal, property-personal and not property relations. Cohabitation of persons is always less protected than a spouse or children.

<sup>1247</sup> JANČO, Milan. et al. *Introduction to Slovak Civil Law*. Plzeň : Aleš Čeněk, 2010, p. 51.

Their condition (e.g. in succession) is only supportive. According to the law there is possibility of succession only if a legator did not have any children. When proxy for each other, no legal proxy is possible, they need delegation of powers. They are not automatically informed about health condition of their partner (e.g. hospitalization) and also have no access to state benefits and allowances.

**2.1.7. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/de facto family formations? Explain briefly.**

Since the establishment of sovereign Slovak Republic in 1993, there have been two attempts to legalize, or at least to establish in certain form institute “registered partnership” for the same-sex couples in our legal order. Both of these attempts ended in development phase of law without being presented in legislative process. In 2000, Slovak public opinion was literally indignant with the proposal of this institute and its arrangement in preparing Civil Code (that still is not enacted),. To be specific, registered partnership had to be amended in its second part, titled Family Law as a section V. Registered partnership should have been made by contract between two natural persons of the same gender, older than 18 years of age. The aim of this contract should have been to create the life and property union. The contract had to be made in a form of notary memorandum registered in personal register.

In 2012-2013 the work on the new Civil Code was renewed. Amending registered partnership in a part of family law did not cause any protests. Relatively conservative Slovak society within more than 10 years, has managed to process this novelty and accept, that two persons of the same gender, will have partnership institute similar to a marriage. However, during legislation work the European Court of Human Rights decreed in case X. and Others v. Austria. This resolution influenced further law evolvement of the same gender partners in Slovak Republic. The idea, of state allowing persons of the same gender adopting minors, Slovak society declined. Government coalition rarely (and very fast) agreed on changes in Constitution by amending sentences: Marriage is a legal relationship between one man and one woman. Slovak Republic broadly protects marriage and helps its well-being, in article 41.

**2.2. Property relations.**

**2.2.1. List different family property regimes in your country.**

Property rights and duties of spouses (undivided co-ownership and common lease of flat) are regulated by the Civil Code. The undivided co-ownership is stipulated in §§ 143–150 and the common lease of flat in §§ 703–711 of the Civil Code.

The regulation of joint property of spouses is based on statutory and contractual regime. Statutory regime arises by operation of law by the entering into a marriage. It cannot be excluded before wedding, nor by a contract, neither by a decision of any state authority. Statutory regime is called ‘undivided co-ownership of spouses’. This regime can be changed on contractual regime during marriage by an agreement of the spouses, which requires to be made in the form of a notarized protocol.

The content of marital agreement is limited by law. Spouses are entitled:

- to extend the scope of undivided co-ownership determined by a statute;
- to restrict the scope of undivided co-ownership determined by a statute;
- to change the rules of property administration;
- to postpone establishment of undivided co-ownership until the moment when the marriage terminates.

**2.2.2. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?**

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Continually during the marriage, there exists the exclusive property of each spouse and the joint property of spouses.

Undivided co-ownership includes property acquired by any of the spouses or by both of them during marriage (not the property acquired before wedding), excluding:

- property acquired by succession
- property acquired by donation
- property intended for personal use or profession of only one spouse
- property acquired by restitution, unless the property was given back to both spouses as to the original owners (already obsolete).

Earnings of the exclusive property (interest of money, rent for the apartment) however belong to the common property.

**2.2.3. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a “new regime just for them”?**

No, spouses may not conclude matrimonial property agreements.

**2.2.4. Explain briefly the rules on the administration of family property and compare if there are difference for different property regimes.**

Both spouses are entitled to use all property in undivided co-ownership. If one of them is excluded from using the whole property or a part of it (or some specific thing), the court will decide upon the petition of him/she and divide the using-time equally between spouses.

Both spouses are obliged to cover the costs related to the use and maintenance of their common property. But – already disbursed incomes of each spouse create the common property as well. So if only one of spouses pays these costs, there is no possibility to ask the other one for recovery of them or of half of them.

Usual juridical Acts related to common property may be made by any of the spouses; in other cases, the consent of both spouses is required, otherwise the juridical act is voidable. Juridical Acts related to common property create solidary obligations of both spouses.

There is possibility to change the rules of property administration in a form of marital contract.

**2.2.5. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

No, Slovakia does not have such a public register. There are some conditions for validity of these contracts in the law:

- they should be done in a form of notarial record,
- if they are about the real-estates, they have to be intabulated into the evidence of real-estates (then they are presumed to be known).



**2.2.6. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

The marital agreement does not affect third persons, who do not know about it.

Only debts, taken by both spouses during marriage are considered community debts. In case of only one spouse being a debtor is important, what are the debts caused by. When the debtor used money for common property, then he/she has right to ask to be given back whole amount invested from his "own" property (his/her own debt) into common property. This right arises only with termination of undivided co-ownership.

**2.2.7. Describe allocation and division of property in case of divorce, separation or dissolution of the union.**

Undivided co-ownership can be settled by:

- an agreement;
- decision of the court;
- statutory presumption.

Agreement: The spouses can mutually agree, when they factually divide movable assets and they use them on their own needs. If things, that are registered in the property register, are objects of the agreement, then it must be written and for formation of the legal effects in rem the agreement must be given into the register (§ 149a CC). Otherwise the ownership right does not arise, neither is cancelled. The intabulation into the register has the constitutive effects.

Judicial decision: is eligible when the spouses cannot agree and one of them gave a petition to the court. A petition can be given in three years after the termination of undivided co-ownership. When making a settlement, the court is bound by the principles which are in § 150 CC. It cannot ignore them, not even in those cases, where the court by their filling has to exceed the claim. There is an exception made here from the rule, that the court is bound by the proposal, because its obligation to decide some way, stipulates the substantive law.

Statutory presumption: stands, if during three years after termination of undivided co-ownership no agreement is reached and any of the spouses requests a court to decide on the settlement, then each of them becomes an owner of those movable properties, which he uses on his own needs and for members of his family and household. The immovable property and other movable property, which both of them use, become their divided co-ownership, while they both own the same part of them.

**2.2.8. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?**

Slovak law does not have special rules about the culture, tradition, religion or other characteristic of spouses. Dowry is not regulated by law as well.

**2.3. Cross-border issues.**

**2.3.1. Is your country participating in the enhance cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?**

Slovakia does not participate in these Regulations and all the issues concerning to matrimonial property regimes are still regulated by Slovakian private international law (Act Nr. 97/1963 Coll.). The jurisdiction of Slovak court is given only if the defendant has in Slovakia his/her permanent residence

or property. I do not know the reason why we are not participating in case of Regulation Nr. 1103/2016. The second one Regulation (1104/2016) is concerning to registered partnerships and how already mentioned below, our law does not regulate registered partnerships at all.

**2.3.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as “marriage”, “matrimonial property agreement”, “partnership property agreement” etc.?**

Slovakia does not participate.

**2.3.3. Are you expecting any problems with the application of the rules on jurisdiction?**

Slovakia does not participate. Even if it did it would be difficult to predict. However, some difficulties might be expected because it has been known to happen before when in similar cases new rules were supposed to be applied in practice.

**2.3.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

Slovakia does not participate.

**2.3.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

Slovakia does not participate.

**2.3.6. Are there any national rules on international jurisdiction and applicable (besides the Regulations) concerning the succession in your country?**

Act Nr. 97/1963 Coll. on International Private Law.

### **3. Succession law.**

#### **3.1. General.**

**3.1.1. What are the main legal sources of Succession Law (SL) in your country? What are the additional legal sources of SL?**

The most important source of Succession law is the Constitution providing the right to own property to everyone. The ownership right of all owners has the same legal content and protection. Inheritance is guaranteed (Article 20). The right to inherit – as well as the right to own property – is similar to basic human laws. Succession law is found more specifically in Civil Code, where it has its own part Nr. 7. Succession proceeding is a non-dispute proceeding laid down in part 2. head 2. Civil Non-dispute Procedure Code (Act. No. 161/2015 Coll.) titled as Proceeding in Succession-Law Matters.

**3.1.2. Provide a short description of the main historical developments in SL in your country.**

Until 1950 only the Kingdom's of Hungary's law was valid. There were some specific questions, changed later with the Civil Code from 1950. E.g. it was possible to leave just a bequest, when only one thing was given and the consignee was not responsible for any duties from the heritage, as the heirs were. The groups of statutory heirs changed with time. Until 1950 they were very complicated.

To choose the right form depended on many factors as whether or not the testator had children or was married, when he died, as well as if he was a lord or not.

Since 1950 only universal succession is applied to all the heirs - the heirs get from the heritage the same amount of actives as passives. Debts of a testator were required to be paid only up to the value of inheritance and the heir was obliged to take care of the funeral of the testator. The law stopped the patrimonial contract as a title to inheritance and it was forbidden to gift something for the case of death. Statutory succession was preferred. There were two groups of statutory heirs. In the first group the children of the testator (also those born out of wedlock) were heirs and the husband/wife of the testator. The husband/wife could not inherit alone in the first group, so in case, there were no children of testator, he/she inherits in the second group, where were also the testator's parents and people, who lived with the testator in the moment of his death.

Civil Code from 1964 stayed this concept of succession. Small changes were made to expand the groups of statutory heirs. One more group was added. Disinheritance came back to law in 1982. In 1991 the fourth group was introduced, as well as the holographic will. The system of compulsory share for the full age heirs was changed from three-fourth to half of their statutory part of the heritage. The succession law is still applied in Slovakia in this form. It is the most stabile part of our civil law for sure.

### **3.1.3. What are the general principles of succession in your country?**

These principles are:

- universal succession (actives and passives are transferred to the heir of the deceased as an inseparable whole);
- the inheritance is on the death of the testator (delational principle);
- accretion (accretion of released hereditary shares to heirs at law);
- hereditary representation (if any heir does not inherit by law, the heir's descendants supersede).

### **3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.**

Succession proceeding is specifically regulated in §§ 158-219 of Civil Non-dispute Procedure Code (Act. No. 161/2015 Coll.). It starts *ex officio* or on the request by the party (§ 174). The first instance court is the district court. The court delegates selected notary to perform notary acts in succession proceedings. The notary has the status of a court commissioner. The public notary by an investigation determines the heirs circuit, circuit of participants in the proceeding, the assets of the deceased and whether the deceased left a will or not checking out the notarized central register of wills. But there is no obligation to register a will, so there may be also found a will that was saved elsewhere.

Notary shall notify the heirs of their succession law and on the possibility to refuse heritage. This can be done within one month from the date when the court has informed the heirs about their right to heir. The hearing is not public, only the participants of the proceeding are allowed to be present there. Such a hearing is not prescribed, if there is only one heir or when the heritage is accounted to the state. If there arises any disagreements about succession they are decided by the court, not by the notary. If the deceased did not settle the undivided co-ownership with his/her spouse, it is settled by the notary, if the heirs are able to agree with the spouse of the deceased. If the heirs and the surviving spouse cannot agree, the court will decide on the settlement.

The succession proceeding may end by:

- being stopped, if the deceased did not leave any property or if he left negligible property; and the court has issued it to the person who managed the funeral;
- confirmation all inheritance to the only one heir;
- confirmation that the all inheritance passed to the state;

- approving the heritage agreement made by heirs;
- approving an agreement between heirs and creditors of the deceased how to use the inheritance to cover the debts;
- confirmation of inheritance according to the shares of heirs (if no agreement is reached, the court will confirm inheritance of the heirs whose right of inheritance is established according to their inheritance shares, if the heirs did not agree or if the court did not approve their agreement).

**3.1.5. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?**

It is possible to inherit either by a will or by law. The both reasons can be combined. Even the same person may concurrently inherit part of the estate by law and another part by the will. In inheritance, the will of the testator is preferred, therefore the will prevails over the law as a heritage title, with only one limitation.

**3.1.6. What happens with the estate of inheritance if the decedent has no heirs?**

The heritage is passed to the state, which is even liable for the debts of the deceased like the heirs are.

**3.1.7. Are there special rules or limitations concerning succession with reference to the deceased's (or heir's) culture, tradition, religion or other characteristics?**

No.

**3.2. Intestate succession.**

**3.2.1. Are men and women equal in succession? Are domestic and foreign nationals equal in succession? Are decedent's children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?**

All people are equal before law. Discrimination is strictly prohibited. Children born in and out of wedlock enjoy equal rights. Adopted children enjoy the same rights as the biological children of the decedent. Also a conceived child (*nasciturus*) has the capacity to heir, if it was born alive after decedents' death. We do not have registered partnership.

**3.2.2. Are legal persons capable of inheriting? If yes, on which basis?**

Legal person possessing the capacity to have rights and obligations can inherit, but only on testamentary basis. A legal person must actually exist at the time of death of the testator. The state is under civil law understood as a legal person and it may also inherit (§ 21 Civil Code).

**3.2.3. Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.**

Yes, Slovak law has such an institute named "incapable heir" under § 469 Civil Code. This is the heir, which by his own fault actions did exclude himself from succession. It arises from two reasons:

- if a heir commits an intentional offence against the decedent, his/her spouse, children or parents;
- if a heir acts in a reprehensible way against the last wish of the decedent.

**3.2.4. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?**

*Ex lege* heirs are arranged into four groups, which are applied in cascades. If there is a heir who can inherit separately in the previous group, no other group shall be applied. Heirs among the individual groups do not combine.

In the first group, the testator's children and spouse inherit, each an equal share.

If there are no descendants of the decedent, spouse can not inherit alone and inheriting does not occur according to the first inheritance group. The second inheritance group is applied, where the heirs are:

- spouse of the decedent;
- father of the decedent;
- mother of the decedent;
- persons who lived with the deceased in the same household for at least one year before his death, and who for that reason, took care of the common household or were depended on the decedent. The spouse inherits at least half of the inheritance, but if there are not other heirs in this group, he/she is entitled to get all the amount of inheritance. Other heirs in this group have equal shares (distributed from the second half). In the third inheritance group, inherit the siblings of the decedent and his cohabitants. Their shares are equal.

Using the fourth group is very rare – when the deceased's grandparents inherit (grandmother, grandfather) and in case of their absence, their children inherit (the deceased uncles and aunts).

**3.2.5. Are the heirs liable for deceased's debts and under which conditions?**

Yes, they are responsible for deceased's debts, but not more than they acquired through inheritance. If there are more heirs, they are responsible for the debts of the deceased according to the amount of the acquired heritage assets. Universal succession (assets and liabilities are transferred to the heir of the deceased as an inseparable whole) is one of the very first principle of Slovak succession law.

**3.2.6. What is the manner of renouncing the succession rights?**

We have the institute of refusal the heritage. A heir can refuse the heritage within one month from the moment the heir learned of his status from the court. If he exercised this right, he has never entered into the rights and obligations of the deceased. The refusal cannot be done partly, it cannot be under conditional terms. In terms of form it may be made orally or in writing. If a parents refuse heritage as a legal guardian for the minor, they need court's approval for such act, otherwise it is invalid.

**3.3. Disposition of property upon death.**

**3.3.1. Testate succession.**

**3.3.1.1. Explain the conditions for testate succession.**

There are two reasons to inherit in Slovak civil law - either by a will or by law. These reasons can be combined. Even the same person may concurrently inherit part of the estate by law and another part by the will. In inheritance, the will of the testator is preferred, therefore the will prevails over the law as a heritage title, with only one limitation. It is an institute of forced heirship (§ 479 CC). Forced heirs are always descendants of the testator. Minor heirs must acquire at least what their legal share

is; adult heirs must acquire at least half of what their legal share is. If the will violates this rule, it shall be ignored in parts, which collide with this rule unless the forced heirs were disinherited. To legally inherit is possible especially in cases where the deceased does not leave a will, or did not resolve upon the whole of the property, if the testamentary heir does not acquire the inheritance (by rejection, or is incapable, etc.).

### **3.3.1.2. Who has the testamentary capacity?**

The people with full legal capacity and minors older 15 years of age (but those only in a form of notarial record).

### **3.3.1.3. What are the conditions and permissible contents of the will?**

The testator may either write the will by his or her own hand or draw it up in another written form with the presence of witnesses or in the form of a notarial record. Every will has to contain the day, month and year dating when it was written; otherwise, it is null and void. Common will of several testators is invalid. In the last will, the testator shall identify the heirs and may also specify their shares or things and rights to be acquired by the heirs. Unless the shares of the heirs are specified in the will, the shares shall be divided equally. Any conditions annexed to the will shall have no legal relevance.

The will written by the testator's own hand must be written and signed by the testator's own hand; otherwise, it is null and void. A will not written in the testator's own hand must be signed by the testator's own hand; the testator must proclaim in front of two simultaneously attending witnesses that the document contains his or her last will. The witnesses must sign the document, but not really read it and know the content of it. Only people with the full legal capacity may act as witnesses. They cannot be blind, deaf or mute and they must understand the language of the last will. In drawing up the will, neither a testamentary heir nor a legal heir nor people close to him or her, can be official representatives, witnesses, writers, interpreters or readers.

The testament shall be cancelled by a later valid testament if it is incompatible with the later version or by appealing of the will; the appeal must have the form required for the will. The testator may cancel the will also by destroying the document.

### **3.3.1.4. Describe the characteristics of will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a will?**

Look above for the answer. Slovak law does not recognize public and private will, although there is a possibility to make a will in a form of notarial record. This is a prescribed strictest form for a minors up to 15 years of age – their will must be done in the form of a notarial deed. Other special cases are:

- A. A testator who is not able to read or write shall express his or her last will before three simultaneously attending witnesses in a document that must be read and signed by attending witnesses. The testator must confirm before the witnesses that the document contains his or her last will. A witness may either write or read the testament; however, the person who wrote the testament cannot be the same one as the one who read it. The document has to mention the fact that the testator can not read or write, who wrote the document and who read it aloud and in what way the testator confirmed that the document contains his or her true will. The witnesses have to sign the document.
- B. Blind people may also manifest their will in front of three simultaneously attending witnesses in a document that must be read to him or her.
- C. Deaf people who can not read or write may manifest their last will either in the form of a notarial record or in front of three simultaneously attending witnesses mastering the sign language and in a document that must be translated into the sign language.

**3.3.1.5. Is there a (public) register of wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

There is such a register powered by notaries, but there is no priority of registered wills considering to holograph or allograph wills as well. The form of will is not really important, just the content of it and the date when it was made.

The registration is very simple, the testator needs just to ask the notary to do it and pay a charge. The register is public.

**3.3.2. Succession agreement (*negotia mortis causa*). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.**

A will is the only one legal act by which the testator disposes of his property in a case of death. All legal actions that can be done in case of death are listed in section 7 of the Civil Code (SUCCESSION). No other legal acts are admissible for that purpose. Succession agreement or joint wills are not allowed.

**3.3.3. Are conditions for validity of wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

Conditions are not allowed as well. The conditions contained in the will have to be disregarded (§ 478 CC).

**3.3.4. Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

Only descendant of the testator are "forced heirs". Minor heirs must acquire at least what their legal share is; adult heirs must acquire at least half of what their legal share is. If the will violates this rule, it shall be ignored in parts colliding with this rule unless the forced heirs were disinherited. A will in this section is considered voidable. Its invalidity must be challenged by the descendants.

The testator may deprive the forced heir of his statutory right to a mandatory share. Disinheritance is strictly formal legal act, which must be done by holograph, allograph or in the form of a notarial record only upon the reason in law.

**3.3.5. Cross-border issues.**

**3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?**

There are still just few experiences with the application of this Regulation, but Slovakia respects it. Therefore, it is too early to say and answer the following questions.

**3.3.5.2. Are there any problems with the scope of application?**

**3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country had experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?**

**3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?**

**3.3.5.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?**

**3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?**

**3.3.5.7. Are there any national rules on international jurisdiction and applicable (besides the Succession Regulation) concerning the succession in your country?**

One of the ground principles which is the new Civil Non-Contentious Procedure Code – Nr. 161/2015 Col. (where is also the inheritance proceeding) built on, is “free movement of judicial decisions” (Art. 14 of Ground Principles). This means, that the decision of foreign courts have the same effects and protection like the Slovak ones.

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# Slovenia

Filip Dougan

## 1. Social perspective.

### 1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without *affectio maritalis*).

The new Slovenian Family code (*Družinski zakonik, DZ*)<sup>1</sup> defines a family as a domestic community consisting of a child, regardless of child's age, and both parents or one parent or another adult if such adult cares for the child and has certain obligations and rights in relation to that child pursuant to Family code (DZ § 2, see question 2.1.4.).

However, for the purpose of statistics, the Statistical Office of Republic of Slovenia (*Statistični urad Republike Slovenije, SURS*) provides a different definition. It defines family as a domestic community of persons living in a private household, namely: (1) domestic community of parents (one or both) and unmarried children (regardless of age, under condition that they do not have their own family), who live with them or one of them; (2) domestic community of man and woman, who are married; and (3) domestic community of partners, who live in cohabitation.<sup>2</sup> Under this definition (unlike in the Family Code) a couple without children is also considered a family. Although the above definition excludes same sex partnerships (with or without children), data about such families is collected by SURS since 2015 and same-sex families are considered a type of family in their statistics.

According to statistical data, Slovenia had on the 1 October 2018 2.076.595 inhabitants<sup>3</sup> and 577.544 families.<sup>4</sup>

	1981	1991	2002	2011	2015	2018
<i>Type of family - TOTAL</i>	522.187	551.899	555.945	567.347	576.177	577.544
<i>Married couple, no children</i>	106.339	109.594	114.835	125.489	131.245	131.201
<i>Married couple with children</i>	330.672	325.622	294.726	237.422	224.290	217.119
<i>Mother with children</i>	65.251	85.214	89.683	119.706	116.295	117.775
<i>Father with children</i>	9.580	14.095	14.609	23.423	26.844	28.418
<i>Unmarried couple, no children</i>	4.595	4.966	12.807	12.185	15.575	18.692
<i>Unmarried couple with children</i>	5.750	124.08	29.285	49.122	61.847	64.198
<i>Same-sex partnership without children</i>	-	-	-	-	64	111
<i>Same-sex partnership with children</i>	-	-	-	-	17	30

<sup>1</sup> The Family Code (Official Gazette of RS, nos. 15/17 and 21/18 - ZNOrg).

<sup>2</sup> SURS, Families and Households, available at: <https://www.stat.si/StatWeb/en/Field/Index/17/47>.

<sup>3</sup> SURS, Population, available at: <https://www.stat.si/StatWeb/en/Field/Index/17>.

<sup>4</sup> SURS, Families and Households, available at: <https://www.stat.si/StatWeb/en/Field/Index/17/47>.

### Families in Slovenia by type of family and year.<sup>5</sup>

As it can be seen from the table above, the total number of families is slowly growing and is 10,6% higher as in year 1981. The predominant type of family remains the family formed by married parents with children, although a decrease of 34,34% of this type of family can be seen since 1981. On the other hand, a substantial increase can be observed when it comes to single-parent families (increase of 95,36% in comparison to 1981). A substantial increase of 1.016,49% in comparison with year 1981 can be observed with families consisting of unmarried parents and children.

These trends are also noted in theory, which points out the following changes in families:<sup>6</sup>

- pluralisation of family types and styles of living;
- marriage is losing its social status and importance;
- number of single-parent families is growing; and
- number of reorganized families is growing.

Although the above statistics take into account only several types of families, another classification can be found in literature, which includes: **nuclear families** (consisting of two parents and a child), **classic extended families** (families composed of various nuclear families, which are related and live nearby each other), **modified extended families** (families, which are geographically separated, but maintain regular contacts and offer mutual support to each other), **single-parent families**, **reorganized families** (families, which are re-established or families, in which at least one parent is a social parent, but not biological), **dispersed extended families** (families, in which family members live together or on different locations and offer each other mutual material support, work and emotional support), **families in which children live with parents into young adulthood**.<sup>7</sup> Further statistical data on Slovenian families may be found [here](#).

#### 1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.

According to information available from a census in 2011, almost half (49%) of Slovenia's population aged 20+ was married, while 35% were single, 9% widowed and 7% divorced.<sup>8</sup> In 2017 (last available information), 6.481 marriages and 50 civil unions were concluded.<sup>9</sup>

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
<i>Marriages - TOTAL</i>	6.558	5.769	6.368	6.373	6.703	6.542	6.528	6.671	7.057	6.254	6.571	6.449	6.667	6.481
<i>Marriages per 1.000 persons</i>	3,3	2,9	3,2	3,2	3,3	3,2	3,2	3,3	3,4	3	3,2	3,1	3,2	3,1

Number of marriages per year in Slovenia between 2004 – 2017.<sup>10</sup>

<sup>5</sup> SURS, Families by Type of Family and Year, available at: [https://pxweb.stat.si/pxweb/Dialog/viewplus.asp?ma=H135E&ti=&path=./Database/Hitre\\_Repozitorij/&lang=1](https://pxweb.stat.si/pxweb/Dialog/viewplus.asp?ma=H135E&ti=&path=./Database/Hitre_Repozitorij/&lang=1).

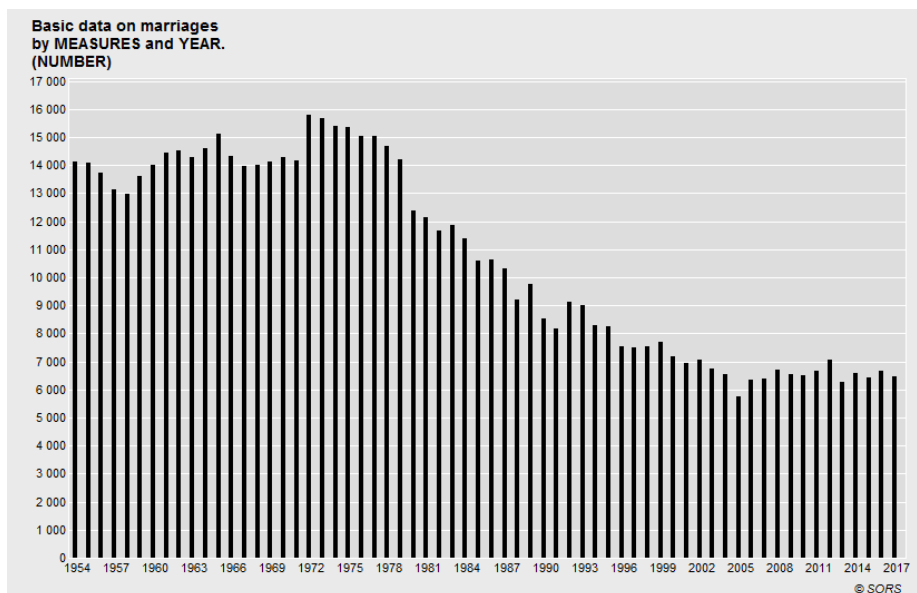
<sup>6</sup> Mojca Perić, Družina v sodobnem svetu, available at: [http://www.mizs.gov.si/fileadmin/mizs.gov.si/pageuploads/podrocje/vs/Gradiva\\_ESS/Impletum/IMPLETUM\\_271ORGANIZATOR\\_Druzina\\_Peric.pdf](http://www.mizs.gov.si/fileadmin/mizs.gov.si/pageuploads/podrocje/vs/Gradiva_ESS/Impletum/IMPLETUM_271ORGANIZATOR_Druzina_Peric.pdf), p. 14.

<sup>7</sup> Mojca Perić, Družina v sodobnem svetu, available at: [http://www.mizs.gov.si/fileadmin/mizs.gov.si/pageuploads/podrocje/vs/Gradiva\\_ESS/Impletum/IMPLETUM\\_271ORGANIZATOR\\_Druzina\\_Peric.pdf](http://www.mizs.gov.si/fileadmin/mizs.gov.si/pageuploads/podrocje/vs/Gradiva_ESS/Impletum/IMPLETUM_271ORGANIZATOR_Druzina_Peric.pdf), p. 9-10.

<sup>8</sup> Eurostat, Marriages and Births in Slovenia, available at: [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Marriages\\_and\\_births\\_in\\_Slovenia](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Marriages_and_births_in_Slovenia).

<sup>9</sup> SURS, Marriages and Divorces, available at: <https://www.stat.si/StatWeb/en/Field/Index/78>.

As it can be observed from the table above, the annual number of concluded marriages within last 14 years has been relatively stable. Nonetheless a gradual drop in number of marriages can be observed since 1980s and a gradual drop of marriages per 1.000 inhabitants since the end of 1960s (the highest ratio was measured in 1954, when 9,3 marriages were concluded per 1.000 inhabitants).<sup>11</sup>



Number of Marriages in Slovenia per Year.<sup>12</sup>

In regard to same-sex partnerships a slow increase in numbers can be seen (in particular in 2017, when civil unions replaced registered same-sex partnerships, *see question 2.1.5.2.*).

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Formal civil unions	8	8	2	11	9	15	11	22	27	22	29	50
-												
TOTAL												

Number of registered same-sex partnerships and civil unions from 2006 – 2017.<sup>13</sup>

<sup>10</sup> SURS, Basic Data on Marriages, Slovenia, Annually, available at: [https://pxweb.stat.si/pxweb/Dialog/varval.asp?ma=05M1002E&ti=&path=../Database/Demographics/05\\_population/34\\_Marriages/05\\_05\\_M10\\_Marriages-SL/&lang=1](https://pxweb.stat.si/pxweb/Dialog/varval.asp?ma=05M1002E&ti=&path=../Database/Demographics/05_population/34_Marriages/05_05_M10_Marriages-SL/&lang=1).

<sup>11</sup> SURS, Basic Data on Marriages, Slovenia, Annually.

<sup>12</sup> SURS, Basic Data on Marriages, available at: [https://pxweb.stat.si/pxweb/igraph/MakeGraph.asp?gr\\_type=1&gr\\_stacked=1&gr\\_width=1550&gr\\_height=800&gr\\_fontsize=12&menu=y&PLanguage=1&pxfile=05M1002E2019214354995p1.px&wonload=1600&honload=850&rotate=](https://pxweb.stat.si/pxweb/igraph/MakeGraph.asp?gr_type=1&gr_stacked=1&gr_width=1550&gr_height=800&gr_fontsize=12&menu=y&PLanguage=1&pxfile=05M1002E2019214354995p1.px&wonload=1600&honload=850&rotate=)

<sup>13</sup> SURS, Formal Civil Unions, Slovenia, available at: [https://pxweb.stat.si/pxweb/Dialog/varval.asp?ma=05M5001E&ti=&path=../Database/Demographics/05\\_population/35\\_05M50\\_same\\_sex/&lang=1](https://pxweb.stat.si/pxweb/Dialog/varval.asp?ma=05M5001E&ti=&path=../Database/Demographics/05_population/35_05M50_same_sex/&lang=1).

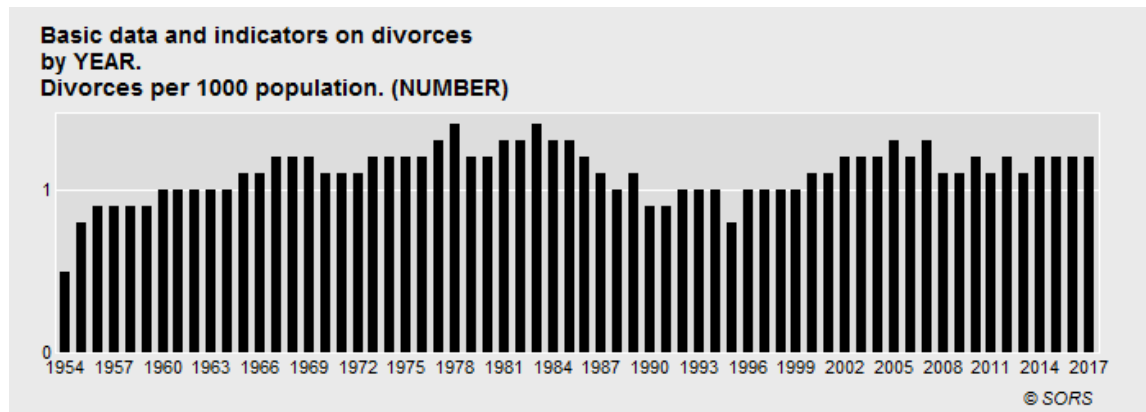
**1.3. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.**

In the year 2017, there were 2.387 divorces in Slovenia.<sup>14</sup>

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
<i>Divorces - TOTAL</i>	2.411	2.647	2.334	2.617	2.246	2.297	2.430	2.298	2.509	2.351	2.469	2.432	2.531	2.387
<i>Divorces per 1.000 population</i>	1,2	1,3	1,2	1,3	1,1	1,1	1,2	1,1	1,2	1,1	1,2	1,2	1,2	1,2

**Divorces in Slovenia between 2004 – 2017.**<sup>15</sup>

Just as in the last 14 years, the number of divorces and in particular the ratio of divorces per 1.000 inhabitants was relatively stable since 1960s with a slight temporary decrease in 1990s:



**Divorces per 1.000 inhabitants in Slovenia between 1954 – 2017.**<sup>16</sup>

**1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).**

According to the latest available data, out of **6.481 marriages**, which were concluded in 2017, **5.225 (80,6%)** were concluded between a bride and groom, who were both Slovenian citizens. In **573 marriages (8,8%)** concluded in 2017 a groom with Slovenian citizenship married a bride with a foreign citizenship (mostly from Bosnia and Herzegovina). On the other hand, in **520 marriages (8,0%)** a bride with Slovenian citizenship married a groom with foreign citizenship (mostly from Bosnia and Herzegovina). There were also **163** instances, where marriage was concluded between a bride and a groom with foreign citizenship.<sup>17</sup>

<sup>14</sup> SURS, Marriages and Divorces, available at: <https://www.stat.si/StatWeb/en/Field/Index/78>.

<sup>15</sup> SURS, Basic Data on Divorces by Measure and Year, available at: [https://pxweb.stat.si/pxweb/Dialog/viewplus.asp?ma=H143E&ti=&path=../Database/Hitre\\_Repozitorij/&lang=1](https://pxweb.stat.si/pxweb/Dialog/viewplus.asp?ma=H143E&ti=&path=../Database/Hitre_Repozitorij/&lang=1).

<sup>16</sup> SURS, Basic Data and Indicators on Divorces, available at: [https://pxweb.stat.si/pxweb/Dialog/varval.asp?ma=05M3002E&ti=&path=../Database/Demographics/05\\_population/36\\_Divorces/05\\_05M30\\_Divorces-SL/&lang=1](https://pxweb.stat.si/pxweb/Dialog/varval.asp?ma=05M3002E&ti=&path=../Database/Demographics/05_population/36_Divorces/05_05M30_Divorces-SL/&lang=1).

<sup>17</sup> SURS, Saturday, 17 June, the day with most marriages in 2017, available at: <https://www.stat.si/StatWeb/en/News/Index/7436>.

With regard to divorces, there were **2.387 divorces** in Slovenian in 2017. Out of those, **1.956 divorces (81,9%)** included spouses, who were both Slovenian citizens. In **171 cases of divorce (7,2%)** husband had Slovenian citizenship and the wife had foreign citizenship (the wife had EU citizenship in 28 of those cases). In **224 cases of divorce (9,4%)** the wife had Slovenian citizenship and the husband had a foreign citizenship (the husband had EU citizenship in 51 of those cases).<sup>18</sup>

## 2. Family law.

### 2.1. General.

#### 2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?

Hierarchically, the highest legal source of family law in Slovenia is **The Constitution of the Republic of Slovenia (*Ustava Republike Slovenije*, hereinafter *URS*)**.<sup>19</sup> Provisions forming the basis for regulation of family law can be found in chapter II (Fundamental Rights and Freedoms). These articles stipulate that marriage and the legal relations within it, as well as legal relations within family and extramarital union (cohabitation) shall be regulated by law (URS 53 § 2). The state shall protect the family, motherhood, fatherhood, children and young people and shall create the necessary conditions for such protection (URS 53 § 3). Constitution also provides for the rights and duties of parents (maintenance, education and raising of their children), which can only be revoked or restricted for reasons that are provided by the law in order to protect child's interests (URS 54 § 1); freedom of choice in childbearing (URS § 55) and rights of children, who shall enjoy special protection and care (URS § 56).

During the preparation of this Report, the main substantial source of family law in Slovenia is still the **Marriage and Family Relations Act (*Zakon o zakonski zvezi in družinskih razmerjih*, hereinafter *ZZZDR*)**<sup>20</sup>, which will remain in force until 15 April 2019, when the new **Family Code** will become applicable. For this reason, the Report will already take into account the changes brought by the Family Code.

Civil unions and *de facto* civil unions between two men or two women are not included in the Family Code, but are regulated by the **Civil Union Act (*Zakon o partnerski zvezi*, hereinafter *ZZPZ*)**<sup>21</sup>.

In addition to the abovementioned sources, several additional legal sources of Family Law in Slovenian can be found:

- **Domestic Violence Prevention Act (*Zakon o preprečevanju nasilja v družini*, *ZPND*)**<sup>22</sup> defines the concept of domestic violence and the role of authorities, as well as non-governmental organisations in dealing with domestic violence. It also lays down measures for protecting victims of domestic violence;
- **Infertility Treatment and Procedures of Biomedically-Assisted Procreation Act (*Zakon o zdravljenju neplodnosti in postopkih oploditve z biomedicinsko pomočjo*, *ZZNPOB*)**<sup>23</sup>, which regulates health measures designed to assist a woman and a man in conceiving a child;

<sup>18</sup> Data was obtained from the SURS on request of the author on the 10 May 2019.

<sup>19</sup> The Constitution of the Republic of Slovenia (Official Gazette of RS, No. 33/91-I, 42/97 - UZS68, 66/00 - UZ80, 24/03 - UZ3a, 47, 68, 69/04 - UZ14, 69/04 - UZ43, 69/04 - UZ50, 68/06 - UZ121,140,143, 47/13 - UZ148, 47/13 - UZ90,97,99 and 75/16 - UZ70a).

<sup>20</sup> Marriage and Family Relations Act (Official Gazette of RS, No. 69/04 - official consolidated text, 101/07 - dec. US, 90/11 - dec. US, 84/12 - dec. US, 82/15 - dec. US,15/17 - DZ and 30/18 - ZSVI).

<sup>21</sup> Civil Union Act (Official Gazette of RS, No. 33/16).

<sup>22</sup> Domestic Violence Prevention Act (Official Gazette of RS, Nos. 16/08, 68/16 and 54/17 - ZSV-H).

<sup>23</sup> Infertility treatment and procedures of biomedically-assisted procreation act (Official Gazette of RS, no. [70/00](#) and [15/17](#) - DZ).

- **Public Scholarship, Development, Disability and Maintenance Fund of the Republic of Slovenia Act** (*Zakon o javnem štipendijskem, razvojnem, invalidskem in preživninskem skladu Republike Slovenije, ZJSRS*)<sup>24</sup> stipulates the right of a child to compensation for the unpaid maintenance by the maintenance debtor;
- **Parental Protection and Family Benefits Act** (*Zakon o starševskem varstvu in družinskih prejemkih, ZSDP-1*)<sup>25</sup> governs the insurance for parental protection and family benefits;
- **Provision of Foster Care Act** (*Zakon o izvajanju rejniške dejavnosti, ZIRD*)<sup>26</sup>, etc.

The procedural provisions concerning family law cases can be found in the **Civil Procedure Act (ZPP)**<sup>27</sup> and **Non-Contentious Proceedings Act (ZNP)**<sup>28</sup>. Following the reform of substantial family law rules, a reform of procedural rules is due to take place before 15 April 2019. The draft<sup>29</sup> of the new **Non-Contentious Proceedings Act (ZNP-1)** has already been coordinated by the government, but still waits to be adopted by the parliament. According to the draft, the majority of family related proceedings will be included in the new **Non-Contentious Proceedings Act**.

### 2.1.2. Provide a short description of the main historical developments in FL in your country.

The first systematic codification of family law in force on today's Slovenian territory was the French *Code Civil (Code Napoléon)*. This period, which was connected to the existence of Illyrian Provinces, however, only lasted between 1809 and 1815,<sup>30</sup> after which the Austrian Empire reclaimed its former authority in the "Slovene Lands" and thus the Austrian *Allgemeines bürgerliches Gesetzbuch (ABGB)* came into force. On the territory of today's Slovenia, the *ABGB* remained in use even after the First World War, when Slovenia became part of the Kingdom of Serbs, Croats and Slovenes (later Kingdom of Yugoslavia). After the Second World War a new constitution of Federal People's Republic of Yugoslavia was adopted, which served as the basis for several new acts in the field of family law (i.e. Basic Law on Marriage from 3 April 1946, Basic law on Custodianship from 1 April 1946, etc.).<sup>31</sup> In 1974 a new constitution of the Socialist Federal Republic of Yugoslavia was adopted. It represented the basis for the new (and at the time very modern) Marriage and Family Relations Act, which (although amended on several occasions) remains in force until the 15 April 2019 (*see also question 2.1.1.*).

### 2.1.3. What are the general principles of FL in your country?

The general principles of family law in Slovenia can be deduced from the Constitution, as well as from various provisions of the Family Code.

<sup>24</sup> Public Scholarship, Development, Disability and Maintenance Fund of the Republic of Slovenia (Official Gazette of RS, No. 78/06 - official consolidated text, 106/12, 39/16 and 11/18 - ZIZ-L).

<sup>25</sup> Parental Protection and Family Benefits Act (Official Gazette of RS, Nos. 26/14, 90/15, 75/17 - ZUPJS-G and 14/18).

<sup>26</sup> Provision of Foster Care Act (Official Gazette of RS, No. 110/02, 56/06 - dec. US, 114/06 - Social Assistance Act, 96/12 - ZPIZ-2 and 109/12).

<sup>27</sup> Civil Procedure Act (Official Gazette of RS, No. 73/07 - official consolidated text, 45/08 - ZArbit, 45/08, 111/08 - dec. US, 57/09 - dec. US, 12/10 - dec. US, 50/10 - dec. US, 107/10 - dec. US, 75/12 - dec. US, 40/13 - dec. US, 92/13 - dec. US, 10 / 14 - dec. US, 48/15 - dec. US, 6/17 - dec. US and 10/17).

<sup>28</sup> Non-Contentious Proceedings Act (Official Gazette, No. 30/86, 20/88 - corr., Official Gazette, No. 87/02 - SPZ 131/03 - dec. US, 77/08 - ZDZdr and 10 / 17 - ZPP-E)

<sup>29</sup> A draft of the new Non-Contentious Proceedings Act from 3.12.2018 can be found at: [http://84.39.218.201/MANDAT18/VLADNAGRADIVA.NSF/18a6b9887c33a0bdc12570e50034eb54/6d5203671e1b913fc125835900331f87/\\$FILE/ZNP-1\\_VG.pdf](http://84.39.218.201/MANDAT18/VLADNAGRADIVA.NSF/18a6b9887c33a0bdc12570e50034eb54/6d5203671e1b913fc125835900331f87/$FILE/ZNP-1_VG.pdf).

<sup>30</sup> Juhart, M., 2015, 7.

<sup>31</sup> Finžgar, A., 1965, 10-11.

One of the main principles, which can be found in both of the abovementioned sources is the **equality of spouses** (URS § 53, DZ § 21). This principle is also reflected in several provisions, which stipulate: (a) that parental rights pertain jointly to both parents (DZ § 6) and provide for equal rights and duties of parents towards children (DZ § 57), (b) consensual decision making in joint matters (DZ § 60), (c) a presumption of equal shares on co-owned property (DZ § 74) etc.

Marriage is based on **free will** of the spouses, feelings of mutual attachment, respect, understanding, trust and mutual assistance (DZ § 20) and needs to be concluded before a competent state authority (URS § 53).

Every person is **free to decide whether to bear children**, but the state also bears the obligation to guarantee the opportunities to exercise this freedom and to create conditions, which will enable parents to decide to bear children. (URS § 54).

In addition to equality of spouses and equality of parents, the Constitution also guarantees **equality of children** born in wedlock or out of it (URS § 55). Furthermore, children enjoy **special protection and care**, as well as human rights and fundamental freedoms consistent with their age and maturity (URS § 56). As already mentioned above, the Constitution stipulates the right and duty of parents to maintain, educate and raise their children (URS § 54) In cases of children without parents or without proper family care, state provides for the special protection (URS § 56).

Special position of children is also guaranteed by procedural law provisions, according to which courts need to *ex officio* take all measures necessary to safeguard the rights and interests of children and other persons, who are not able to take care of their rights and interests (ZPP § 409, ZNP § 5).

**2.1.4. Define “family” and “family member” in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

A definition of family can be found in the Family Code, which defines it as a domestic community consisting of a child, regardless of child’s age, and both parents or one parent or another adult if such adult cares for the child and has certain obligations and rights in relation to the child pursuant to Family code (DZ § 2). Therefore, to form a family two conditions are crucial: (1) a child and (2) a domestic living community with (at least) one of the parents or other person, which has rights and obligations towards the child (i.e. foster parent).

This definition is already criticised in the literature as being too narrow.<sup>32</sup> It is also important to note that although the Slovenian legislator included a definition of family in the new Family Code, family does not present an institution of family law and as such does not create any legal consequences, but is only protected through various provisions of family law, which also considerably widen the definition of family (i.e. according to the abovementioned definition a parent and a child, who are not living together, do not form a family – that parent nonetheless enjoys many rights and duties towards the child).<sup>33</sup>

The definition of family in the Family Code is not the only definition that can be found in the field of family law. The Domestic Violence Prevention Act defines family much broader and includes also close blood relatives, spouse’s or partner’s relatives, people living in joint household as well as partners who do not live together etc. (ZPND § 2). A broader concept of family can also be found in tax law<sup>34</sup> and for the purpose of statistics (*see question 1.1.*).

A child is defined in the Family Code as a person under the age of 18, unless he/she has obtained full capacity to contract before that age (DZ § 5).

<sup>32</sup> Novak, B., 2017. (a), 40-41.

<sup>33</sup> Novak, B., 2017. (a), 38 – 40.

<sup>34</sup> See Income Tax Act – ZDoh-2 (Official Gazette of RS, Nos. 13/11 - official consolidated text, 9/12 - dec. US, 24/12, 30/12, 40/12 - ZUJF, 75/12, 94/12, 52 / 13 - dec. US, 96/13, 29/14 - dec. US, 50/14, 23/15, 55/15, 63/16 and 69/17), § 16.

### 2.1.5. Family formations.

#### 2.1.5.1. Define the “spouse” in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?

Family Code defines marriage as a domestic community of one man and one woman, the formalisation, legal consequences and termination of which are regulated by the Family Code (DZ § 3). Same-sex marriage is not allowed in Slovenia. Based on the above definition of marriage a spouse could be defined as a person who is legally married.

In order to conclude a marriage (1) **conditions for existence of marriage** and (2) **conditions for validity of marriage** must be fulfilled, while at the same time an (3) **absence of legal prohibitions** must exist.<sup>35</sup>

Conditions for existence of marriage (DZ § 22) are:

- persons concluding a marriage must be of different sex;
- consent to conclude marriage needs to exist; and
- consent needs to be expressed before a competent state body.

In case any of the abovementioned conditions are not met, the marriage is considered non-existent and has no legal consequences (DZ § 42).

Conditions for validity of marriage are:

- consent given as a free expression of will of the future spouses that they desire to conclude marriage (consent must not be forced or given in error, DZ § 23);
- person concluding marriage may not be a child (person under 18 years old). A court may, however, on justifiable grounds, allow the conclusion of marriage to a child aged 15 (or more), who has appropriate physical and mental maturity, which enables him/her to understand the meaning and consequences of the rights and obligation arising from marriage (DZ § 24);
- marriage may not be concluded by a person, who is not of sound mind or a person, who at the time of concluding marriage is temporarily of sound mind, but who for reasons causing their unsoundness of mind is incapable of establishing with the other spouse a domestic community as provided by the Family Code (DZ § 25);
- new marriage may not be concluded until previously concluded marriage is terminated (DZ § 26);
- marriage may not be concluded by persons who are direct blood relatives, or who are collateral relatives up to four times removed (DZ § 27).

Marriage concluded in contravention to the abovementioned conditions is invalid. Another reasons for invalidity of marriage are also if both prospective spouses are not present upon the conclusion of marriage or if the marriage was concluded without the intention of creating a domestic community of spouses (DZ § 47).

The Family Code further stipulates that during the existence of guardianship, a marriage between a guardian and their ward may only be concluded if authorized by a court (legal prohibition, DZ § 28).

The definition of marriage and spouse can be considered valid also in other legal fields (successions, tax law etc.).

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<sup>35</sup> Novak, B., 2017. (a), 52.



**2.1.5.2. What types of relationships/unions between persons are recognised in FL of your country? In particular, formal (registered) and informal (*de facto*) unions, heterosexual and same-sex unions, unions with and without *affectio maritalis*. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

Slovenian family law distinguishes between the following types of relationships:

- marriage;
- cohabitation; and
- civil union (“formal” and “non-formal”).

**Marriage** (see question 2.1.5.1.) is a domestic community of one man and one woman, the formalisation, legal consequences and termination of which are regulated by the Family Code (DZ § 3).

**Cohabitation** is a long-term domestic community of a man and a woman, who are not married, but there are no reasons for a marriage between them to be invalid (DZ 4 § 1). Between the partners, cohabitation has the same legal consequences as those of marriage, provided for by the Family code (DZ 4 § 1). In other areas, cohabitation has the same legal consequences if so is provided by law (DZ 4 § 1).

**Civil union** is regulated by the Civil Union Act, which defines it as a domestic community between two women or two men, the formalisation, legal consequences and termination of which is regulated by the Civil Union Act (ZPJ § 2). In addition to “formal”/concluded civil union, the Civil Union Act also regulates “non-formal” civil union, which is defined as a long term domestic community between two women or two men, who have not concluded a civil union, but there are no reasons for a civil union between them to be invalid (ZPJ § 3). Provisions regarding marriage from Marriage and Family Relations Act/Family Code apply *mutatis mutandis* to civil unions (ZPJ § 4). Civil Union Act replaced the Civil Partnership Act (*Zakon o registraciji istospolne partnerske skupnosti, ZRIPS*)<sup>36</sup> on 24 February 2017. Same-sex couples were allowed to conclude a civil partnership since 23 July 2006.

**2.1.6. What legal effects are attached to different family formations referred to in q 2.1.5.?**

A marriage creates legal effects both on personal as well as on property level.<sup>37</sup>

On the personal level spouses are required to respect, trust and help one another (DZ § 56), to jointly decide on common matters (DZ § 60) and to contribute to the subsistence of the domestic community as well as to subsistence of their family in proportions to their capabilities (DZ § 61). A spouse who is without the means of subsistence and unemployed without his fault, has the right to be maintained by the other spouse insofar this is within their power (DZ § 62). Spouses also need to determine the accommodation in which they will live and which will be their home and the home of their children that will live with them by common agreement (DZ § 59). Furthermore, spouses have the right to freely decide on the birth of children (DZ § 57) and to freely choose their profession and work (DZ § 58).

On the property level, the new Family Code introduced several changes. The matrimonial property regime is no longer mandatory and the spouses are free to regulate their property relations by a matrimonial property agreement (**contractual matrimonial property regime**, DZ § 85). In case spouses do not conclude a matrimonial property agreement, the **statutory matrimonial property regime is applicable** (DZ § 65).

Between the partners, **cohabitation** has the same legal consequences as those of marriage, which are provided for by the Family Code (DZ 4 § 1). In other areas, cohabitation has the same legal

<sup>36</sup> Civil Partnership Registration Act (Official Gazette of RS, no. [65/05](#), [55/09](#) - dec. US, [18/16](#) - dec. US, [33/16](#) - ZPJ and [68/16](#) – ZPND-A).

<sup>37</sup> Novak, B., 2017 (a), 69.

consequences if so is provided by the law (DZ 4 § 1). Cohabitation, therefore, has the same legal consequences as marriage on personal as well as on the property level, thus the matrimonial property regimes applicable to marriage are also applicable to cohabitation.<sup>38</sup> Furthermore, although the Family code explicitly prescribes that cohabitation has the same legal consequences as marriage only between the partners, cohabitation also has the same legal consequences as marriage regarding the matrimonial property in respect of third parties.<sup>39</sup> In legal areas other than Family Law, cohabitation creates legal consequences only if the relevant laws/acts stipulate so (i.e. succession law, law of obligations, tax law, social security law etc.).<sup>40</sup>

Pursuant to Civil Union Act a **civil union** has the same legal consequences as marriage in all legal spheres (also outside family law), unless otherwise provided by the Civil Union Act (ZPZ 2 § 1). The two exceptions to the abovementioned rule are that civil union partners are not allowed to adopt children together and they do not have the right to biomedically assisted procreation (ZPZ 2 § 2).

A **non-formal civil union** has the same legal consequences between the partners as if the partners have formalised their civil union (ZPZ 3 § 2). This means that in the field of family law, partners enjoy same rights and obligations as partners of “formal”/concluded civil union, namely same rights as spouses.<sup>41</sup> In legal areas outside of family law, a non-formal civil union has the same legal consequences as cohabitation, unless otherwise provided by the Civil Union Act (ZPZ 3 § 2) - civil union partners are not allowed to adopt children together and they do not have the right to biomedically assisted procreation. This means that a non-formal civil union will have legal consequences in other legal areas only if cohabitation also creates legal consequences in that areas (i.e. succession law, law of obligations, tax law, social security law).<sup>42</sup>

### **2.1.7. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/*de facto* family formations? Explain briefly.**

No. Slovenian family law just underwent a reform with the Family Code being adopted on the 21 March 2017 and the Civil Union Act being adopted on 21 April 2016.

## **2.2. Property relations.**

### **2.2.1. List different family property regimes in your country.**

Slovenian family law distinguishes between two matrimonial property regimes:

- contractual matrimonial property regime; and
- statutory (legal) matrimonial property regime.

Both regimes are applicable to marriage, cohabitation, civil union and non-formal civil union.

### **2.2.2. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?**

(Default) statutory matrimonial property regime applies to spouses, unless they conclude a matrimonial property agreement (presumption of statutory matrimonial regime, DZ § 65).

<sup>38</sup> Novak, B., 2017 (b), 136.

<sup>39</sup> Novak, B., 2017 (b), 136.

<sup>40</sup> Novak, B., 2017 (b), 137 – 138.

<sup>41</sup> Novak, B., 2017 (b), 154 – 155.

<sup>42</sup> Novak, B., 2017 (b), 155 – 156.

The statutory matrimonial property regime envisages a **community property regime** for the co-owned property (*skupno premoženje*) of spouses and a **separate property regime** for the separate property (*posebno premoženje*) of each spouse (DZ § 66).

Co-owned property of spouses includes all property, which was acquired by work or against payment during the marriage or domestic community of the spouses (DZ § 66). It also includes the property, which is acquired on the basis and by means of co-owned property and which arises from co-owned property (DZ § 66). The shares on the co-owned property are not specified (it belongs jointly to both spouses, DZ 67 § 1). The co-owned property may be divided and the shares may be specified if the marriage is terminated or during marriage by an agreement or on the proposal of either spouse (DZ 71 § 1).

Separate property regime applies to separate property of each spouse, which is the property that was acquired before marriage or received by a spouse without consideration during marriage (DZ 77 § 1) – i.e. inheritance and gifts. Separate property also includes items of small value, which are intended for exclusively personal use, regardless of the manner of acquisition (DZ 77 § 2). Separate property is exclusively owned by the spouse, who has acquired it (DZ 78 § 1).

**2.2.3. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a “new regime just for them”?**

The Marriage and Family Relations Act (ZZZDR), which remains in use until 15 April 2019 envisaged only a mandatory statutory matrimonial property regime. With the new Family Code (DZ) spouses will have the possibility of concluding a matrimonial property agreement, thus choosing a contractual matrimonial property regime.

In deciding about the content of the matrimonial property agreement, the spouses are free to determine their property regime that differs from the statutory property regime as well as to regulate other property affairs among them during marriage and in case of a divorce (DZ 85 § 1). Spouses are not limited to any models that would be envisaged by law.<sup>43</sup> The spouses are, however, not allowed to circumvent the provisions on accommodation protection of a co-owned accommodation in which they live with their children.<sup>44</sup> The agreement must be concluded in the form of notarial deed (DZ 64 § 2) and the notary public, which assists during the conclusion of the agreement, also needs to make sure that the content of the agreement does not contravene the Constitution, mandatory rules and moral principles (DZ 87 § 2).

A matrimonial property agreement may be concluded (1) before marriage (such agreement takes effect on the date of conclusion of marriage or on a later date as determined in the agreement, DZ 85 § 3) or (2) after the marriage was concluded (such agreement takes effect on the day of its conclusion or on a later date determined in the agreement, DZ 85 § 2). In the matrimonial property agreement spouses may also include an agreement on mutual spousal maintenance and an agreement on maintenance in the event of divorce (DZ § 86).

In case the matrimonial property agreement is invalid or its provisions are unclear, the statutory matrimonial property regime applies (DZ 89 § 1,2).

**2.2.4. Explain briefly the rules on the administration of family property and compare if there are difference for different property regimes.**

Under the statutory matrimonial property regime co-owned property of spouses is managed and disposed of jointly and in agreement between spouses (DZ 69 § 1). However, for cases of ordinary

<sup>43</sup> Novak, B., 2017 (a), 72.

<sup>44</sup> Novak, B., 2017 (a), 72.

administration of co-owned property and disposition of movable property of smaller value, a spouse is deemed to have the consent of the other spouse (DZ 69 § 1). Spouses may also agree on management and use of co-owned property, which differs from the abovementioned rule (DZ 70 § 1), but may not contravene the provisions of Family Code on accommodation protection regarding the common home in which they live with their children (DZ 70 § 3). If spouses agree that the co-owned property will be managed and disposed of by only one spouse, this spouse must consider the interests of the other spouse (DZ 70 § 2). Either of the spouses may withdraw from an agreement at any time, but may not do so at an unfavourable time (DZ 70 § 2).

As the shares on the co-owned property are not specified (DZ 68 § 1) a spouse may not dispose of its unspecified share on the co-owned property by a legal transaction *inter vivos* and may not expropriate or encumber it (DZ 68 § 2).

Spouses may conclude all legal transactions between them, which may also be concluded with other persons. Agreements concerning property rights and obligations between them need to be concluded in the form of a notarial deed (unless the object of transaction are small gifts, which are proportional to the economic status of the giver, DZ 64 § 1,2,3).

Regarding separate property of a spouse, he/she is allowed to freely dispose and manage it<sup>45</sup> (DZ 78 § 1).

Family code includes no specific provisions on administration of matrimonial property in case of contractual matrimonial property regime.

**2.2.5. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

Yes, Family Code envisages the establishment of a **register of matrimonial property agreements**.

Matrimonial property agreements need to be concluded in the form of notarial deed (DZ 64 § 2) and the information about the conclusion of such agreements needs to be entered into the register of matrimonial property agreements (DZ 85 § 4).

Before concluding a matrimonial property agreement, the spouses must inform each other of their material standing or the validity marital property agreement may be challenged (DZ 85 § 6). A notary public also holds the duty to explain to the spouses (prior to the conclusion of the agreement) the rules of statutory matrimonial property regime and the duty to inform them about the property rights and obligations under the Family Code (DZ 87 § 1). A notary public also needs to give spouses unbiased advice and make sure that they both fully understood the meaning and legal consequences of the matrimonial property agreement they wish to conclude (DZ 87 § 2). Furthermore, he informs the spouses of the register of matrimonial property agreements, of the data, which is entered into the register and of the legal consequences of the entry of their agreement into the register (DZ 87 § 3).

A concluded matrimonial property agreement is deposited with a notary public (DZ 88 § 1) and entered into the register of matrimonial property agreements, which is maintained by the Chamber of Notaries Public of Slovenia (DZ 90 § 1). The following information is open to the public (DZ 93 § 2):

- personal name and address of permanent and/or temporary residence of spouses or cohabiting partners,
- personal name and registered office of the notary depositary of the matrimonial property agreement,
- date of entry in the register of marital property agreements, date of conclusion, date of effect, date of amendment and date of termination of matrimonial property agreement.

The public nature of this information, however, does not negate the rules of trust in the land register (DZ 93 § 3). If matrimonial property agreement is not entered into the register, it is presumed in relation to third parties that the statutory property regime applies to property relations between spouses (DZ § 94).

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<sup>45</sup> Novak, B., 2017 (a), 90.

**2.2.6. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

Spouses may assume joint obligations, which are (1) obligations that are binding on both spouses under the general rules of obligations, (2) obligations created in connection with their co-owned property and (3) obligations, which one of the spouses assumes for the current needs of the domestic community or the family (DZ 82 § 1).

Spouses are liable for joint obligations jointly and severally with their co-owned property as well as with their separate property (DZ 82 § 1). A spouse has a right to reclaim from the other spouses a refund of the sum paid in excess of a spouse's share in paying for joint obligations (DZ 82 § 2).

A creditor may (based on a final judgement) demand that a court determines the debtor's share on co-owned property and then demands enforcement against such share (DZ 83 § 1). If the court, which is leading the enforcement procedure, allows the sale of spouse's share on co-owned property, the other spouse has a pre-emptive right (DZ 83 § 2).

In case of civil **bankruptcy proceedings** against a spouse, the court conducting the bankruptcy proceedings determines that the share of the debtor in bankruptcy on the co-owned property shall be equal to one half (DZ 83 § 3). The other spouse may claim before the court that his share on co-owned property exceeds one half (DZ 83 § 5). The official receiver may also claim with the court that debtor's share exceeds one half (DZ 83 § 4).

Each spouse may also assume and bear **specific obligations**. They include (1) obligations, which the spouse assumed before concluding marriage and (2) obligations, which the spouse assumed after concluding marriage, but are not joint obligations of the spouses (DZ 84 § 1). A spouse is liable for specific obligations with his/her separate property and his/her share on co-owned property (DZ 84 § 2).

**2.2.7. Describe allocation and division of property in case of divorce, separation or dissolution of the union.**

Co-owned property of spouses is divided either (1) in the case of termination of marriage or already during marriage by (2) an agreement or (3) on proposal of either of the spouses (DZ 71 § 1). If the matrimonial property agreement, with which the spouses modified the statutory matrimonial regime, does not define the manner of division of co-owned property, such co-owned property is divided in accordance with rules applicable to the statutory matrimonial property regime (unless otherwise agreed by the spouses, DZ 71 § 3).

Prior to establishing the size of each spouse's share on the co-owned property, spouses' debts and claims against this property must be established (DZ § 72).

Spouses are free to agree on the sizes of their shares or they can request the court to determine them (DZ § 73). If spouses conclude an agreement on division of co-owned property, such agreement also needs to include an agreement on the sizes of their shares.

In case the spouses do not agree on the sizes of their shares, they are deemed to be equal, however, the spouses may prove that they have contributed to the co-owned property in a different proportion (a negligible difference in contribution to the co-owned property is not taken into consideration, DZ 74 § 1). In a dispute on the amount of each spouse's share in co-owned property, a court considers all circumstances of the case, particularly the income of each spouse, the assistance that the spouses provided to each other, the care and upbringing of children, performing household work, care for home and family, concern for maintaining the property, and any other form of work and cooperation in managing, maintaining and increasing the co-owned property (DZ 74 § 2).

After establishing the shares on co-owned property, spouses may agree on the manner of dividing the property. Their agreement to become co-owners of items in proportion to their shares on co-

owned property is also be considered division of property (DZ 75 § 1). In case spouses are not in agreement, the court decides according to the rules applicable to the division of co-owned property. In dividing co-owned property, a spouse may propose that he/she should receive those objects, which are intended for carrying out his/her occupation or that enable him/her to earn an income (DZ 76 § 1). A spouse may also propose to receive the objects, which are intended for personal use and are not part of his/her separate property.

**2.2.8. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?**

No, there are no special rules or limitations regarding the property regimes between spouses or partners in reference to their culture, tradition, religion or other characteristics. No, the dowry is neither provided for nor regulated within Slovenian legislation.

**2.3. Cross-border issues.**

**2.3.1. Is your country participating in the enhanced cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?**

Yes, Slovenia is participating in the enhanced cooperation with regard to the Regulations 1103/2016 and 1104/2016.

**2.3.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as “marriage”, “matrimonial property agreement”, “partnership property agreement” etc.?**

Yes.

**2.3.3. Are you expecting any problems with the application of the rules on jurisdiction?**

Yes.

**2.3.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

Yes.

**2.3.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

**2.3.6. Are there any national rules on international jurisdiction and applicable law (besides the Regulations) concerning the succession in your country?**

Yes, the Private International Law and Procedure Act (*Zakon o mednarodnem zasebnem pravu in postopku, ZMZPP*).<sup>46</sup>

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<sup>46</sup> Private International Law and Procedure Act (Official Gazette of RS, nos. 56/99 and 45/08 - ZArbit).

### 3. Succession law.

#### 3.1. General.

##### 3.1.1. What are the main legal sources of Succession Law (SL) in your country? What are the additional legal sources of SL?

Hierarchically, the highest legal source of succession law in Slovenia is **the Constitution**, which grants the right to inheritance (URS § 33). The Constitution also stipulates that the manner and conditions of inheritance shall be specified by a law (URS § 67). This law is the **Inheritance Act** (*Zakon o dedovanju, ZD*)<sup>47</sup>, which was adopted in 1976 and since amended, changed and partially derogated on several occasions. In addition to provisions stipulating the rights and obligations relating to inheritance, it also regulates the inheritance procedure. A further important source of Slovenian succession law is the **Inheritance of Agricultural Holdings Act** (*Zakon o dedovanju kmetijskih gospodarstev, ZDKG*)<sup>48</sup>.

Additional sources of Slovenian succession law are:

- **Notary Act** (*Zakon o notariatu, ZN*)<sup>49</sup>, which includes several provisions regarding the competences of notaries public in relation to inheritance;
- **Financial Operations, Insolvency Proceedings and Compulsory Winding-up Act** (*Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju, ZFPPIPP*)<sup>50</sup>, which partially regulates bankruptcy of the estate;
- **Civil Union Act**, which regulates legal consequences of civil unions and non-formal civil unions (*see question 2.1.6.*);
- **Inheritance and Gift Tax Act** (*Zakon o davku na dediščine in darila, ZDDD*)<sup>51</sup>;
- **Denationalization Act** (*Zakon o denacionalizaciji, ZDen*)<sup>52</sup>, which regulates denationalisation of property that was nationalized by agrarian reform, nationalization and confiscation and includes provisions on succession of nationalized property.

##### 3.1.2. Provide a short description of the main historical developments in SL in your country.

As in the field of family law (*see question 2.1.2.*) first codifications of civil law in force on the territory of today's Slovenia were the French *Code Civil* (*Code Napoléon*) and the Austrian *Allgemeines bürgerliches Gesetzbuch* (*ABGB*). Changes in succession law in Slovenia took place after the Second World War, when Slovenia was part of socialist Yugoslavia. After the constitutional reform in the early 1970, the Inheritance Act was adopted in 1976. The Inheritance Act with several amendments (the most substantial was the amendment in 2001) remains in force in Slovenia until today.

<sup>47</sup> Inheritance Act (Official Gazette, no. 15/76, 23/78, Official Gazette of RS, no. [13/94](#) - ZN, [40/94](#) - dec. US, [117/00](#) - dec. US, [67/01](#), [83/01](#) - OZ, [73/04](#) - ZN-C 31/13 - dec. US [63/16](#) ).

<sup>48</sup> Inheritance of Agricultural Holdings Act (Official Gazette of RS, no. [70/95](#), [54/99](#) - dec. US and [30/13](#)).

<sup>49</sup> Notary Act (Official Gazette of RS, no. 2/07 - official consolidated text, 33/07 - ZSReg-B, 45/08 and 91/13).

<sup>50</sup> Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act (Official Gazette of RS, no. [13/14](#) - official consolidated text, [10/15](#) - corr., [27/16](#), [31/16](#) - dec. US, [38/16](#) - dec. US, [63/16](#) - ZD-C [54/18](#) - dec. US).

<sup>51</sup> Inheritance and Gift Tax Act (Official Gazette of RS, Nos. 117/06 and 36/16 - odl. US).

<sup>52</sup> Denationalization Act (Official Gazette, no. 27/91-I, 56/92 - dec. US, 13/93 - dec. US, 31/93, 24/95 - dec. US, 20/97 - dec. US, 23/97 - dec. US, 65/98, 76/98 - dec. US, 66/00, 66/00 - ORZDen27, 11/01 - dec. US, 54/04 - ZDoh-1 and 18 / 05 - dec. US).

### 3.1.3. What are the general principles of succession in your country?

According to Slovenian theory, the general principles of Slovenian succession law include: **freedom of testation, principle of family heirship** and **principle of universal succession**.<sup>53</sup> Other main features of Slovenian succession law include equality in succession (ZD § 4), existence of only two legal bases for succession (see *question 3.1.5.*), limitations on testamentary dispositions (ZD § 8, see *question 3.3.4.*), an estate without an heir becomes property of the Republic of Slovenia (ZD § 9), *ipso iure* acquisition of inheritance, limited liability of an heir for debts of the deceased and the right of heirs to freely decide, whether they want to inherit (ZD 133 § 1).<sup>54</sup>

### 3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.

Probate proceeding in Slovenia is regulated in the Inheritance Act (ZD § 162 – 227) as a **non-contentious proceeding**. The purpose of the proceeding is to determine the deceased's heirs; to determine which assets form his/her estate and which rights from the estate go to the heirs, legatees and other persons (ZD § 162). The court begins proceedings *ex officio* as soon as it learns that a person has died or was declared dead (ZD § 164).

The proceeding starts with **preparatory assignments** (ZD § 179 – 192). After a person dies, a registrar of deaths needs to send to a court a special document, which includes various information on the deceased, which is available in public registers and provided by the family members (i.e. personal information of the deceased; date and time of death; place of death; personal information of spouse, descendants and other close relatives, who might inherit; approximate value of the estate; etc., ZD § 182).

**Competence** for the probate proceedings lies with district courts (Courts Act, *Zakon o sodiščih*, ZD, § 99).<sup>55</sup>

After the Court receives the document regarding death from the registrar, it appoints the **probate hearing** (ZD § 205 – 213) and invites affected persons, who can give various statements regarding succession (i.e. renouncement of succession rights, objection to inventory and appraisal etc.). The court stays the proceedings and directs parties to contentious or administrative procedure in case the parties contest facts and these facts present the basis of their rights (i.e. facts about the validity of the will). In cases of conflict between parties regarding legacy or some other right from the estate, the court directs the parties to contentious or administrative procedure without staying the proceedings.

If according to the document on death, the deceased left no property, the court decides not to appoint a probate hearing (ZD 203 § 1). The court acts in this manner also, when the deceased left only movable property and none of the heirs requests a probate hearing (ZD 203 § 2).

After the court determines, which persons have the right to inheritance, it declares them as heirs by a **decree on inheritance** (ZD 214 § 1). The decree must include (ZD 214 § 2): personal information on the deceased; list of real estate and/or movable property; personal information of heir/heirs and their shares (in case of more heirs); information on, whether the appointment of heir is postponed; information on, whether the heir's succession right is postponed due to a deadline or condition; personal information of legatees or other beneficiaries from the estate.

An **inventory and appraisal of the estate** (ZD § 184 – 192) may be conducted in certain circumstances by a court appointed notary, enforcement officer or court employee. A court may also appoint an administrator of the estate (ZD § 192).

<sup>53</sup> Zupančič, K., Žnidaršič Skubic, V., 2009, 32.

<sup>54</sup> Zupančič, K., Žnidaršič Skubic, V., 2009, 63 – 70.

<sup>55</sup> Courts Act (Official Gazette of RS, Nos. 94/07 - official consolidated text, 45/08, 96/09, 86/10 - ZINepS, 33/11, 75/12 - A-ZSPDSL, 63/13, 17/15, 23/17 - ZSSve and 22/18 - ZSICT).



**3.1.5. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?**

Slovenian succession law knows two legal bases for succession: a will and the law (ZD § 7), therefore a distinction can be made between **statutory (intestate) succession** and **testate succession**.

Succession law in Slovenia does not recognize succession contracts/agreements and the Inheritance Act explicitly states that a contract in which a person leaves his/her estate or a portion of it to his/her co-signatory or another person is invalid (ZD § 103). Invalid are also contracts on expected inheritance or legacy (ZD § 104) and contracts on the content of a will (ZD § 105).

Testate succession always prevails before the intestate succession. Succession on both legal basis is, however, possible.<sup>56</sup>

**3.1.6. What happens with the estate of inheritance if the decedent has no heirs?**

An estate without heirs **becomes property of the Republic of Slovenia**, unless the estate **becomes a bankruptcy estate** in the bankruptcy procedure against an estate without heirs (ZD § 9).

Prior to a court decision, with which the court declares that the estate became property of the Republic of Slovenia, it needs to publish a call to unknown creditors of the estate and to inform the Republic of Slovenia and known creditors of the estate that the estate is without an heir (ZD 142.a § 2).

If none of the creditors requests the beginning of bankruptcy proceedings within 6 months (ZD § 142.a, 142.b) the estate becomes property of the Republic of Slovenia, which is then not liable for deceased's debts (ZD 142.a § 1). In case a bankruptcy procedure is requested and initiated by a court, the estate is not transferred to the Republic of Slovenia, but it becomes bankruptcy estate.<sup>57</sup>

**3.1.7. Are there special rules or limitations concerning succession with reference to the deceased's (or heir's) culture, tradition, religion or other characteristics?**

No.

**3.2. Intestate succession.**

**3.2.1. Are men and women equal in succession? Are domestic and foreign nationals equal in succession? Are decedent's children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?**

Inheritance Act stipulates that nationals of Slovenia are under same circumstances equal in succession (ZD 4 § 1). **Men and women** are therefore equal in succession<sup>58</sup>, which also follows from the Constitution (URS § 14).

Inheritance Act also states that **children born in and out of wedlock** are equal in succession (ZD 4 § 2). **Equality of adopted and natural children** derives from the Family Code, according to which adoption established the same relations between a child (and his descendants) and between adoptive parent (and his relatives) as between relatives (DZ § 219). Furthermore, a child conceived

<sup>56</sup> Zupančič, K., Žnidaršič Skubic, V., 2009, 75.

<sup>57</sup> Borsellino, F., 2018, 55-56.

<sup>58</sup> Zupančič, K., Žnidaršič Skubic, V., 2009, 75.

but not yet born at the time of opening of succession is capable of inheriting under the condition that he is born alive (ZD 125 § 2).

**Spouses and partners in cohabitation** are also equal in their rights and obligations under Inheritance Act (ZD § 4.a). As already previously mentioned, a **civil union** has the same legal consequences as marriage in all legal spheres, unless otherwise provided by the Civil Union Act<sup>59</sup> (ZPZ 2 § 2). **Non-formal civil unions**, on the other hand, have the same legal consequences outside family law as cohabitation (ZPZ 3 § 2). Since the partners in cohabitation are equal to spouses it can be concluded that also partners in non-formal civil unions enjoy same rights and obligations as spouses regarding succession.<sup>60</sup>

Foreign nationals enjoy same rights and obligations in succession as Slovenian nationals under the condition of reciprocity (ZD § 6).

### 3.2.2. Are legal persons capable of inheriting? If yes, on which basis?

Yes. A legal person which exists at the time of death of the deceased is capable of inheriting or accepting a legacy (ZD 125 § 3). The legal basis can only be a will.

### 3.2.3. Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.

Yes, according to Inheritance Act unworthy of succession (based either on the law or a will) is (ZD § 126):

- a person who deliberately killed or attempted to kill the deceased whose succession is involved;
- a person who by the use of threat, coercion or deception has compelled the deceased to create or revoke a will or a provision of a will, or who prevented the deceased to do so;
- a person who destroyed or hid the deceased's will with the intention to prevent the fulfilment of the deceased's final will, as well as a person who forged a will;
- a person who has gravely violated his duty to maintain the deceased and whose duty to maintain derived from the law, as well as a person who did not offer help to the deceased (the interpretation of omission of help needs to be interpreted in accordance with the Criminal Code)<sup>61</sup>.

The list of the grounds for unworthiness is exhaustive and needs to be interpreted restrictively.<sup>62</sup> The unworthiness is relative, which means that a person is unworthy of succession only in relation to the deceased, against which he acted in one of the abovementioned ways.<sup>63</sup>

The unworthiness, however, is not an obstacle for the descendants of the unworthy person to inherit (they inherit as if the person unworthy of succession would die before the deceased, ZD 127 § 1). The rules about unworthiness do not apply if the deceased has forgiven an unworthy heir (ZD 127 § 2).

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<sup>59</sup> No special provision regarding succession of partners in civil union can be found in the Civil Union Act.

<sup>60</sup> Novak, B., 2017 (b), 155.

<sup>61</sup> Zupančič, K., Žnidaršič Skubic, V., 2009, 76.

<sup>62</sup> Zupančič, K., Žnidaršič Skubic, V., 2009, 75.

<sup>63</sup> Zupančič, K., Žnidaršič Skubic, V., 2009, 78.

**3.2.4. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?**

In case of intestate succession, the heirs *ex lege* can be the deceased's descendants; his/her adoptive children and their descendants; his/her spouse; his/her parents; his/her adoptive parents and their relatives; his/her brothers and sisters and their descendants and his/her grandfathers and grandmothers and their descendants (ZD 10 § 1). As already mentioned above (*see question 3.2.1.*) a partner in cohabitation or in civil union and non-formal civil union inherits as a spouse.

The heirs *ex lege* inherit in three orders. Heirs of a lower order exclude from succession all persons belonging to a higher order (ZD 10 § 3).

**I. Order** includes the deceased's descendants and the spouse. They inherit in equal shares (ZD § 11). In case a descendant, who could inherit, dies before the the deceased, his/her share is inherited by his/her children (deceased's grandchildren) by representation in equal shares (ZD § 12). The same rule applies to to deceased great-grandchildren and continues in the order down to the last descendant of the deceased (ZD § 12).

If the deceased's spouse does not have the necessary means for sustaining a livelihood and inherits along with other heirs of the first order, the court can, at the spouse's request, decide that the spouse also inherits a part of the share of the estate that was, according to the law, to be inherited by the spouse's co-heirs. The spouse may request an increase in his/her share of the inheritance against all or individual co-heirs. The court can decide that the spouse inherits the entire estate if the value of that estate is so small that the spouse would suffer hardship if it was divided (ZD 13 § 1).

Similarly, if other heirs of the first order of inheritance do not have the necessary means for sustaining a livelihood and inherit along with the deceased's spouse, the court can, at their request, decide that they also inherit a part of the share of the estate that was, according to the law, to be inherited by the spouse. All or individual co-heirs may request an increase in their inheritance share to the detriment of the spouse (ZD 13 § 2). Furthermore, individual co-heirs who do not have the necessary means for sustaining a livelihood can also request an increase in their inheritance share to the detriment of other co-heirs (ZD 13 § 3) and the court may decide that all or individual co-heirs inherit the entire estate if the value of that estate is so small that they would suffer hardship if it was divided (ZD 13 § 4).

**II. Order** applies in cases, where the deceased did not leave any descendants and it includes as heirs the descendant's spouse and descendant's parents (ZD 14 § 1). In the II. order the spouse inherits half of the estate. The other half is inherited by the parents in equal shares (ZD 14 § 2). If the deceased did not leave a spouse, his/her parents inherit the entire estate in equal shares (ZD 14 § 3). If the deceased's parents died before the deceased and left no descendants, the spouse inherits the entire estate (ZD § 17).

If either of the deceased's parents died before the deceased, his/her share of the estate is inherited by that parent's children (brothers or sisters of the deceased) or grandchildren and great-grandchildren or further descendants by representation (ZD 15 § 1). If both parents of the deceased die before the deceased, their shares of the estate are inherited by their descendants (ZD 15 § 2). In all cases, the deceased's half-brothers and half-sisters on the father's side inherit equal shares of the father's share of the estate and the half-brothers and half-sisters on the mother's side inherit equal shares of the mother's share of the estate, while the full brothers and sisters inherit the father's share in equal shares with the half-brothers and half-sisters by the father and with the half-brothers and half-sisters by mother, the mother's share (ZD 15 § 3).

If either of the deceased's parents died before the deceased and left no descendants, his/her share of the estate is inherited by the other parent. If that parent also died before the deceased, that parent's descendants inherit that share of the estate (ZD § 16).

**III. Order** applies in cases when the deceased left no spouse, no descendants and no parents and when the parents also left no descendants. In the III. order the estate is inherited by the grandfathers

and grandmothers of the deceased (ZD 18 § 1). A half of the estate is inherited by the grandfather and grandmother on the father's side and the other half by the grandfather and grandmother on the mother's side (ZD 18 § 2). Grandfather and grandmother on the same side inherit in equal shares (ZD 19 § 1).

If either of the deceased's ancestors on one side died before the deceased, that share of the estate that would have gone to that ancestor is inherited by that ancestor's children, grandchildren and further descendants, under the rules applying to cases where children and other descendants inherit the estate of a deceased person (ZD 19 § 2). With regard to everything else, the rules under which the deceased's parents and their descendants inherit, apply to the right of inheritance of a grandfather and grandmother from one side and their descendants (ZD 19 § 3).

If the grandfather and grandmother from one side die before the deceased and leave no descendants, their share of the estate (had they outlived the deceased) is inherited by the grandfather and grandmother from the other side, and by their children, grandchildren and further descendants (ZD § 20).

### 3.2.5. Are the heirs liable for deceased's debts and under which conditions?

Universal succession is one of the main principles of succession law in Slovenia (*see question 3.1.3.*), therefore an heir inherits all rights of the deceased as well as his obligations and debts. In Slovenian succession law an heir is liable for deceased's debts, but only up to the value of the estate (ZD 142 § 1). In case of several heirs, they are jointly and severally liable for deceased's debts up to the value of their share (ZD 142 § 3). Although liability is limited with the value of inheritance, an heir is liable with his entire assets (*pro viribus hereditatis*).<sup>64</sup> An heir can avoid liability for deceased obligations and debts by renouncing his succession rights (ZD 142 § 2, *see also question 3.2.6.*).

A creditor may achieve repayment in the following ways:<sup>65</sup>

- by filing a lawsuit against the heir in contentious civil procedure;
- by demanding (within three months after the opening of succession) that the estate shall separate from the assets of the heir (*separation bonorum*, ZD 143 § 1). In that case the heir cannot dispose with objects and rights deriving from the estate and his creditors cannot achieve repayment from them until the creditors of the deceased, who requested the separation are repaid (ZD 143 § 1). The defendant's creditors can demand repayment of their claims only from the estate (ZD 143 § 2, liability *cum viribus hereditatis*).
- by bankruptcy proceedings against the estate in cases when the value of assets is lower than the value of debts and obligations (ZFPPIPP 14 § 3), which allows equal treatment of creditors.

### 3.2.6. What is the manner of renouncing the succession rights?

In Slovenian succession law, the estate is transferred to heirs (*ipso iure*) in the moment of the deceased's death (ZD § 132). This is also the moment of opening of the succession (ZD 123 § 1). Therefore, an heir can renounce his/her succession rights. He can do so with a statement at court before the end of probate proceedings (ZD 133 § 1). The statement is irrevocable, unless it was made due to coercion, threat, deception or error (ZD 138 § 1,2).

Renouncing succession rights also affects the descendants of the heir, who renounced his/her succession right, unless he/she explicitly states that he is renouncing only his/her succession right (ZD 133 § 2). In that case it is considered that he/she was never an heir (ZD 133 § 4). The share of a testamentary heir, who renounced his succession right goes to deceased's *ex lege* heirs, unless the deceased decided differently in his will (ZD § 139). The share of an *ex lege* heir is inherited as if this heir died before the deceased (ZD § 140).

<sup>64</sup> Zupančič, K., Žnidaršič Skubic, V., 2009, 230.

<sup>65</sup> See, Borsellino, F., 2018.

If an heir has already disposed of the estate or parts of it, he/she cannot renounce it anymore (ZD 135 § 1), as it is considered that he/she has already tacitly accepted it.<sup>66</sup>

A descendant or a spouse may in agreement with his/her ancestor or spouse renounce the inheritance that he/she would inherit after the death of his/her ancestor or spouse (ZD 137 § 2, *see also question 3.3.2.*).

### 3.3. Disposition of property upon death.

#### 3.3.1. Testate succession.

##### 3.3.1.1. Explain the conditions for testate succession.

A testator is free to dispose of his/her property in a will in the ways and limits as are prescribed by the law (ZD § 8). A Slovenian law knows only two legal bases for succession (the law and a will). Testate succession can therefore only be based on a will, which is only valid if it was drawn up in a form and under conditions as laid down by the law (ZD § 62).

##### 3.3.1.2. Who has the testamentary capacity?

According to the Inheritance Act, a will may be drawn up by every person, who is **capable of discernment** and **has reached the age of 15** (ZD 59 § 1). The testator needs to have the testamentary capacity at the time of creating the will, or the will is invalid (ZD 59 § 2) and may be challenged by any person with legal interest (ZD 60 § 1). If a testator loses his testamentary capacity after the will has already been created, this does not influence its validity (ZD 59 § 3).

A testator must make his testamentary dispositions personally and cannot use a representative.<sup>67</sup>

In order to possess testamentary capacity one does not need to have the capacity to contract. The capability of discernment as one of the conditions for testamentary capacity needs be interpreted with milder criteria.<sup>68</sup>

##### 3.3.1.3. What are the conditions and permissible contents of the will?

In order for a will to be valid several conditions need to be met:<sup>69</sup>

- **testamentary capacity of testator** (*see question 3.3.1.2.*);
- **testator must express his right and true will (ZD 60 § 1)**: a will is invalid if it was drawn up under threat, coercion or deception, or in error;
- **a will must be drawn up in one of the forms prescribed by the Inheritance Act (ZD § 62, see question 3.3.1.4.)**;
- **content of the will must be possible, permissible and specific or specifiable and it needs to have a permissible basis (grounds)**: this condition derives from the general provisions of the Obligations Code, (*Obligacijski zakonik, OZ*)<sup>70</sup>.

A testator may choose from various testamentary dispositions, which are prescribed by the law. The most important of them is certainly the nomination of one or more heirs (ZD 78 § 1). A testator may decide that an heir inherits his entire estate or just a share of the estate (ZD 78 § 2). Furthermore, a testator may nominate one or more legacies (ZD § 80) and an alternative successor or legatee (ZD 79

<sup>66</sup> Zupančič, K., Žnidaršič Skubic, V., 2009, 207.

<sup>67</sup> Zupančič, K., Žnidaršič Skubic, V., 2009, 114.

<sup>68</sup> Zupančič, K., Žnidaršič Skubic, V., 2009, 115.

<sup>69</sup> Zupančič, K., Žnidaršič Skubic, V., 2009, 114 - 127.

<sup>70</sup> Obligations Code (Official Gazette of RS, no. 97/07 - official consolidated text, 64/16 - dec. US and 20/18 - OROZ631).

§ 1,2). He is, however not allowed to nominate an heir to his heir or legatee (fiduciary substitution, ZD 79 § 3). A will is also valid even if it only includes legacies.<sup>71</sup>

A testator may also decide that his estate, a part of the estate, an object from the estate or a right from the estate is used for some legal purpose (ZD § 81), he/she may determine a burden (obligation) to any person that has benefited from the estate (ZD 82 § 1), as well as set out conditions and deadlines (ZD 82 § 2). Impossible, illegal, immoral, incomprehensive and self-contradicting conditions and burdens are considered as being non-existent (ZD 82 § 3).

Further provisions that testator may include in the will are:

- disinheritance of a compulsory heir (ZD 43 § 1);
- disinheritance of a compulsory heir to the benefit of his descendants (ZD § 45);
- repeal of a previous will (ZD 99 § 1);
- appointment of executor of the will (ZD 95 § 1); etc.

#### 3.3.1.4. Describe the characteristics of will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a will?

A will in Slovenian succession law can be defined as a unilateral, revocable and a strictly personal declaration of will, expressed in a prescribed form, with which a person disposes of his/her property for the case of his/her death.<sup>72</sup> Wills can be classified in various groups: ordinary/extraordinary, written/oral and private/public.

The following forms of wills are known to Slovenian succession law:

- Ordinary wills:
  - a holographic will (ZD § 63);
  - a written will signed in the presence of witnesses (ZD § 64);
  - a judicial will (ZD § 65,66);
  - a will compiled abroad, by a consular or diplomatic representative (ZD § 69);
  - an international will (ZD § 71.a – 71.g);
  - a notarial will (ZN 46 §1):
    - a notary will, compiled by the notary in the form of notarial deed as dictated by the testator;
    - a notary will, compiled by the testator and confirmed by the notary;
- Extraordinary wills:
  - a will compiled on board of Slovenian ship (ZD § 70);
  - a will compiled during a state of emergency or war (ZD § 71);
  - an oral will (ZD § 72).

In making a public will, various public authorities may take part. A **judge** is authorized to draw up a judicial will, a **diplomatic or consular representative** can draw a will compiled abroad, both a **judge or a diplomatic or consular representative** can also take part in compiling an international will. **Notaries** are competent to compile or confirm notarial wills. During a state of an emergency or war, a **company commander, or commander of an equivalent or higher unit, or anyone in the presence of a commander** may compile a will for a member of military staff. The theory considers as a public will also a will compiled on board of Slovenian ship.<sup>73</sup> Such will can be compiled by a captain of the ship (or his deputy or assistant).

#### 3.3.1.5. Is there a (public) register of wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.

<sup>71</sup> Zupančič, K., Žnidaršič Skubic, V., 2009, 113.

<sup>72</sup> Zupančič, K., Žnidaršič Skubic, V., 2009, 113.

<sup>73</sup> Zupančič, K., Žnidaršič Skubic, V., 2009, 135

Yes, the Slovene Chamber of Notaries manages the **Central Register of Wills** (ZN 108.a § 1). The register contains information about notarial wills and wills deposited with notaries; wills which are drawn up by an advocate or are deposited with him; judicial wills and wills which are deposited with a court (ZN 108.b § 1).

After a notary, a court or an advocate has drawn up a will or has received a will for safekeeping, he/she/it needs to send to the Chamber of Notaries a request for entering the will into the register (ZN 108.b § 2,3,4) for which a special form may be used. Information about wills can only be sent to the register by notaries, courts and advocates.

The Central Register of wills contains the following information (ZN § 108.c):

- serial number and date of entry;
- first and second name of testator;
- personal registration number and place of birth if testator is national of Slovenia, or date, place and country of birth if testator is a foreign national;
- address of testator;
- date and reference number of the will;
- first and second name and the address of the notary or of other person or institution, with which the will is deposited;
- type of will;
- every change, revocation or derogation of a will, for which the entry into register is mandatory;
- date of return of the will to a testator;
- information about the death of testator; and
- information about persons, who looked into the register.

Until the testator is alive, the entry of a will into the register remains confidential (ZN 108.č § 1). Information from the register can be obtained upon death of testator by a court or a person which proves his/her legitimate interest (ZN 108.č § 2).

**3.3.2. Succession agreement (*negotia mortis causa*). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.**

As already mentioned above (*see question 3.1.5.*) Slovenian succession law does not recognize succession agreements, and recognizes only two legal basis (grounds) for succession (a will or the law). The Inheritance Act also explicitly stipulates that a contract in which a person leaves his/her estate or a portion of it to his/her co-signatory or another person is invalid (ZD § 103). Invalid are also contracts, with which a person disposes with expected inheritance or legacy (ZD § 104) and contracts on the content of a will (ZD § 105).

The only exception to the above rule is an agreement between a descendant and an ancestor or between spouses, with which a descendant or a spouse renounces the inheritance, which he/she would be entitled to upon the death of the ancestor/spouse (ZD 137 § 2).

In relation to succession agreements, theory mentions two additional agreements: **the contract on delivery and distribution of property** (OZ § 546 – 556), with which the deliverer undertakes to deliver and distribute property to his/her descendants, adopted children and adopted children's descendants; and **the contract of lifelong maintenance** (OZ § 557 – 563), with which the maintaining party undertakes to support the maintained party, and the maintained party declares that he/she will leave the former all or part of his/her property (comprising of real estate and the movable property intended for the use and enjoyment of the real estate), whereby the delivery thereof is deferred until the deliverer's death. Both contracts are regulated in the Obligations Code and cannot be considered succession agreements, as the contractor disposes of the property he owns in the time of concluding the contract and not the property, which he will own at the time of death.<sup>74</sup>

<sup>74</sup> Zupančič, K., Žnidaršič Skubic, V., 2009, 177.

**3.3.3. Are conditions for validity of wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

The vast majority of rules regarding the proper form and validity of wills can be found in the Inheritance Act (ZD § 59 – 84). Nonetheless, some provision of general civil law, which can be found in Obligations Code also need to be taken into account when assessing the validity of a will, namely: content of the will must be possible, permissible and specific or specifiable (OZ 34 § 2) and it needs to have a permissible basis/grounds (OZ 39 § 1).<sup>75</sup>

Provision regarding the form and drawing up of a notarial will can be found in the Notary Act (ZN § 46).

**3.3.4. Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

Slovenian succession law knows the concept of compulsory/forced heirs, with which the freedom of testation is limited, meaning that certain *ex lege* heirs cannot be completely excluded from inheriting (unless certain conditions are fulfilled). Compulsory heirs are: deceased's descendants, his/her adoptive children and their descendants, his/her parents and his/her spouse (ZD 25 § 1). Grandfathers, grandmothers, brothers and sisters are compulsory heirs only if they are incapable of work and have no means to sustain a livelihood (ZD 25 § 2). The above-listed persons are compulsory heirs only if they would be entitled to inherit as *ex lege* heirs (ZD 25 § 3).

The compulsory share of deceased's descendants, his/her adoptive children and their descendants and his/her spouse is a half of the share to which the compulsory heirs would be entitled had it come to intestate succession (ZD 26 § 2). The compulsory share of other compulsory heirs is one third of the share to which they would be entitled had it come to intestate succession (ZD 26 § 2). A compulsory share is also protected by rules, according to which gifts need to be taken into account, when determining the size of compulsory share (ZD § 28).

**3.3.5. Cross-border issues.**

**3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?**

Despite mild scepticism, which could be detected in Slovenian literature<sup>76</sup> the court practice<sup>77</sup> has not seem to stumble across any bigger issues yet.

**3.3.5.2. Are there any problems with the scope of application?**

From the available court practice (although scarce), no particular problems regarding the scope of application can be determined.

**3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did**

<sup>75</sup> Zupančič, K., Žnidaršič Skubic, V., 2009, 124.

<sup>76</sup> See: Rijavec, V., 2016, 1351; Ivanc, T., 2014, 22; Ivanc, T., 2016, 1365.

<sup>77</sup> See: Higher Court in Maribor, Judgement I Cp 12/2017 (17.1.2017); Higher Court in Ljubljana, Decree II Cp 1455/2018 (7.11.2018); Higher Court in Ljubljana, Decree II Cp 2567/2017 (7.2.2018); Higher Court in Koper, Decree I Cp 682/2016 (27.6.2017).



**the authorities in your country had experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?**

All available court decisions relate to the questions of scope of application, therefore Slovenian courts did not have the opportunity yet to decline jurisdiction under Article 6 or to accept jurisdiction under Article 7.

**3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?**

No such problems can be detected from available court practice.

**3.3.5.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?**

No such case can be found in available court practice.

**3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?**

The Inheritance Act was amended in 2016 to adjust Slovenian legal order to the Succession Regulation. Certificates of Succession are issued by probate courts (ZD § 227.b).

**3.3.5.7. Are there any national rules on international jurisdiction and applicable law (besides the Succession Regulation) concerning the succession in your country?**

Additional rules on international jurisdiction and/or applicable law concerning the succession can be found in International Private Law and Procedure Act (ZMZPP § 32, 32, 79, 80, 81, 114) and Inheritance Act (ZD § 225 – 227).

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## Spain

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### 1. Social perspective.

**1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without *affectio maritalis*).**

In today's Spanish society, family models have changed. Relationships are based not only on those constituted by marriage, but also by those formed by couples who live together in a stable manner. It is important to stress that our country, following the trend in Europe, is in the midst of a demographic transition. The birth rate is critical and the ageing of the population is increasing. Thus, the structure of families has been modified: the number of members has been reduced, at the same time as the number of families in which three generations live together has been reduced and the number of people living alone has increased. This, together with the increase in divorces and break-ups of unmarried couples, has also led to the existence of one-person households and family homes in which only one of the parents lives with the children. There is also an increase in reconstituted families (consisting of a parent, his or her spouse or partner and the children of at least one of them). There are also convivial relations of mutual help that the Civil Code of Catalonia regulates and defines as those situations in which two or more people (who do not even have to be relatives, but simply have relationships of simple friendship or companionship) live together in the same home sharing the same expenses, domestic work or both, without consideration and with the purpose of mutual help.

**1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.**

**Number of couples by type of union and sex of the couple (INE 2019)**

	Total (Couples)	Couples of different sexes	Same sex couple	male	Same sex couple	female
<b>2017</b>						
<b>Total (Couples)</b>	11.298,6	11.219,7		47,4		31,5
<b>Married couple</b>	9.650,5	9.607,9		24,5		18,0
<b>Domestic partner</b>	1.648,1	1.611,8		22,9		13,4

Number of couples by type of union and sex of the couple (INE 2019)						
	Total (Couples)	Couples of different sexes	Same sex couple	male	Same sex couple	female
<b>2017</b>						
<b>Total (Couples)</b>	11.298,6	11.219,7		47,4		31,5
<b>Married couples</b>	9.650,5	9.607,9		24,5		18,0
<b>Domestic Partners</b>	1.648,1	1.611,8		22,9		13,4
<b>2016</b>						
<b>Total (Couples)</b>	11.144,6	11.049,2		66,2		29,1
<b>Married couple</b>	9.566,3	9.512,2		38,9		15,3
<b>Domestic couple</b>	1.578,2	1.537,0		27,4		13,8
<b>2015</b>						
<b>Total (Couples)</b>	11.214,9	11.121,5		52,9		40,5

### 1.3. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.

As in other surrounding countries, separation, divorce and breakups have become normal and have progressively increased. In the following graph you can see how the processes of separation have decreased and the majority trend is divorce.

#### Nullities, separations and divorces Spain (INE 2019)

	Total	Nullities	Separations	Divorces
	2017	2017	2017	2017
<b>Total National</b>	102.341	100	4.280	97.960

The figures of the last Report approved by the CGPJ show the high number of marriages dissolutions. And although they have decreased by 8.2% in the first quarter of 2018 with respect to the first quarter of 2017, there is a high number of procedures for modifying measures in processes of separation and divorce, guardianship and custody, maintenance of non-marital children, although they also show a minimal decrease. There were 2,846 changes in consensual marriage measures, 0.5 percent less than in the first quarter of 2017; 8,734 changes in non-consensual measures, with a decrease of 4.9 percent; 4,998 changes in consensual guard, custody and maintenance of non-marital children, 0.6 percent less; and 7,050 changes in non-consensual measures, 9.3 percent less than in the first quarter of 2017<sup>1325</sup>. And following this line, in the fourth quarter of 2018 the number of demands for marriage dissolutions: separations and divorces, was reduced by 0.6 percent compared to the same quarter of 2017, according to the data collected by the Council's Statistics Service

<sup>1325</sup> Source CGPJ Judicial Branch Communication (June 2108). Statistical data can be accessed at the webpage: [http://www.poderjudicial.es/cgpj/es/Temas/Estadistica\\_Judicial](http://www.poderjudicial.es/cgpj/es/Temas/Estadistica_Judicial) (18.5.2019).

General of the Judicial Power. In this fourth quarter, separations, both consensual and non-consensual, showed year-on-year decreases. The 904 consensual separation lawsuits were 12.2 percent less than those filed in the same quarter of 2017. The 442 non-consensual separation lawsuits were 7.7 percent less. With regard to divorce demands, the consensual ones, of which 16,689 were filed, decreased by 1.3 percent with respect to 2017, while, on the contrary, the non-consensual ones increased by 1.6 percent, having presented 12,287. The number of nullity claims, 34, was 13.3 percent higher than those filed in the fourth quarter of 2017.<sup>1326</sup>

**1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).**

According to the latest available data, 82.8% of the total number of divorces registered in 2017 took place between spouses of Spanish nationality. In 10.9% one of the spouses had foreign nationality and in 6.3% both spouses were foreign (INE, 2018).<sup>1327</sup>

## 2. Family law.

### 2.1. General.

**2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?**

The main source of **Family Law is the Spanish Civil Code (Cc)** approved by Royal Decree of 24 July 1889, and applies as primary source to the Autonomous Communities of Andalusia, the Canary Islands, Cantabria, La Rioja, Castilla-La Mancha, Castilla y León, and the Autonomous Communities of Valencia, Extremadura, Madrid, Murcia, Asturias, as well as the autonomous cities of Ceuta and Melilla.

However, in Spain, there are some territories with their own foral or special civil law, whose conservation, modification or development empowers them to legislate in accordance with art. 149.1.8<sup>a</sup> of the Constitution; and therefore they have their own regulation in some matters that affect family law. All of them establish the general civil law of the State (Civil Code) as a supplementary right, in the absence of an applicable law or foral custom:

- **Navarra:** Law 1/1973 of 1 March 1973, approving the Compilation of the Civil Law of Navarre, modified by the Foral Law 5/1987, of 1 April, of Navarre. Recently, the Foral Law 21/2019, of 4 April, on the modification and updating of the Compilation of the Civil Law of Navarre or Fuero Nuevo was published.

- **Baleares Islands:** Legislative Decree 79/1990, of 6 September, approved the consolidated text of the compilation of the civil law of the Balearic Islands.

- **Cataluña:** Law 25/2010, of 29 July, of the second book of the Civil Code of Cataluña, relating to the person and the family.

- **País Vasco:** Law 5/2015, of 25 June, on Basque Civil Law and Law 7/2015, of 30 June, on family relations in the event of separation or rupture of the parents of the Basque Country.

- **Galicia:** Law 2/2006, of 14 June, on Galician civil law.

- **Aragón:** Legislative Decree 1/2011 of 22 March, of the Government of Aragon, approved, under the title "Code of the Foral Law of Aragon", the Revised Text of Aragonés Civil Laws. In this

<sup>1326</sup> Source CGPJ Judicial Branch Communication (March 2109). Statistical data can be accessed from the web: [http://www.poderjudicial.es/cgpi/es/Temas/Estadistica\\_Judicial](http://www.poderjudicial.es/cgpi/es/Temas/Estadistica_Judicial) (18.5.2019).

<sup>1327</sup> Estadistics of nullities, separations and divoces - In 2017 (Note INE, september - 2018)

text, they are recast among others: Law 6/1999, of 26 March, on unmarried stable couples, Law 2/2003, of 12 February, on matrimonial property regime and widowhood, Law 13/2006, of 27 December, on personal rights, or Law 2/2010, of 26 May, on equality in family relations in the event of the parents breaking up.

Other sources of regulation in the area of the Family are those relating to FACT Pairings. Spain has the particularity that there is NO law on de facto couples at state level. Thus, most of the Autonomous Communities, also those that do not have a foral or special civil law of their own, have regulated de facto couples from a perspective that is not strictly administrative. Laws that define their concept based on alternative criteria -whether a certain period of cohabitation, the existence of common children, or the will to become such a couple accredited by different means valid in Law- and paying special attention to the economic, personal and family relationships of its members. Some of them declared totally or partially unconstitutional as will be seen. .

Cataluña, Navarra, Galicia, Aragón, the Baleares Islands, País Vasco and the Valenciana Community, **have their own foral or special civil law** which regulate the effects of the cessation of coexistence *more uxorio*:

- **CATALUÑA**: The first autonomous law was passed in 1998, "Law of Stable Couple Unions". They are currently regulated by Law 25/2010, of 29 July, of the second book of the Civil Code of Catalonia, relating to the person and the family. Specifically, in Chapter IV of Title III of this law, which reads "Stable cohabitation in a couple". Decree Law 3/2015, of 6 October, modifying Law 25/2010, creates the Registry of stable couples; and Order JUS/44/2017, of 28 March, approves the Regulations of the Registry of stable couples of Catalonia.

- **NAVARRA**: Foral Law 6/2000, of 3 July, for the Legal Equality of Stable Couples. This Law determined its economic regime (articles 5.3 and 7) and contemplated a periodic pension or economic compensation for that of its members who were in a situation of patrimonial inequality on the occasion of the dissolution of the couple (articles 5.4 and 5.5): both provisions have been declared unconstitutional by Judgment of the Constitutional Court, no. 93/2013, of 23 April.<sup>1328</sup> In this case, not due to the lack of competence of the Comunidad Foral over the civil effects of this relationship, but in the violation of the personal freedom of the members of the couple (article 10.1 of the Constitution) which, according to the Court, occurs with the establishment of certain civil rules of necessary law, applicable in the absence of an agreement of its members, even if they have not shown their will to adhere to them. The third derogatory provision of the Foral Law 21/2019, of 4 April, of modification and updating of the Compilation of the Civil Law of Navarra or Fuero Nuevo, repeals articles 1, 2, 3, 4, 5 and 8 of the Provincial Law 6/2000, of July 3, for the legal equality of stable couples, as well as the rest of its provisions in what is contrary to what is regulated in the present statutory law. And the first final provision, under the rubric "Single Registry of Stable Couples", establishes that within a period of one year from the publication of this statutory law, a Single Registry of Stable Couples must be created, for the purposes of publicity, ascribed to the Administration of the Autonomous Community of Navarre.

- In the Community of **GALICIA**, the Third Additional Provision of Law 2/2006, of 14 June, relating to the Rules regulating civil law in Galicia, equates de facto marriage to marriage. Shortly afterwards, Law 10/2007, of 28 June, reformed again the Third Additional Provision to reserve this equality for those couples registered in a specific Registry.

- In **ARAGÓN**, section 3 of chapter II of title II of the Code of Foral Law, approved by Decree 1/2011 of 22 March, which bears the heading "Effects of the rupture of the cohabitation of parents with dependent children", is applicable to any "family relations in cases of rupture of the cohabitation of parents with dependent children, including cases of separation, nullity and divorce and proceedings concerning guardianship and custody of minor children" (article 75.1).

- Law 18/2001, of December 19, of the **BALEARES Island**, of Stable Couples, whose art. 4 regulates that the members of the couple can validly regulate by any form admitted in law, oral or written, the personal and patrimonial relations derived from cohabitation, in addition to the

<sup>1328</sup> A commentary on these judgments can be found in Echeverría Albácar, I., 2014, 1 et seq.

economic compensations in the case of extinction of cohabitation, with the limit of the minimum rights established by this Law, which are inalienable until the moment they are required.

- Law 2/2003, of 7 May, of the **PAÍS VASCO**, regulating de facto couples. This Law establishes a supplementary economic regime, in default of agreement, to which its members "may adhere", in which a periodic pension or economic compensation is provided for that of its components that was in a situation of patrimonial inequality after the extinction of the couple (article 6).

The **additional legal sources of family law**, in Spain there are **Communities that do not have their own foral or special civil law**, such as Valencia, Madrid, Asturias, Andalusia, the Canary Islands, Extremadura, Cantabria and Murcia, **but which have regulated in autonomous laws for their region (autonomous community) the civil effects of the cessation of coexistence *more uxorio***:

- In the **Community of VALENCIA**, the first Law 1/2001, of 6 April, regulating de facto unions was repealed by Law 5/2012, of 15 October, of the Generalitat, of formalized de facto unions of the Comunitat Valenciana. However, the validity and application of Law 5/2012 was suspended, from 18 July 2013, until it was finally declared unconstitutional by Constitutional Court Decision 110/2016 of 9 June. (BOE-A-2016-6838). Likewise, article 1.1 and articles 2 and 6 to 14 were declared null and void, with the effects indicated in legal basis 10 of the aforementioned sentence.

- Law 11/2001, of 19 December, of the **Community of MADRID**, of the domestic partner. This law contemplated an economic regime of coexistence in defect of pact (article 4.2) that has been declared unconstitutional due to the lack of competence of this Autonomous Community in matters of civil legislation (Sentence of the Constitutional Court nº 81/2013, of April 11, 2013).<sup>1329</sup>

- Law 4/2002, of May 23, of **ASTURIAS**, of Stable Couples, whose art. 5 .1 establishes that the members of the stable couple will be able to regulate the personal and patrimonial relations derived from the coexistence, by means of public or private document, with the possibility of including economic compensations that agree for the case of dissolution of the couple, under the observance of the applicable legality.

- Law 5/2002, of 16 December, of **ANDALUCÍA**, of the domestic partner. This Law establishes, in the event of dissolution, that the members of the stable couple shall be jointly and severally liable to third parties for the obligations contracted for the expenses necessary for the maintenance of the house (article 12.4).

- Law 5/2003, of 6 March, of the **CANARIAS**, of the domestic partner. This Law determines the economic regime of cohabitation in the absence of an agreement between its members (article 7.3).

- Law 5/2003, of 20 March, of **EXTREMADURA**, of the domestic partner. This Law establishes its economic regime in the absence of a pact (article 6.2), recognises compensation, in the event of dissolution of the couple, in favour of that of its members who are in a situation of economic inequality (article 7), and regulates, for the same hypothesis, the guardianship and custody of the minors in foster care (article 8.2) and of the children (article 9).

- Law 1/2005, of 16 May, of **CANTABRIA**, regulating De facto couples. This law defines its economic regime in the absence of a pact (article 8.2), provides for compensation in favour of the cohabiting party in a situation of unequal assets when the couple ends (article 9), provides for the application of "the civil legislation in force on paternal and filial relations" to the "guardianship and custody of common children and the regime of visits, communication and stay" (article 10), and the same applies in respect of foster children (article 11.2).

- Law 7/2018, of 3 July, of the domestic partner in the Autonomous Community of the Region of Murcia, provides in its Preamble that article 39 of the Constitution states that "the public authorities shall ensure the social, economic and legal protection of the family", where de facto couples are found understood as a new social model of the family.

In this sense, and after the regulation of common-law couples in the different Autonomous Communities, it can be seen that at present regulated unions coexist with those that are not. In turn, the former (regulated unions) are considered stable with one year of uninterrupted cohabitation

<sup>1329</sup> A commentary on these judgments can be found in Egúsqiza Balmaseda, M. A., 2013, 75-115.

(Asturias, Extremadura, Cantabria) or two years (Aragón and Cataluña); even without a term (mere cohabitation) when there are common descendants (Navarra); or they are constituted with the vocation of being a de facto couple manifesting it in public deed (Aragón, Asturias, Catalonia, Navarra), through registration in the relevant Register (Balearic Islands), or in any other way (Andalusia). On the other hand, the Registries destined for this purpose are divided between the declarative ones (Andalusia, Asturias, Canary Islands, Navarre, Catalonia, Murcia) and the constitutive ones that either delay until registration the voluntary submission to the law (Valencia, Madrid, Balearic Islands, Extremadura) or simply request it as a valid budget (Basque Country). Thus, and as an example of the complexity of the problem, a mixed Catalano-Navarra civil neighbourhood couple resident in Andalusia would be under the scope of the three possible laws.

### 2.1.2. Provide a short description of the main historical developments in FL in your country.

The social and legal-political changes that have taken place in Spain have had a notable influence in the area of family law. A brief historical overview of the main regulatory milestones in the area of Family Law leads us to refer to Law 14/1975, of 2 May, which eliminated the limitations on the ability of married women to act.

After the Spanish Constitution (1978),<sup>1330</sup> the enshrinement of the common **inspiring principle of the legal equality** of the spouses and of the children born outside or inside the marriage, brought with it the reform of the entire Spanish matrimonial system. As a consequence of this, important reforms were undertaken in Spanish Family Law.

On the other hand, this evolution shows a progressive extension of **private autonomy** within the framework of family law.<sup>1331</sup>

Law 11/1981, of 13 May, enshrined the principle of the freedom of spouses to conclude between themselves all kinds of legal acts and business, abolishing the differences between matrimonial children and children from a de facto union; Law 30/1981, of 7 July), which introduced the regulatory agreement, the maximum exponent of the family legal business, allowing spouses to determine by mutual agreement the effects of its rupture. Subsequently, Law 15/2005, of 8 July, extended the scope of autonomy of the spouses, in order to end their cohabitation, recognizing the power to request the dissolution of the marriage with no other requirements than the lapse of three months from its celebration.

The causal regime of divorce has been abandoned and the obligation to dissolve the marriage has been eliminated the double procedure of first resorting to separation and then, after some time, to divorce.

A radical change in the institution of marriage was brought about by Act No. 13/2005 of 1 July amending the Civil Code on the right to marry and allowing marriage between persons of the same sex.

In addition, Law 15/2015 of 2 July on Voluntary Jurisdiction introduces the possibility for spouses to agree on divorce or separation by mutual agreement, except in the case of having children subject to parental authority, through the formulation of a regulatory agreement before a Lawyer for the Administration of Justice (formerly a court clerk) or in public deed before a notary (arts. 82 and 87 CC).

### 2.1.3. What are the general principles of FL in your country?

Currently, it is stated that the lines along which the family runs are presided over by an authentic individualism that has led to the evolution of the concept of institutional family to what has come to be called contractual or voluntary family, of a foundation not necessarily matrimonial, of an

<sup>1330</sup> Sánchez Hernández, A., 2012, 223-260.

<sup>1331</sup> Pérez Vallejo, A. M., 2000, 49 et seq. Parra Lucán, M. A., 2012, 97 et seq.

egalitarian structure and plural configuration, subordinated to the satisfaction of individual interests.<sup>1332</sup>

**2.1.4. Define “family” and “family member” in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

Focusing on what has been and is currently the general profile of the family, we are basically offered two models of family relationship:

- what we could call an "extended" family, which would include, in a broad sense, people united by a family relationship;
- and the so-called "nuclear" family, limited to the couple and their children.

After the Constitution, the family protected by Article 39 CE (Spanish Constitution) is not only the legitimate family based on marriage, since Article 39 CE itself makes the integral protection of children independent of their matrimonial or non-matrimonial origin, and Article 14 CE prevents any type of discrimination. However, this does not mean that marriage and non-marital cohabitation are equivalent realities. The concept of family does not specify as a *sine qua non* requirement that the family be based on marriage. As an inherent consequence of the constitutional principles, the extension of the benefits traditionally reserved to the spouse, to the cohabitant *more uxorio*, when its *raison d'être* rests on the subsistence of a stable and lasting union and as an instrument of guardianship for the latter, is increasingly profusely included in ordinary legislation.

In short, we can affirm that the constitutional model of family is open and plural but not invertebrate, for this reason it is possible to identify a family group when there is kinship, when there is hierarchy and when there is dependence, being solidarity the reason for the union.

**2.1.5. Family formations.**

At present, the dynamic of family formation has been transformed from the traditional married family to the *de facto* family (whether registered or not), to the single-parent family, to reconstituted families, single-parent families and multicultural families. It is important to stress that the social changes that have taken place in recent years, especially in the world of work, have led many women in Spain to face motherhood alone by free choice. A personal choice to be a single mother, resorting to the safety of assisted reproduction techniques.

As recognized by the Supreme Court (SC), in its ruling of May 12, 2011: "The current family system is plural, that is, from the constitutional point of view, are considered families those groups or units that constitute a nucleus of coexistence, regardless of the form that has been used to form it and the sex of its components, provided that the constitutional rules are respected").

**2.1.5.1. Define the “spouse” in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

Marriage between people of the same sex is permitted in Spain. Following Law 13/2005, of 1 July, amending the Civil Code on the right to marry, article 44 C.c (civil Code). has been reworded and a second paragraph has been added, proclaimed that "the sex identity of both partners does not prevent the celebration of the marriage or its effects".

Consequently, the legal effects of marriage have been referred *in toto* to this other family model made up of persons of the same sex.

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<sup>1332</sup> Martínez De Aguirre, C., 1996, 25, 45-51. Díez Picazo, L., 1984, 40.



**2.1.5.2. What types of relationships/unions between persons are recognised in FL of your country? In particular, formal (registered) and informal (*de facto*) unions, heterosexual and same-sex unions, unions with and without *affectio maritalis*. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

A single definition is not valid.

The common note, which results from the very notion of "domestic partnership", is the exclusion, as a general rule, of the legal rules of marriage to discipline these situations. Thus, at the level of the state legislation there is no definition, being the doctrine and jurisprudence those that have been outlining the concept of *de facto* union, stable couple or cohabitation "more uxorio": "as that which has to be developed in regime of daily coexistence, stable, with temporary permanence consolidated over the years, practiced extensively and publicly with accredited joint actions of interested parties, thus creating a broad community of life, interests and ends, in the nucleus of the same home.

In the case of non-formalised couples with respect to whom there is no applicable legislation of their own, or where the cohabitants do not register or register, it will be firstly the parties who, by means of agreements, will regulate their relations; and secondly and in the absence of such agreements, it will be the Courts who will have to resolve such situations on a case-by-case basis through the application of provisions of ordinary law.

The jurisprudence of the Supreme Court has clearly established that the *de facto* union "is not a situation equivalent to marriage" and since it is not so, it cannot be applied to the former (as far as personal and patrimonial relations between the cohabitants are concerned), the regulation of the latter since those who joined in such a way, being able to have married, did so precisely in order to be excluded from the discipline of marriage and not subject to it.

**2.1.6. What legal effects are attached to different family formations referred to in question 2.5.?**

The marriage is born of an agreement of wills of the contracting parties, and once the legally established solemn requirements have been fulfilled, this constitutive act generates the so-called marital status. After and once this one arose, the consequences and personal and patrimonial effects, are marked by the law, without possibility in some suppositions, or with relative possibility in others, of modification or alteration on the part of the spouses.

None of this happens with *de facto* unions, without prejudice to the fact that social reality considers coexistence "more uxorio", as a relationship similar to marriage. As the Supreme Court (SC) reiterated in its ruling of 12 September 2005: "the *de facto* union is an institution that has nothing to do with marriage, even though both are part of family law".<sup>1333</sup> Today, with the legal existence of homosexual marriage and unilateral divorce, it can be proclaimed that the *de facto* union is made up of people who do not want, at all, to contract marriage with its consequences.

**Legal effects recognised for unmarried couples.**

The recognition of effects in various legal provisions (leases, fiscal, administrative, social, etc.) does not entail attributing to them a legal status similar to that of marriage. It will be necessary to **differentiate between formalised and non-formalised *de domestic partner***, since only the former are subject to the legal effects recognised in the different autonomous regulations. The recognised legal effects are as follows:

**1.- Formalized or registered couples:**

**\* When there is a pact between the parties:**

- Personal effects: any effect of a personal nature may be agreed with the limit established by article 1.255 of the Civil Code.

<sup>1333</sup> Sentencia del Pleno 611/2005, de 12 de septiembre de 2005 (Tol 725211)].

- Patrimonial effects: By means of an agreement, the parties can agree that their coexistence and subsequent dissolution is governed by any of the matrimonial economic regimes, they can agree on a society or community regime or separation of goods.

\* Absence of pact - recognition *ope legis*:

- Patrimonial effects *inter partes (between two persons)*:

- Pension or economic compensation: Aragon, Balearic Islands, Cantabria, Catalonia, Extremadura, Basque Country and Navarra,<sup>1334</sup>
- Solidarity in the maintenance of common expenses in proportion to income, maintaining private ownership of the assets

- Patrimonial effects *mortis causa*:

- There are Autonomous Communities that equate the de facto spouse with the widowed spouse (Balearic Islands, Catalonia, Galicia and the Basque Country). Navarre and Comunidad Valenciana regulated the hereditary rights of stable couples by equating them with marriage and were declared unconstitutional. Judgment of the Plenary Chamber of the Constitutional Court of 23 April 2013 and Judgment of the Plenary Chamber of the Constitutional Court of June 9, 2016.
- Other laws of the Autonomous Communities recognize certain rights to the surviving couple independently of what the will establishes. Right over domestic trousseau, except works of art, jewelry and high value goods. Use and enjoyment of housing (Aragon); and in Navarre, the Foral Law 21/2019, of April 4, of modification and updating of the Compilation of the Civil Law of Navarra or Fuero Nuevo, the survivor will only have the inheritance rights that would have been granted among themselves or by any of them in favor of the other, jointly or separately, by testament, succession agreement, donation 'mortis causa' and other acts of disposition recognized in this Compilation (Law 113).
- The laws of the other Autonomous Communities lack specific regulations regarding the inheritance regime and hereditary rights of common-law couples.

- Relations with third parties:

- Andalucía, Aragón, Illes Balears and Comunidad Valenciana set up a solidarity scheme to meet the obligations incurred by the expenses necessary for the maintenance of the house.
- In Navarra the Foral Law 21/2019, of April 4, indicates that both members of the couple will respond jointly and severally to third parties for the obligations contracted by one of them for the expenses (...) if they accommodate social uses and without prejudice of the corresponding reimbursements, as the case may be, according to their internal relations (Law 109).

- Effects on public administrations:

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<sup>1334</sup> The Law 112 of the Foral Law 21/2019, of April 4, of modification and update of the Compilation of the Civil Law of Navarra or Fuero Nuevo, indicates as effects to the extinction of the stable couple that at the moment of the cessation of coexistence, may be subject to compensation both work for the family as developed by one of the members in the business or professional activities of the other.

Full equality with public administrations in the area of public law and in relation to benefits versus public function (leave, permits, family aid...); right of access to health information; access to residential centres for the elderly; access to rehabilitation centres for drug addicts; work regime; prison regime; fostering of minors.

The widow's pension provided for marriage is extended to registered unions. Article 174-3 of the General Law on Social Security (LGSS) (today 221.2 of the Revised Text of that Law that was approved by RDL 8/2015) confirms the existence of the domestic partnership is accredited with the "registration in one of the specific registers existing in the autonomous communities or municipality of the place of residence. And that they accredit, by means of the corresponding census certificate, a stable and notorious coexistence with immediate character to the death of the causer with an uninterrupted duration not less than 5 years". The Sentence of the Supreme Court (Sala de lo Social) of May 4, 2017,<sup>1335</sup> notes that to collect a widow's pension it is enough to register the de facto couple in the municipal register.

- Tax effects:

The general rule is full equality to marriage except in Aragon and the Canary Islands with respect to joint taxation with respect to the autonomous bracket of personal income tax.

At the state level (IRPF-taxation of the subtraction for the physical persons) there is no equalization, not being able to make the joint income more than the marriages. On the other hand, there is fiscal equality with common-law couples in autonomous taxes (for example, ISD) in some Autonomous Communities, for example Cataluña.

## 2.- Couples not formalized or in fact.

The courts, in their inexcusable duty to resolve conflicts, have been obliged to pronounce on the personal and patrimonial consequences derived from the rupture of the union. In some cases, resorting to the rules regulating the effects of marital dissociation (applying them by analogy ex art. 4.1 of the Code of Civil Procedure) for their appropriate resolution, not without hesitation and even contradictions, and in others, applying the general rules of the Code of Civil Procedure and invoking the general principles of law. The recognition of effects results from the jurisprudential construction through the application of solutions of common law.<sup>1336</sup>

\* **Application of the regime of community of goods,**<sup>1337</sup> although only when it is deduced from the *facta concludentia* that the coexistence wanted to make common a certain patrimony. Tacit agreements from which it derives a continued and lasting contribution of its profits or its work to the common stock. (Sentence of the Supreme Court nº. 8/2001 of January 22 (RJ \ 2001 \ 1678).

\* **Application of the civil society** The starting point is the circumstance of considering that as a consequence of the joint effort within a commercial activity a common patrimony was generated (*affectio societatis*).

\* **Compensation for damages in application of article 1.902 of the Cc,** but always demanding the full concurrence of all its requirements, and, naturally, rejecting that the simple decision of rupture, even without any cause, constitutes fault or negligence determining a duty to indemnify, because in that case something very similar to the indissolubility of the de facto union or its dissolvability only upon payment (STS of September 12, 2005).

\* **Principle of unjust enrichment.** It is the solution that emerges as the most appropriate to address the economic imbalance after the breakup (provided for marriage in art. 97 C.c.) to prevent the enrichment of one person at the expense of the other without a cause that justifies it. Doctrine of unjust enrichment just applicable when economic compensation is claimed for economic imbalance after the rupture and concur the requirements for granting, this is increased wealth of the enriched, correlative impoverishment of the actor, lack of cause to justify the enrichment and

<sup>1335</sup> Mesa Marrero, C., 2017, 265-281.

<sup>1336</sup> Pérez Vallejo, 1999, 38, 39.

<sup>1337</sup> Chaparro Matamoros, P., De Verda Y Beamonte, J. R., 2014, 393-415.

inexistence of a legal precept that excludes its application. This is confirmed by the Sentence of the Supreme Court of January 15, 2018 (RJ 2018/76).

**2.1.7. Are there any proposals that have been to reform the present legislation in the context of marriage and formal/registered or informal/*de facto* family formations? Explain briefly.**

Yes, the "Draft Law on the exercise of parental co-responsibility and other measures to be adopted after the rupture of cohabitation" (last version of 10 April 2014) that finally did not see the light. The initial version of the Preliminary Draft on parental co-responsibility in cases of nullity, separation or divorce (2013) was modified at the suggestion of the General Council of the Judiciary. In its report, this body observes that, even though living together *more uxorio* and marriage "are not comparable", the jurisprudential doctrine "has understood that the legal regime foreseen for the rupture of the marital bond is extensible, insofar as it affects the relations of the children with their respective parents". For this reason, the title is modified and the new regulation of the Preliminary Draft "should be applied to any situation of rupture of the coexistence between the parents with common children", in line with what is already stipulated "in some autonomic systems" such as the Aragónés and Catalán.

**2.2. Property relations.**

**2.2.1. List different family property regimes in your country.**

**SPANISH CIVIL CODE:** The Civil Code (which we recall applies in the Autonomous Communities of Andalusia, Canary Islands, Cantabria, La Rioja, Castilla-La Mancha, Castilla y León, Valenciana, Extremadura, Madrid, Murcia, Asturias, as well as in the autonomous cities of Ceuta and Melilla); regulates as economic regimes of marriage, the regime of marital property (arts. 1344 et seq.), participation (arts. 1411 et seq.) and separation of property (arts. 1435 et seq.):

- **Supplementary legal regime of first degree and presumed:** Article 1316 CC foresees that, in the absence of capitulations (marriage contracts) or when these are ineffective, the regime will be that of the **community of property**.
- **Second Degree Supplementary Regime:** If the spouses agree in marriage settlements that the marital property regime will not govern between them, but they do not establish any regime, or if the marital property regime is constantly extinguished without a different one being agreed, there will be a **separation of property between the spouses**, article 1435 (Nos. 2 and 3) provides.
- **Participation regime:** It is a conventional regime that will only govern a marriage when it has been expressly agreed in capitulations.

However, there is a set of rules, referring to the patrimonial effects of marriage that apply to it, regardless of its economic regime. This is known as the "primary matrimonial regime". It is included in the first of the chapters of the Civil Code, within Title III of Book IV, dedicated to the matrimonial property regime, under the expression "general provisions".

As for those provided for in the **OWN FORAL OR CIVIL LAW**, are divided between the application of the partnership of gains or the separation of assets, provided they have not agreed economic regime before contracting marriage.

**\* In defect of previous pact they will be governed by the society of *gananciales*:**

- Law 5/2015, of 25 June, on País Vasco Civil Law. Title III deals with the system of property in marriage and in its first chapter establishes a system of free choice, before or after the celebration of the marriage. And in the event that there is no pact, the system of marital property regulated in the Civil Code shall apply. Although for the province of Vizcaya the Jurisdiction of Bizkaia applies, the second chapter of this title establishes that, following tradition, it will be

understood that the system of foral communication that already regulated the Jurisdiction governs between the spouses and by virtue of which all property, movable or immovable, of whatever origin, becomes common.

- Law 2/2006, de 14 de junio, de derecho civil de **Galicia**. TÍTULO IX. The family economic regime. The matrimonial economic regime will be the one agreed by the spouses in marriage contracts (art. 171). In the absence of an agreement or its ineffectiveness, the regime will be the joint-stock company (art. 172). The spouses may agree in marriage settlements the total or partial liquidation of the company and the bases to carry it out, with full effectiveness upon dissolution of the conjugal society. The capitulations may contain any stipulation relating to the family economic regime and inheritance, with no limitations other than those contained in the law (art. 174).
- Legislative Decree 1/2011, of 22 March, of the Government of **Aragón**. Article 193 regulates the conjugal consortium, which is equivalent to a community of property.
- Compilation of 1973, modified by the Law of 1987 for **Navarra**: In the absence of a pact, it regulates the regime of conquests, similar to a community of property.

**\* In defect of previous agreement they will be governed by the separation of goods:**

- **Baleares Islands**: Legislative Decree 79/1990, of 6 September, approved the consolidated text of the compilation of the civil law of the Balearic Islands. Article 3, matrimonial property regime. The marital economic regime shall be that agreed in chapters, formalised in a public deed, before or during the marriage and, in the absence of these, that of separation of property.

- Chapters I (Second Section) and II of Title III of Law 25/2010, of 29 July, of the second book of the Civil Code of **Cataluña**, says that "in the absence of a pact or ineffectiveness of the provisions of the matrimonial chapters, the economic regime is that of separation of property, regulated throughout articles 232.1 to Art. 232.12 of the CCCat.

- **Valencia** Law 10/2007 on the matrimonial economic regime establishes the regime of separation of assets as a legal regime in the absence of an agreement on the separation of assets. However, this law was declared unconstitutional on 31 May 2016 when Judgment No. 82/2016 of 28 April 2016, issued by the Plenary of the Constitutional Court, was published in the Official State Gazette, establishing that the supplementary legal matrimonial property regime in the Valencian Community, as in all territories under ordinary law, is that of the community of property provided for in the Civil Code. That is to say, the regime of separation of bines in the Valencian community was in force since the law came into force (1 July 2008) until the Sentence of the Constitutional Court that annulled it (1 June 2016), in such a way that all marriages married since 2 June 2016, except for marriage settlements before a notary who by mutual agreement establishes another economic regime, the applicable regime will be that of marital property.

- **Navarra**: Provincial Law 21/2019, of April 4, establishes that if the spouses had not agreed in matrimonial agreements the economic regime of their marriage, it will be observed as a supplementary legal regime that of *conquests*, which will be governed by the provisions of this Compilation in what has not been specially agreed between them. (LAW 87).

**2.2.2. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?**

The **SUPPLETORY AND PRESUNTO LEGAL REGIME** established by the Spanish Civil Code is that **community of property** (art. 1316 CC). In the system of matrimonial property, together with the private property of each spouse, a common mass is formed for both, the community of matrimonial

property, because it comes from the profits that both spouses obtain and from the yields produced by the matrimonial property and the own patrimony (private property) of each spouse; in addition, the property that is acquired with other matrimonial property is also matrimonial property. Article 1344 C.c. establishes that "through a community of property, the gains or benefits obtained indistinctly by any of them are made common to the husband and wife, who will be attributed to them by half when the former is dissolved".

In the consideration of property as community of property, the *iuris tantum* presumption of article 1361 Cc is of particular practical importance: community of property existing in the marriage is presumed to be community of property until it is proven that it belongs exclusively to the husband or wife. In the same way as article 1324 Cc provides, the confession of one spouse is sufficient to prove that one property is privative of the other, without prejudice to the rights of legitimates and creditors: In order to prove between spouses that certain property belongs to one of them, the confession of the other will be sufficient, but such confession alone will not harm the forced heirs of the confessor nor the creditors, whether they belong to the community or to each of the spouses. Such a statement, which the code calls a "confession" that one or more assets are the property of the other spouse, binds the person who made it and his or her heirs.

In the **SEPARATION OF PROPERTY REGIME**, each spouse shall own the property (and rights) he or she had at the time of the initial separation and those he or she later acquires by any title (art. 1437 CC). In this regime there is no conjugal community and if there were one in a particular case, it would be a community on a specific property, ordinary or Roman or by quotas (arts. 392 and ff. CC). In the conventional regime of separation, what the spouses have foreseen in the capitulations and, supplementary, the norms of articles 1435 to 1444 apply first of all.

**A PARTICIPATION IN ACQUISITIONS REGIME:** was introduced into the Civil Code by Law of 13 May 1981 (arts. 1411 to 1434). It is a conventional regime that will only govern a marriage when it has been agreed in marriage settlements. By this regime each spouse maintains during its validity the ownership, administration and disposition of its patrimony and when it is extinguished it participates in the patrimonial gain of the other. Its functioning assumes that while the marriage is in force, the system is one of separation: each spouse is the holder of the rights he or she had when contracting the marriage and of those acquired during it, having the administration and disposition thereof; when the system is extinguished, the difference between the initial and final assets of each spouse is calculated, and the other has the right to share (normally half) in the earnings that have been. It is considered as a mixed system between community and separation.

**2.2.3. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a "new regime just for them"?**

With regard to marriage, matrimonial property regimes are determined ex lege in the Spanish Civil Code and the legal systems of the region with their own civil law in the terms set out above. In general, article 1315 of the CC allows any matrimonial regime to be stipulated, and therefore the principle of the autonomy of the will is fully applicable, provided that it is not contrary to the law, to good customs or limiting the equality of rights between the spouses. Before the 1981 reform, for example, article 1317 of the Civil Code did not allow spouses with a common civil neighbourhood to agree on a legal economic regime of an autonomous community with foral law, but now there would no longer be any inconvenience, provided that the mandatory rules of the common Civil Code are respected (arts. 1315 et seq.).

Although, they are not expressly regulated in the Spanish Civil Code, the validity of **premarital agreements** is admitted, with certain contents in anticipation of a future conjugal crisis.<sup>1338</sup> (ex arts.

<sup>1338</sup> García Rubio, M. P., 2003, 1657-1658. Berrocal Lanzarot, A. I., 2015.

1323 y 1325 C.C). They would have a place in marriage settlements ("by reason of marriage" stipulations...). The phenomenon of premarital pacts has the denomination of matrimonial agreements in our order", although subject to formal criteria, have their legal limit in art. art. 1328 Civil C., which considers null stipulations that are contrary to laws, good customs or limiting the equality of rights of the spouses. It is also admitted its validity in public document (public deed) and depending on its content will be valid if held in private document.

Among others, the validity of agreements relating to the renunciation of compensatory pension, the agreement establishing a monthly life annuity in favour of one of the spouses in the event of separation (STS of 24 June 2015. Rec. 2392/2013) is admitted, including agreements that modify the marital property regime by incorporating the renunciation of certain earnings of the other spouse as a consequence of a certain activity, etc.

The Catalan Civil Code, in its article 231-20, expressly admits pacts in anticipation of rupture, in which the specific requirements determining their validity and effectiveness are established, and states that article 231-10 will be applicable to these pacts.

With regard to common-law couples, it is necessary to remember the basis of their constitution, which is none other than the free and proper decision of the cohabitants not to enter into marriage. De facto couples are governed by the principle of freedom of covenants in relation to the economic regime regulating their patrimonial relations, being able to establish at the time of their registration or later, the economic regime that they will maintain for as long as the relationship lasts. The agreement by which the cohabitants agree that one of the regimes established in the Civil Code (marital, separation or participation) will govern between them is valid.

**2.2.4. Explain briefly the rules on the administration of family property and compare if there are difference for different property regimes.**

In the marital property regime, the acts of administration and disposition are set forth in art. 1375 CC: "In the absence of an agreement in capitulations, the management and disposition of the marital property corresponds jointly to the spouses, without prejudice to what is determined in the following articles (which provide for a judicial authorization and alterations to this system). The administration and disposition of marital property by the spouses may be done: 1) with the concurrence, at the same time, of the wills of both spouses; or 2) by execution by one of the spouses with the express or tacit consent or without the opposition or challenge of the other spouse: the first means is expressly contemplated in article 1375; the second is deduced from article 1322. The acts of administration or disposition for valuable consideration of a property made by one of the spouses, without being able to do so alone and without the consent of the other, may be annulled at the request of the spouse whose consent has been omitted or of his heirs (art. 1322 CC).

In the economic regime of separation of goods there is a private patrimony of one of the spouses and a private patrimony of the other, spun off and separated from each other. There is no type of community. Therefore, each of the spouses maintains the ownership, enjoyment, administration and disposition of their goods and rights. The advantage of this regime is the personal and economic independence of the spouses.

**2.2.5. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

The answer to this question will be structured in two parts: a first part refers to the registry that gives publicity to the pacts on the economic matrimonial regime, and a second part on the registry of common-law couples where the union is recorded as well as possible pacts.

- Firstly, we will deal with the agreements referred to in section 2.2.4 for the publication of property agreements, we understand that they allude to the registration procedure and to the legal effects deriving from publication, Article 1.333 of the Spanish Civil Code being applicable accordingly: "In any registration of marriage in the Civil Registry, mention shall be made, where appropriate, of

the marriage settlements that have been granted, as well as of the pacts, judicial resolutions and other facts that modify the economic regime of marriage. If these or these affect real estate, the Land Registry shall take the matter into account, in the manner and for the purposes set forth in the Mortgage Law".

Add that 1333 Cc is complemented by article 60 of the Civil Registry Law (LRC), the wording of which was modified in Final Provision 4 of Law 15/2015, of Voluntary Jurisdiction, on the registration of the economic regime of marriage, regulating in its first paragraph that "Along with the registration of marriage shall be registered the legal or agreed economic matrimonial regime governing the marriage and the pacts, court decisions or other facts that may affect it....; to conclude in paragraph 4 that "Without prejudice to the provisions of Article 1333 of the Civil Code, in no case shall the third party in good faith be harmed except from the date of registration of the matrimonial property regime or its amendments".

Finally, we must remember that article 58 of the CRL regulates the matrimonial file, article 59 the registration of marriage and article 60 the registration of the matrimonial property regime.

- And secondly, we will refer to the registers of unmarried couples, which are organisms specifically destined to the registration of unmarried unions, in order to recognise the members of these couples with rights and duties equivalent to those of married couples.

In the absence of a state regulation, its regulation is autonomic: couples registered in a registry are equal to marriages for administrative purposes in the corresponding territorial area (autonomic or municipal), and may access the advantages and rights that in that territory the regulations reserve for marriages (for example, tax advantages, family assistance, access to housing, etc.).) And from now on, "mixed" common-law couples will also enjoy state recognition, for residence purposes, since if one of the members is a foreign couple, the latter will enjoy the right to reside and work in Spain due to the mere existence of the bond created when the common-law couple was formed, and therefore, the possibility of applying for a community card.

#### **2.2.6. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

- The **responsibility of the community of property**, members of the community of property, will normally coincide with the obligations in charge of it, but this may not be the case and, in the case of a third party, the action of both or one of the spouses causes the immediate responsibility of the community of property, provisionally, because it will definitely be or not in charge of the same, depending on the cases. Proprietary assets are responsible:

First. *The obligations contracted by the two spouses jointly or by one of them with the express consent of the other, as provided for in article 1367.*

Second. *In the exercise of domestic authority or of the management or disposition of marital property, which by law or by chapters corresponds to it (art. 1365, 1.º Cc).*

Third. *Debts incurred by a spouse... in the exercise of the profession, art or trade or in the ordinary administration of one's own property... or, if he is a trader, the provisions of the Commercial Code shall apply (art. 1365, 2nd and last paragraph Cc). The expenses caused by the exercise of the profession of a spouse are, in principle, responsibility (art. 1365, 2º Cc) and office (art. 1362, 4º Cc) of the community of marital property, in exchange for the fact that the goods produced by the same exercise are marital property.*

Fourth. *Of the obligations contracted by only one of the spouses in the event of de facto separation to meet the expenses of support, welfare and education of children who are in charge of the community of property (art. 1368 Cc).*

Fifth. *Special case of article 1370 Cc: For the deferred price of marital property acquired by one spouse without the consent of the other, the acquired property will always be liable, without prejudice (according to the rules seen) to the responsibility of other property according to the rules of this Code.*



The article 1364 Cc provides that the spouse who has contributed private property for expenses or payments that are the responsibility of the company shall be entitled to be reimbursed for the value at the expense of the common patrimony, which will occur immediately or at the time of dissolution and liquidation of the community of marital property.

- In a **separation of property regime**, it is necessary to distinguish the own debts with own responsibility of each spouse and the matrimonial charges with common responsibility. 1. Own debts. The first paragraph of article 1440 stipulates that the obligations contracted by each spouse shall be their exclusive responsibility. 2<sup>o</sup> Debts and matrimonial charges. By virtue of the provision of article 1319, to which the second paragraph of article 1440 refers, either spouse may exercise domestic authority: acts designed to meet the ordinary needs of the family, entrusted to its care, in accordance with the use of the place and the circumstances thereof. The assets of the debtor spouse who has contracted the debt in the exercise of such domestic authority and those of the other spouse are responsible for such debts, as provided for in the second paragraph of article 1319, conveniently applied to a separation regime in which there is no common property. However, if the purpose of this debt is to raise matrimonial charges, Article 1438 shall apply "for the internal purposes of the spouses". The last subsection of article 1438 establishes that "Work for the house will be computed as a contribution to the charges and will give the right to obtain compensation that the Judge will point out, in the absence of agreement, to the extinction of the separation regime". The interpretation of this precept requires that the work for the house be exclusive and excluding (Supreme Court Judgments 135/2015, March 26, 136/2015, April 14 and 614/2015, November 15). However, the Supreme Court Judgment of April 26, 2017 states that "collaboration in professional activities or family businesses, in precarious working conditions" can be considered as work for the home for the purpose of recognizing the financial compensation.

- In the **participation in acquisitions regime**, article 1413 Cc states that for everything not provided for in this chapter, the rules relating to the separation of property shall apply during the period of the participation regime.

### 2.2.7. Describe allocation and division of property in case of divorce, separation or dissolution of the union.

In the case of **marriage under a community of property regime**: the profits or benefits obtained indistinctly by either of them during the marriage, which will be attributed to them **by half** upon dissolution of the regime, become common to the spouses. The dissolution of the marital property regime not only implies the end and dissolution of the community of marital property, but also the division of profits between both spouses, that is, the liquidation, as expressed in Article 1396: Dissolution of the company, will proceed to its liquidation.

**OPERATIONS:** In order to proceed with the liquidation of a community of marital gains, it will be necessary: I) First, inventory its assets and liabilities; II) once the inventory has been formalized, the liquid assets are determined, separating the inventoried wealth from that of each spouse and the amount of the company's debts, making the corresponding payments III) finally, once the liabilities have been covered, the active balance will be distributed between the spouses or ex-spouses or between the surviving spouse and the heirs of the deceased (if the regime is dissolved due to the death or declaration of death of one of the spouses) or between the deceased heirs (if both have died or have been declared deceased).

In the case of a **marriage with a regime of separation of property**, article 1437 Cc states that each spouse shall own the assets (and the ownership of the rights) that he or she had at the time of the marriage and those that he or she later acquires by any means. However, after a more or less long cohabitation, it is difficult to know, and even less difficult to prove, which assets or rights belonged or were acquired by one or the other, except in the properties registered in the Property Registry in which the mortgage principles play. Article 1441 Cc establishes, with respect to this problem, that when it is not possible to prove which of the spouses owns some property or right will correspond to both by half. It is a presumption *iuris tantum*: the goods and rights are presumed to be of common

ownership, *pro indiviso*, by half, unless one or the other of the spouses proves that they are of their sole and exclusive ownership. Article 1442 Cc, another *iuris tantum presumption*, this one, for the benefit of creditors and provided that the spouses are not judicially or de facto separated, applicable when a spouse is declared bankrupt: it is presumed that the assets acquired by the other spouse for valuable consideration during the year prior to the declaration of bankruptcy were in their half donated by the bankrupt.

In the case of a marriage with a **participation in acquisitions regime**, after the extinction of the regime the same must be liquidated, so that each spouse can make his or her own share of the profits of the other. In order to do so, it will be necessary to calculate the gain experienced by the patrimony of each spouse, and the other will have a share of such gain. Such gain is none other than the difference between the initial and final patrimony of each spouse, as expressed in article 1417 Cc: upon extinction the gains will be determined by the differences between the initial and final patrimony of each spouse. When the estates of both spouses have had profits there will be no participation of one in the profit of the other, but simply the one that has had less will have participation in the difference of profits (simple arithmetic question), as provided in article 1427 Cc: when the difference between the final and initial estates of one and the other spouse shows positive results, the spouse whose patrimony has experienced less increase will receive half of the difference between his own increase and that of the other spouse.

In the case of **unmarried couples**, questions of undoubted practical impact arise. As is well known, Spain lacks a common state law, which in general, deals with the regulation of unmarried couples. This does not imply that this coexistence does not derive patrimonial effects. However, in the absence of pacts regulating the economic regime of cohabitants, and the prohibition of applying by "analogy legis" the rules regulating marital breakdown, it is peaceful to admit, the possibility of resorting to other figures, as valid instruments to liquidate the patrimonial interests of de facto couples, at the conclusion of the relationship.<sup>1339</sup> Among them, the community of property (in which the participation of the cohabitants, both in benefits and in charges proportional to their respective quotas), irregular civil society and unjust enrichment are used. Thus, it is clear that the mere and exclusive fact of initiating a *more uxorio* coexistence does not entail the automatic emergence of a community of goods, which would allow for liquidate 50%. For this to exist, it is necessary that the interested parties, by express pact, even tacit ("*facta concludentia*"), evidence an unequivocal will to make common all or some of the goods acquired during the de facto union. If the aforementioned tacit agreement is not accredited, it becomes obligatory to declare the non-existence of community.<sup>1340</sup>

**2.2.8. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?**

With regard to marriage, the Law of 13 May 1981 established a general criterion for the validity of contracts between spouses (art. 1323 Cc). The spouses have the same freedom to contract among themselves, to contract with third parties and to transfer all kinds of goods and rights for any title, whether onerous, lucrative or remunerative. This permissive criterion, extendable today after Law 13/2005, of 1 July, to "spouses", regardless of whether they are of the same or different sex, is a reflection of the individuality and full personal and patrimonial autonomy of the spouses within the family, once the old prohibitive thesis of the spouses to hire each other has been overcome. At the same time, art. 1325 Cc. included an important modification regarding the content of the matrimonial chapters; now the purpose is not only to stipulate, modify or replace the economic regime of marriage, but "any other provisions by reason thereof". That is to say, from being a contract relating to goods, it seems to have become a general, and not only economic, statute of

<sup>1339</sup> Pérez Vallejo, A. M., 1999, 32 et seq.

<sup>1340</sup> . Pérez Vallejo, A. M., 2018, 239-277.

marriage. In these capitulations, therefore, there will be room for any other patrimonial, family and inheritance business determined by reason of the marriage.

With regard to unmarried couples, the Supreme Court, on the assumption that *more uxorio* cohabitation and marriage are not equivalent realities, rejects the fact that the norms proper to marriage after the rupture of the union can be applied to unmarried couples by "analogía legis", although it admits that they may be so because of the patrimonial effects of registered unions which are affected by cross-border elements expressly agreed by the members of the couple or that, through the "iuris analogy", when a set of inspiring principles may be deduced from their regulation in order to project them in a case not regulated in common civil law such as that of non-marital unions. Thus, for example, the rules of matrimonial property regimes or, where applicable, of the community of property may be applied when there is an unequivocal will of the cohabitants to form a common estate (Judgments of the Supreme Court, Civil Chamber, of 19 October 2006 and 16 June 2011).

### **2.3. Cross-border issues.**

#### **2.2.1. Is your country participating in the enhance cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?**

EU regulations 2016/1103 and 2016/1104 have been approved by Spain. Both came into force twenty days after their publication in the Official Journal of the European Union, which took place on 8 July and their articles will be applied, with exceptions that will do so earlier, from 29 January 2019. But they will only apply to marriages that are celebrated, to unions that are registered, to pacts of choice of applicable law and to chapters that are granted, to legal actions brought (with exceptions), to public documents formalized or registered and to legal transactions approved or concluded, in all cases from that date. The two Regulations articulate their content identically, addressing, the jurisdiction, the applicable law, the recognition of resolutions and documents, the enforceability against third parties.

#### **2.3.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as "marriage", "matrimonial property agreement", "partnership property agreement" etc.?**

The scope of application of the Regulations 2016/1103 and 2016/1104 is referred to the patrimonial issues of marriage and of registered couples and expressly exclude personal effects. The problem that can arise is related to the applicable law, taking into account the Spanish panorama and the legislative diversity in the different Autonomous Communities as it has been seen, particularly visible in the absence of a state regulation of stable couples and the question regarding the registry. That is, if the registration of the couple must be declarative or constitutive, if the merely administrative record is valid, if several registers can coexist, etc.

Following the entry into force of Regulation 1259/2010 on 21 June 2012, reinforced cooperation is established in the area of the law applicable to divorce and judicial separation. This Regulation applies to all divorces in which there are foreigners or foreign element, although they are not community. The art. 4 of Regulation 1259/2010 that states that "The law designated by this Regulation shall apply even if it is not that of a participating Member State". This is what is known as "universal application or erga omnes" And in accordance with Articles 5 and 8, spouses may choose the law applicable to their separation or divorce provided that it is one of those provided for in the regulation. In the absence of a law agreed upon by them, they shall be subject to the law of the State:

a) When the spouses have their habitual residence at the time of the filing of the application or, failing that,

b) According to the law of the State in which the spouses had their last habitual residence, provided that the period of residence did not end more than one year before the application was lodged, and that one of them still resides there at the time the application is lodged or, in the absence thereof;

c) Attends to the nationality of both spouses at the time when the application is lodged or failing that,

d) According to the court before which the action is brought.

The previous one is the law applicable to divorce, although in terms of the effects it produces, the applicable law may be different:

From 29 January 2019, Regulation 1103/2016 will be fully applicable, which means that in the absence of choice, the matrimonial property regime of the law of the state will operate: a) of the first common habitual residence of the spouses at the time of the celebration of the marriage, or in its absence, b) of the common nationality of the spouses at the time of the celebration of the marriage or, in its absence, c) with which both spouses have the closest connection at the time of the celebration of the marriage, taking into account all the circumstances. If the spouses have more than one common nationality at the time of the celebration of the marriage, the criterion of the law of common nationality does not apply.

Questions concerning the custody of children are governed as laid down in the Hague Convention of 19 October 1996 by the law of the resolving authority.

In matters of provisional and precautionary measures, the same law governing separation, nullity and divorce must logically be applied in each case, except for urgent measures that may be adopted in relation to persons or property present in Spain, even if there is no jurisdiction to hear the case.

With regard to maintenance (including use of the family home and, where appropriate, compensatory pension), in the absence of an agreement on the choice of applicable law, the one referring to the habitual residence of the creditor applies.

As regards the accreditation and proof of foreign law in Spain, if this is the specific case, its content and validity must be proven, and the Spanish court may also use whatever means of investigation it deems necessary for its application.

Finally, it should be stressed that the proceedings conducted in Spain are always governed by Spanish procedural law, regardless of the law that applies to divorce, separation and annulment.

### **2.3.3. Are you expecting any problems with the application of the rules on jurisdiction?**

Disputes arising in matters of property regime will be settled by the court, but also, because some Member States so wish, by an authority which does not normally exercise judicial functions, but which may exercise them because it acts by delegation or under the control of a judicial body. This is the case of notaries in some EU Member States.

The European legislator also provides that, in certain cases, the interested parties may agree on the competent body for settling conflicts that may arise in relation to the property regime of a marriage or a couple.

Thus, although, as a general rule, the organ competent to deal with the crisis of a marriage or a couple is also competent to resolve property issues, there are cases in which it must be expressly agreed, and also to submit to the same organ whose law they have chosen as the regulator of their property regime, or to submit the spouses to the competence of the organs of the Member State of the place of celebration of their marriage, and the members of the couple to that of the law under which the couple was created; in some cases, because two issues are intimately linked and it is preferable for a single and identical body to deal with the matter; in others, because it is undoubtedly that body which knows best and knows how to interpret and apply the law governing the property regime.

**2.3.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

The EU Regulations accept **the agreement** between the spouses, where appropriate between the members of the couple, **subject to a specific law**. This agreement may be entered into before or upon marriage or the creation of the couple, and also throughout the life of one or the other, although, in the latter case, it may not take effect retroactively, unless it is agreed, and always without prejudice to third parties. This **agreement in order to avoid problems, this must be done in a public document**. The legislator distinguishes between the choice of applicable law pact and the capitulations (a concept it uses for both marriages and registered unions), demanding, in addition, with respect to these, that the additional formal requirements demanded by the law applicable to the matrimonial property regime be respected, where appropriate, for the patrimonial effects of the registered union.

In the case of marriage, a hierarchical relationship is established, giving preference to that of the common habitual residence of the spouses immediately after contracting it; in the case of registered couples, the law of the State under which the registered union was created. However, both regulations give each party the option of appealing to the competent judicial authority so that the latter may decide that the applicable law is another because it has been acting in accordance with it. In any case, the applicable law will be the same, although there are exceptions. In addition, it can be the law of any State, even if it is not a member of the EU (principle of universal application). Only the substantive law will apply - so there will be no cases of referral - and preference will be given in the case of multi-legislative States to their own rules for determining the applicable law. The application of a certain law may be opposed on the grounds that it is contrary to public policy or to certain mandatory rules of the Member State in which it has intended to be applied.

But if we take into account the concurrence in Spain, in this matter, of a common civil law and multiple special provincial regulations, the rules for the resolution of territorial conflicts provided for in art. 33 of one and the other Regulation take on special relevance and refer to: 1) The application of internal rules on conflict of laws for the determination of the applicable law. 2º) To the criteria established in article 33.2.

In short, from a judicial perspective, in matters of determination of applicable law no other problems are foreseen than those derived from the necessary, and not always simple, game between articles 22 and 26 of the Regulations (law applicable by choice of the parties or in default of agreement) and article 33 put in relation to articles 9, 14 and 16 of our Civil Code.

**2.3.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

With regard to the recognition and enforceability of judicial decisions, the acceptance and enforceability of authentic instruments and the enforceability of court settlements, documents are only valid if they are authentic instruments, including the notary's office.

The European legislation gives a definition of these documents inspired by other previous regulations, such as 805/2004 on the European Enforcement Order, 4/2009 on maintenance obligations and 650/2012 on international successions, which in turn adopted the criteria of the Unibank judgment of the ECJ of 19 June 1999.

**2.3.6. Are there any national rules on international jurisdiction and applicable (besides the Regulations) concerning the succession in your country?**

With regard to the internal production norms of the Spanish legal system, we must refer to articles 21 to 25 of Organic Law 6/1985, of 1 July, on the Judicial Power (LOPJ) and, specifically, in the civil jurisdictional order, to articles 21 and 22 LOPJ. The rules contained in the LOPJ are of a supplementary nature and only apply in the case of States with which there is no applicable

international instrument or in the case where the specific subject matter of the case is outside those established by the international instrument<sup>1341</sup>.

Internally, Law 15/2015, of 2 July, on Voluntary Jurisdiction, which regulates the processes that require the intervention of a jurisdictional body for the protection of rights and interests in matters of civil and commercial law, without there being a controversy that must be substantiated in a contentious process, may also have an international impact when there are several elements from different countries involved. The international jurisdiction of these matters is regulated bearing in mind that the Spanish judicial bodies are competent to hear cases of voluntary jurisdiction arising in international cases, when the forums of international jurisdiction provided for in the Treaties and other international rules in force for Spain concur. However, in cases not regulated by such Treaties and other international rules, jurisdiction will be determined by the concurrence of the forums of international jurisdiction included in the Organic Law of the Judiciary.

The existing rules that contain delimitative criteria of international civil jurisdiction are:

1. - The first refers to civil jurisdiction in general (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters). However, Article 2 **EXCLUDES** matters relating to the status and capacity of natural persons, matrimonial property regimes or those governing relations having effects comparable to marriage under the applicable law, and also excludes wills and succession, including maintenance obligations in the event of death.

2. - **For the recognition in an EU Member State of a judicial decision on divorce, legal separation or annulment of marriage rendered by a judicial body of another EU state**, the regulation applies. Council Regulation (EC) No 2201/2003 of 27 November 2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses ( Brussels II bis ) applies to the recognition in a Member State of a judgment on divorce, legal separation or annulment of marriage given by a court of another Member State of the European Union. The TJCE, Third Chamber, 16-7-2009 established the freedom of choice for EU dual nationals to file for divorce before the courts of both States under Regulation EC 2201/2003.

3.- Council Regulation 4/2009 of 18 December on maintenance.

4.- Regulation (EU) No 1259/2010 (Rome III) on the law applicable to divorce with a foreign element.

### 3. Succession law

#### 3.1.General.

On 17 August 2015 the EU Regulation 650/2012 of 4 July entered into full force, as did the European Regulation on Succession<sup>1342</sup>, a law of great practical importance, which will radically change the application of international law in the field of succession to the cause of death where there is an international element<sup>1343</sup>, such as, for example, that the deceased resided or had property in a State other than that of origin. In the case of Spain, the nationality of the deceased gives way to the place of habitual residence as the main criterion for determining the applicable law and, for the first time in our Law, there is a possibility of choosing the applicable law, limited to the national law itself<sup>1344</sup>.

#### 3.1.1. What are the main legal sources of Succession Law (SL) in your country? What are the additional legal sources of SL?

<sup>1341</sup> Calvo Caravaca, A. L., Carrascosa González, J., 2007, 59-122.

<sup>1342</sup> Requejo Isidro, M., 2018, 127-154.

<sup>1343</sup> Carrascosa González, A. L., 2014, 349-354.

<sup>1344</sup> Carrascosa González, A. L., 2016, 47-75.

The main legal source is the Civil Code approved by Royal Decree of 24 July 1889, and applies to the Autonomous Communities of Andalusia, the Canary Islands, Cantabria, Rioja, Castilla-La Mancha, Castilla y León, Valenciana, Extremadura, Madrid, Murcia, Asturias, as well as the autonomous cities of Ceuta and Melilla<sup>1345</sup>.

**The additional legal sources of SL:**

In Spain, there are some territories with their own special or foral civil law, whose conservation, modification or development empowers them to legislate in accordance with art. 149.1.8<sup>a</sup> of the Constitution; and therefore they have their own regulation in some matters that affect inheritance law in six autonomous communities: Galicia, Basque Country, Navarre, Catalonia, Aragon and the Balearic Islands<sup>1346</sup>.

- Cataluña: Law 10/2008, of 10 July, of the fourth book of the Civil Code of Catalonia, relating to successions.

- Aragón: Legislative Decree 1/2011, of 22 March, of the Government of Aragon, approving, under the title "Code of the Foral Law of Aragon", the Consolidated Text of Aragonese Civil Laws.

- Navarra: Law 1/1973, of 1 March 1973, approving the Compilation of the Civil Law of Navarre<sup>1347</sup>.

- País Vasco: País Vasco Law Act 5/2015, of 25 June.

- Baleares Islands: We must bear in mind the special regulations contained in Legislative Decree 79/1990, of 6 September<sup>1348</sup>, which approved the Consolidated Text of the Compilation of Civil Law of the Balearic Islands and the new wording of some articles given by Law 7/2017, of 3 August, which modifies the Compilation of Civil Law of the Balearic Islands.

- Galicia: Law 2/2006, of 14 June, on Galician civil law.

**3.1.2. Provide a short description of the main historical developments in SL in your country.**

In Spain it is necessary to determine in which territories the person who dies may dispose "mortis causa" of all his goods with absolute freedom, or if on the contrary such faculty is subject to limitations in whole or in part, taking into account the **Theory of the absolute freedom to test or the theory of the legitimate ones**, where the testator can freely determine the destination of part of his goods, but there are certain (legitimate) persons who have to receive the part of the goods that the law reserves in his favour.

Within the theory of the legitimate we find that the legitimate can:

- Forced distribution through a single quota: Catalonia.

- Variable quota: Balearic Islands.

- Free distribution: Aragón and Vizcaya

- With forced distribution portion and free distribution portion: Improvements in the Civil Code.

Together with both systems and from a purely theoretical point of view, the **system of absolute forced succession** can be added, in which the freedom to test disappears completely and which is regulated in the Civil Code in articles 657 to 1087 Cc.

In the absence of a will, the rules of the Civil Code and the relatives indicated in the will (intestate succession) come into play.

Together with the succession system regulated in the Civil Code, the different systems established by the provincial legislations coexist in this country. In general, in the area of inheritance law, these are characterized by a greater freedom to test, as well as the admission of the figure of pacts of succession in most of the foral rights. A specific case is that of the Foral Law of Navarre, where the testator has absolute freedom to dispose of his assets, with two exceptions: That relating to the children of previous marriages, as well as those derived from the usufruct of fidelity established in favour of the widowed spouse.

<sup>1345</sup> Roca Sastre, I., 2002, 124-128.

<sup>1346</sup> Cazorla González, M. J., 1998, 213-333.

<sup>1347</sup> Cazorla González, M. J., 1998, 261-270.

<sup>1348</sup> Cazorla González, M. J., 1998, 319-333.

### 3.1.3. What are the general principles of succession in your country?

The main principle is that of **testamentary freedom** limited by the legitimate ones is set out in article 763 Cc: "Anyone who does not have forced heirs may dispose by will of all or part of his property in favour of any person who has the capacity to acquire it".

### 3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.

The succession process constitutes fundamentally, the means realizing the hereditary right, whose purpose is to assure that the hereditary transmission or acquisition is operated to the person or persons whose vocation results from the law or from the valid will of the causer or testator". It is therefore a procedure whose purpose is the distribution of the hereditary liquid assets among the beneficiary heirs, according to what is determined by the tested or intestate succession.

The following is done during the succession process:

- An inventory of the inheritance and a valuation of the assets.
- An administrator of the estate is appointed for the duration of the judicial process.
- The debts and legacies of the deceased are paid.
- Then the final account is presented.
- The declaration of heirs is dictated.

The **competent authority** in extrajudicial way is the notary; and in judicial way, the judge of first instance of the civil ones, when there are heirs with the modified capacity or absent or when there is no agreement between the heirs; or when we are in a procedure of declaration of death whose regulation is found in arts. 74 and following of the Law of Voluntary Jurisdiction 15/2015, of July 2.

With regard to the **time limits** for accepting inheritance, the Civil Code does not establish a term or term but it is understood that it will be 30 years, by analogy the statute of limitations of the action to claim the inheritance. Although there is a time limit of six months, as a legal period to pay inheritance taxes without surcharges and interest on arrears.

A different situation is when a person is declared dead, understood as the judicial resolution by means of which a person is considered as dead (art. 195 Spanish Cc) the opening of the succession with respect to the assets of the declared deceased, proceeding in accordance with art. 196 Cc to the adjudication of the same in accordance with the provisions of arts. 193 and 194 Cc, which come to establish terms taking into account the circumstances ranging from 8 days to 10 years.

The "interrogatio in iure" procedure should be highlighted here as a faculty to request that an heir make a decision on whether or not to accept the inheritance to which he has been called within a period of time with different effects derived from silence in common law (it is understood that he accepts pure and simple) and in some special civil rights such as in Catalonia, it is understood that he repudiates.

When there is a will and the testator has appointed an executor, the executor will have the power to pay funeral expenses and legacies, conserve property, defend the validity of the will and supervise the execution of the will.

If a *counter-partidor* is named, this corresponds to the division of the inheritance. It can be appointed by the testator, the co-heirs by common agreement, or by the Judicial Secretary or the Notary at the request of heirs and legatees representing fifty percent of the estate.

In defect of partisan and partition made by the testator, the heirs can distribute the inheritance among them as they see fit. In practice, in both cases, the division of the inheritance and the adjudication of property is documented before a notary for the purposes of proof and registration of rights. If no party has been appointed and an heir requests it, the division is carried out in a judicial procedure. It appoints an expert for the valuation of the assets and an accountant for the division of the inheritance. Also, if requested, the appointment of an administrator and the judicial formation of the inventory of assets can be agreed in advance. The divisive operations carried out by the party



(with the modifications that the judge can introduce if any heir opposes them) are incorporated into the protocol of a notary.

**3.1.5. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?**

Spain has seven different legal systems in Inheritance Law, as described above, which will be directly applicable to non-Spanish residents in each territory with its own legislation. For Spaniards, it will be necessary to resort to the criterion of civil neighbourhood (link with each regulatory territory according to Spanish internal rules), in accordance with the provisions of Article 36 of Regulation (EU) No. 650/2012 of 4 July.

With regard to testamentary dispositions, it would be necessary to differentiate between the regulation of common civil law, regulated in the Civil Code of 1889, -modified on several occasions and especially after the publication of the Spanish Constitution of 1978-, and the regulation of the foral or special rights of those Autonomous Communities with competence in the field of civil law (Galicia, Basque Country, Navarre, Aragon, Catalonia and the Balearic Islands). Both under the Civil Code, that is, under common civil law and under the civil laws of the six autonomous communities that have their own regulations, a distinction is made between tested and intestate succession. Testate succession is understood to be that hereditary succession in which the deceased has recorded his will by means of a will; and intestate when the legal provisions are applied because the deceased has not expressed his last will.

**3.1.6. What happens with the estate of inheritance if the decedent has no heirs?**

In my opinion, reference would be made to the succession of the State in common law (arts. 956 and following: art. 956 Cc. "In the absence of persons having the right to inherit in accordance with the provisions of the preceding Sections, the State shall inherit").

Article 807 Cc provides for the regulation of legitimate (forced heirs). For the intestate succession it is necessary to resort to arts. 912 et seq.

The intestate succession is opened, establishing article 807 of the Civil Code the forced or legitimate heirs. Once determined, it is necessary to comply with the provisions of articles 930 and following, where the distribution of assets is established according to the heirs who concur to the inheritance specified in article 807 of the Civil Code.

**3.1.7. Are there special rules or limitations concerning succession with reference to the deceased's (or heir's) culture, tradition, religion or other characteristics?**

No.

**3.2 Intestate succession.**

**3.2.1. Are men and women equal in succession? Are domestic and foreign nationals equal in succession? Are decedent's children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?**

Yes, men and women are equal in the succession, under art. 14 of the EC and the modifications to the Ccc that it has been having, among which it is worth mentioning: Law 30/1981, 7 July, which modifies the regulation of marriage in the Civil Code and determines the procedure to be followed in

cases of nullity, separation and divorce, Law 13/2005, 1 July, which modifies the Civil Code on the right to contract marriage or Law 15/2015, 2 July, on Voluntary Jurisdiction.

- No, because according to their nationality, each one applies his personal law, unless they have selected another law by will under pact.

The children of the deceased born in or out of wedlock are equal regardless of whether they are of matrimonial or non-matrimonial filiation since Law 30/1981 of 7 July.

- The person conceived not born at the moment of the opening of the succession according to art. 29 Cc is considered born for all the effects that are favourable to him, as long as he is born with the conditions expressed in art. 30 Cc: to be born alive and detached from the mother's womb.

- Registered de facto couples regulated under common civil law are not equated with marriage and do not acquire the same inheritance rights regulated for marriage. Nevertheless, the surviving couple may receive until 1/3 the goods of deceased partner by testament, corresponding to the third of free disposal.

- Homosexual couples are not distinguished by their sexual status, as their rights will depend on whether they are married or registered. In this case, they have the same rights as those mentioned above for heterosexual partners, and if not, they can receive a third of the free disposition if it has been left to them in a will.

### 3.2.2. Are legal persons capable of inheriting? If yes, on which basis?

Yes, Legal persons: can inherit all legal persons, except associations or corporations not allowed by law. In some cases, the testator institutes an heir to a previously existing entity, but can also create in the will a foundation to which the assets are attributed (art. 9 of Law 50/2002, of 26 December, on Foundations).

### 3.2.3 Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.

Yes, the **causes of unworthiness** are regulated in art. 756 of the Civil Code and consists of the exclusion of a person from the succession of his causer by the fact of having carried out against him an act that the Law qualifies as reprehensible. Indignity establishes that those who commit acts of particular gravity lose the right to inherit, regardless of whether it is a legitimate inheritance, an intestate or testamentary succession.

The causes of indignity to occur when parents abandon, prostitute or corrupt their children, when convicted in court for having attempted against the life of the testator, his spouse, descendants or ascendants. If the offender is a forced heir, if the offender has accused the testator of a crime punishable by no less than imprisonment, if the accusation is declared slanderous, or if the adult heir who, knowing the violent death of the testator, has not reported it to the courts within a month, if the latter has not proceeded ex officio. This prohibition shall cease in cases in which, according to the law, there is no obligation to accuse, when the threat, fraud or violence forces the testator to make a will or modify it; when it prevents another will from being made, or revokes the one made, or supplant, conceals or alters a later one; or in the case of the succession of a person with a disability, the persons entitled to inheritance who have not paid the attention due to him.

Any of the above is sufficient cause for the legislator to determine the succession incapacity, constituting indignity to succeed.

It should also be noted that article 757 of the Civil Code contemplates the possibility that the offended party may forgive the causes included in the previous article. This provides that the causes of indignity cease to have effect if the testator knew them at the time of making the will, or if, having known them later, he or she sends them in a public document, which means that the tacit or testamentary pardon is accepted and the express pardon is admitted provided that the remission is instrumentalised in a public document.

The indignity to succeed affects both the tested and the intestate succession and is based on the fact that the deceased would have excluded the unworthy from the succession, if he had had knowledge of the fact constituting dignity. In addition, the causes of indignity are determined by the legislator and cannot be extended by the testator or by the judges by means of an interpretation, and they do not need, in order to be effective, their express manifestation in the will.

**3.2.4. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?**

Those cited in the civil code when the person dies without a will, either because he or she did not want to do so or because the will he or she made is null and void or has been annulled. In this case, the so-called intestate succession or "*ab intestato*" takes place, in which it is the law that says which relatives inherit and in what proportions. These people are called "legal heirs" (which are different from legitimate ones).

**Under the Civil Code, the persons called to inherit will be, in that order, the following persons:**

**1. Children and descendants.** The first inherit "by heads" and the second "by races". That is to say, the grandchildren and other descendants inherit by the so called "right of representation" (they inherit by equal parts between them, the part that would have corresponded to their father). This is without prejudice to the legal usufructuary quota of the widowed spouse (if he also survives).

**2. Parents and ascendants.** The father and mother inherit equally. If only one of the parents lives, he inherits everything. If none of the parents live and grandparents survive, they inherit dividing the inheritance by half between the paternal and maternal line. This is without prejudice to the usufructuary legal quota of the widowed spouse (if he or she also survives).

**3. Spouse.** The latter has the right to inherit as long as they are not separated judicially or in fact. In common law, the common-law couple does not have the right to inherit *ab intestato*.

The common-law partner does not inherit the deceased in common law. Thus, in the event that no will has been granted, the spouse is called in third place as heir, in the absence of the children or grandchildren and parents or grandparents of the deceased. On the other hand, the members of the common-law couples lack hereditary, legitimate or intestate rights. Therefore, they can only have them by will, whose convenience is indisputable since it is the only means for the couple of the deceased to inherit it, as long as this is their will duly manifested before a notary.

On the other hand, in some Autonomous Communities the solutions are different, as there are some that fully equalize marriages and de facto unions, such as the País Vasco, Galicia or the Balears Islands, and in others that recognize only some of their specialties. By way of example:

- In Aragón, the surviving domestic partner is attributed the right to household goods (furniture and fixtures, except for objects of extraordinary value), and the right of residence, for a period of one year, in the habitual residence owned by the deceased.
- In Cataluña, in addition to the right to a trousseau and residence, known as the year of widowhood or "*any de plor*", the right to the fourth life estate is recognised, i.e. a quarter of the inheritance if it lacks its own assets for its sustenance.
- In the Valencia Community, the legislation on de facto unions that recognised the surviving partner as the same position that legally corresponds to the widowed spouse has recently been annulled by the Constitutional Court.

**4º. Brothers and nephews of the deceased.** As in the case of grandchildren, the former inherit "by heads" and the latter "by bloodlines", that is to say, the nephews share among themselves what would have corresponded to their ascendant (brother of the deceased). However, if there are only nephews, they would all inherit in equal parts.

**5º. Carnal uncles/aunts of the deceased.** In the absence of all the previous relatives, the uncles of the deceased will inherit in preference to other relatives and in equal parts.

**6º Rest of collateral relatives of 4th degree** (all in equal parts).

7º. In the absence of all the above, the Spanish State would inherit.

**On de other hand, for the six autonomous communities that have their own applicable civil law, the persons called to inherit will be, in that order, the following persons:**

**ORDER OF APPEAL IN ARAGÓN:**

1. Children and descendants: The children and their descendants succeed their parents and other ascendants without distinction of sex, age or filiation.

2. Ascendants: Without prejudice to the right of recovery and trunk succession, the inheritance is defended to the father and mother in equal parts. In the event that one of the parents has pre-deceased the deceased or is unwilling or unable to accept the inheritance, his share shall accrue to the other parent. In the absence of a father and mother, or when both are unwilling or unable to accept, the inheritance is deferred to the nearest ascendants in degree.

3. Spouse. The following is without prejudice to the right of recovery and trunk succession. The appeal to the surviving spouse shall not take place if at the time of the death of the deceased the separation was judicially decreed, the procedures for obtaining a declaration of nullity of the marriage, divorce or separation are in process, or if the deceased was de facto separated by mutual agreement that is reliably established.

If the legal widowed heir dies without having disposed by any title of all the property acquired from his spouse, those remaining shall be deferred to the relatives of the deceased called, at that time, to his legal succession, as heirs of the latter and substitutes for the former. In the absence of these relatives, such property shall be integrated into the survivor's estate.

4. Collateral. The following is without prejudice to the right of recovery and trunk succession. Siblings and children and grandchildren of siblings are called in preference to other collateral. If there are no more than brothers of double bond, the betrayal takes place in equal parts. If there are brothers with descendants of other brothers with double bonds, the inheritance is deferred to the former in their own right and to the latter by legal substitution. If there are children and grandchildren of siblings, the inheritance is deferred by legal substitution, but if there are only children or grandchildren of siblings, the inheritance is deferred by heads. If there are no siblings or children or grandchildren of siblings, the inheritance is deferred to the other relatives of the deceased in collateral line up to the fourth degree.

6. In defect of the previous ones, the Autonomous Community happens, excepts the Hospital of Nuestra Señora de Gracia will be called, with preference, to the legal succession of the patients who die in it or in dependent establishments.

**ORDER OF CALLS CATALUÑA:**

1. Children and descendants. In the intestate succession, the inheritance is first defended to the children of the deceased, in their own right, and to their descendants by right of representation, without prejudice, if applicable, to the rights of the widowed spouse or of the surviving partner in a stable union.

2. Spouse. The widowed spouse or the surviving partner in a stable union, if he or she attends the succession with the children of the deceased or their descendants, has the right to the universal usufruct of the inheritance. If the deceased dies without children or other descendants, the inheritance is deferred to the widowed spouse or to the surviving partner in a stable union. In this case, the parents of the deceased retain the right to legitimate.

3. Ascendants. If the deceased dies without children or descendants and without a spouse or cohabitant, the inheritance is deferred to the parents, in equal parts. If only one of the two survives, the betrayal to the other extends to the entire inheritance. If the deceased dies without children or descendants, without a spouse or cohabitant and without progenitors, the inheritance is deferred to the ascendants of the nearest degree. If there are two lines of relatives of the same degree, the inheritance is divided by lines and, within each line, by heads.

4. Collateral. The siblings, in their own right, and the children of siblings, by right of representation, succeed the deceased with preference over the other collateral, without distinction between siblings with double or simple ties. If there are no siblings or children of siblings, the

inheritance is deferred to the other relatives of the closest degree in collateral line within the fourth degree, by heads and without the right of representation or distinction of lines.

5. Generalitat of Cataluña. If the indicated persons are missing, the Generalitat of Cataluña takes place.

#### **ORDER OF APPEALS GALICIA**

1. Sons and descendants. The Civil Code applies, although in the absence of relatives the Autonomous Community of Galicia will inherit.

2. Ascendants.

3. Spouse. The rights and obligations that the Galician Civil Law recognises for spouses are extended to the members of the couple.

4. Collateral.

5. Autonomous Community of Galicia.

#### **ORDER OF APPEALS NAVARRA**

1. Children and descendants. Married children, adopted children with full adoption and non-married children whose filiation is legally determined; in equal parts, and with the right to representation in favour of their respective descendants. (Without prejudice to the family core.)

2. All sibling with Dual-bonded. The brothers of double bond for equal parts, and the descendants of the deceased, for representation. (Without prejudice to the family core.)

3. All sibling with a simple bond. The brothers of simple bond in equal parts, and the descendants of the dead, by representation. (Without prejudice to the family core.)

4. Ascendants. Ascendants. If they were of different lines, the inheritance will be divided by half between both, and within each line, by equal parts. (Without prejudice of the family core.)

5. Spouse or stable couple. The spouse or stable partner not excluded from the fidelity usufruct. (Without prejudice to the family core.)

6. Other collateral. Collaterals not included in numbers II and III up to the sixth degree, without distinction of double or single bond, nor of lines, excluding those of the closest degree to those of the most remote, without representation and always in equal parts. (Without prejudice to the family core.)

7. Community Foral de Navarra. In the absence of the relatives included in the previous numbers, the Community Foral de Navarra shall succeed, which shall apply the inheritance to charitable, educational, social or professional institutions, halfway between institutions of the Community and municipal institutions of Navarra. (Without prejudice to the family core.)

#### **ORDER OF APPEALS BALEARES ISLANDS**

- ISLANDS OF MAYORCA AND MENORCA (Balears):

1. Children and descendants. The intestate succession shall be governed by the provisions of the Civil Code, without prejudice to the legitimate widowed spouse.

2. Ascendants.

3. Spouse. The common-law couple is equivalent to the widowed spouse.

4. Collateral.

5. Spanish State.

- ISLANDS OF IBIZA AND FORMENTERA (Balears)

1. Children and descendants. Intestate succession in Ibiza and Formentera is governed by the rules of the Civil Code, although the widowed spouse will acquire, free of bond, in the succession of the deceased consort, the usufruct of half of the inheritance in concurrence with descendants and two thirds of the inheritance in concurrence with ascendants.

2. Ascendants.

3. Spouse.

4. Collaterals.

5. Spanish State.

#### **ORDER OF APPEAL OF THE PAIS VASCO**

1. Children and descendants. Intestate succession shall be deferred in favour of the children, in their own right, and of the other descendants, by right of representation.

2. Spouse and unmarried partner. In the absence of descendants, the widowed spouse or surviving member of the unmarried couple who died due to the death of one of its members shall succeed, in preference to ascendants and collateral members.
3. Parents and ascendants. The parents acquire the inheritance by halves and equal parts. If neither of the parents lives, the other ascendants will succeed by half between both lines, and if in any of the lines there are no ascendants, the totality of the goods will correspond in equal parts to the ascendants of the line in which there are them.
4. Collaterals. In the absence of descendants, ascendants and spouse or surviving member of the unmarried couple, the collateral relatives shall succeed, in the first place, the siblings and children of deceased siblings and, in the absence of them, the closest relatives within the fourth degree. Only when siblings concur with children of siblings shall the right of representation be given, the first succeeding by heads and the second by lineages. If there are brothers of double bond with brothers of simple bond, those will happen in double portion that these.
5. General Administration of the Autonomous Community of the País Vasco. In the absence of persons legally called to succession in accordance with the preceding articles, the General Administration of the Autonomous Community of the Basque Country will succeed in all assets, assigning a third to itself, another third to the provincial council corresponding to the last residence of the deceased and another third to the municipality where the deceased had his last residence.

### 3.2.5. Are the heirs liable for deceased's debts and under which conditions?

Yes, according to the acceptance of the inheritance: **pure and simple** or for the **benefit of inventory** the responsibility will be different.

The fundamental effect of **pure and simple acceptance** is the unlimited responsibility of the heir for debts (*ultra vires*), according to article 1.003 of the Civil Code, so that the heir will be responsible for all the burdens of the inheritance, not only with the property of the latter, but also with his own. Thus, the heir who accepts purely and simply becomes the debtor of the hereditary debts, without any limitation, and not as a simple patrimonial responsible, but as a debtor obliged to lend personally. In particular, hereditary succession in debts is not the assumption of a responsibility invisible in the estate, but the continuation of a series of private legal relationships.

On the contrary, when the heir accepts to benefit from inventory, in such a case the heir is allowed not to have to face debts with his estate, so that he is protected against the possibility of inheriting unexpected obligations. What will allow **inheritance to benefit inventory** is that debts are paid solely and exclusively with the estate of the inheritance.

The adjudication of inheritance to benefit of inventory supposes that the personal patrimony of the heir is extracted from the scope of responsibility for hereditary debts, and thus, article 1023 of the Civil Code provides that the benefit of inventory produces *in favor* of the heir the effect of "not being forced to pay the debts and other loads of the inheritance but up to where the goods of the same one reach". Consequently, the heir will only be obliged to satisfy the creditors with the estate of the causer, not confusing, to the detriment of the heir, his own and private property with those belonging to the inheritance. Acceptance of the inheritance for the benefit of inventory.

The result, therefore, of accepting the inheritance for the benefit or not of inventory, is important, since to do it in the first way ("for the benefit of inventory"), the heir what he is expressing, is that an inventory of the property of the deceased is carried out previously, but also of his debts, to pay the latter with what is in the inheritance, and if there is something left over, the remaining rights and property are distributed, and all this, without endangering his particular patrimony to face the debts of the causer.

### 3.2.6. What is the manner of renouncing the succession rights?

For the waiver of the inheritance to be valid and effective, it cannot have the effect of harming third parties (in creditor fraud). Therefore, when your creditors cannot collect, our Civil Code protects you

by granting you the legitimacy to file the action regulated in article 1001, which states that: "If the heir repudiates the inheritance to the detriment of his own creditors, they may ask the Judge to authorize them to accept it in the name of the heir", adding the second paragraph that said acceptance "will only take advantage of the creditors as soon as it is sufficient to cover the amount of their claims. The excess, if any, will not belong in any case to the resigning, but will be awarded to the persons to whom it corresponds according to the rules established in this code".

### **3.3. Disposition of property upon death.**

#### **3.3.1. Testate succession.**

##### **3.3.1.1. Explain the conditions for testate succession.**

In accordance with article 657 of the Civil Code, rights to the succession of a person are transferred from the moment of death, and in accordance with the following provisions, such transfer may be carried out via the will when the testator has left a will or intestate, in the opposite case.

The will may provide for universal succession, private succession or both at the same time. That is to say, it is possible to name heir or heirs, or to order legacies; also to any of them, to establish vulgar substitution or trustee; in its case, it is possible to name heir to another one by means of the pupil substitution or the exemplary one. Finally, conditions, terms or modalities may be established.

The foundation of the tested succession is the principle of private property as transmissible *mortis causa* and the principle of the autonomy of the will as it reaches the voluntary availability *mortis causa* in will. In effect, since the ownership of goods and rights may be transmitted *mortis causa* and one of the essential faculties of ownership is its availability, the voluntary availability of that ownership is necessarily derived. Thus, the owner of the property right or of any other transferable right not only transmits it *mortis causa*. But may also voluntarily order the manner and recipient of such transfer.

However, the principles of private property and the autonomy of the will are not absolute enough or without limits capable of supporting an unlimited test succession. On the contrary, they have limits based on the protection of family interests, on the social interest and on the very limit of the right to property. Family interests are protected through the institution of legitimate -forced succession-, which acts as a limit to the faculty of disposition *mortis causa*; the social interest is reflected in the establishment of taxes on the transmission *mortis causa*, which includes the tested one; the limit of the property right is manifested in the limitations that the tested succession imposes on all types of connection, essentially in the trustee substitution.

##### **3.3.1.2. Who has the testamentary capacity?**

According to the Civil Code, anyone who is not forbidden by law can make a will.

Legal persons cannot make will. The moment to appreciate the testamentary capacity is the moment to grant it (art. 666 of the Civil Code). Minors under fourteen years of age and those who are not usually in full trial at the time of granting a will are incapacitated to test with absolute character.

The capacity to make a will or, as is also said, for legal acts "*mortis causa*", is much broader than that legally provided for the conclusion of other legal acts "*inter vivos*", such as contracts. The law establishes the general capacity to test, excluding only those who lack discernment: those who have not reached a certain age (14 years), before which, in general terms, it is difficult to find sufficient maturity to serve as a basis for discernment; those who lack sufficient mental capacity, due to lack of mental development, illness or transitory mental disorder (drunkenness), or due to a lack of elementary culture that prevents them from a minimum of communication (deaf-mutes who do not know how to read or write). With the exception of these cases, all persons may test and, even if they are unable to hire, such as the bankrupt or the civilly disabled, in accordance with the provisions of articles 662 to 666 of the Civil Code.

The judgment on the capacity of the testator in the notarial wills will have to be made by the authorizing Notary. The Notary must ensure that the testator has the necessary legal capacity to grant a will (article 685 Cc). The absence of a judgement on the capacity will result in the absolute nullity due to non observance of the required legal formality. The notarial faith regarding the capacity of the testator carries with it a rebuttable presumption that can be destroyed by means of evidence to the contrary that is fulfilled, convincing and unequivocal and that upholds this assertion. The Supreme Court has declared as a fundamental principle that the capacity of persons to test is presumed, as long as the incapacity is not evidenced in an evident and complete way, corresponding the proof of it to the one that challenges the will.

### 3.3.1.3. What are the conditions and permissible contents of the will?

The freedom to make will has as its limit the legitimacy in most of the national territory. Although the contents allowed under will can affect both the patrimonial and personal scope. That is to say, the content of the will, although it is limited to the will of the testator; once he has died, the distribution of his goods and/or rights, on the basis of his own will, must comply with the legal provisions provided for this purpose.

But in addition, we can include in the testamentary set, diverse or different dispositions or wills as:

- 1.- Patrimonial dispositions, such as: of ordination, such as the institution of heir or legatee or the disinheritance of execution, such as the designation of executor, partidor accountant among others.
- 2.- Provisions or acts of a personal and family nature, such as: appointment of a guardian, recognition of children, or emancipation of children.
- 3.- Provisions or declarations lacking legal value: religious beliefs or the form of the funeral.

### 3.3.1.4. Describe the characteristics of will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a will?

**Under ordinary civil law (Cc Spanish)**, the will is the title of succession, since, in general, neither the contract of succession nor the joint will is admitted<sup>1349</sup>.

The will can be:

- a) Open Will: granted before a notary, who drafts it and incorporates it into his protocol. It is the usual form of will.
- b) Closed Will: granted before a notary, without knowing the content of the testamentary disposition. It is in disuse.
- c) Holographic Testament: handwritten by the testator, signed and dated. It is unusual.

Although we must add that there are **special wills** such as the military, maritime, and made in a foreign country:

- a) The military will is the one granted in time of war by those people involved in the same (ordinary will) or in danger of death for their participation in a war action (extraordinary will).
- b) The maritime will one is the one granted by those who go on board of a ship, during a maritime trip.
- c) The one carried out in a foreign country deals with two situations:

- Testament according to the laws of the country of grant: Spaniards may test outside the national territory, subject to the forms established by the laws of the country in which they are.

They may also test at sea while sailing on a foreign vessel, subject to the laws of the nation to which the vessel belongs.

They may also make holographic wills even in countries whose laws do not admit such wills.

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<sup>1349</sup> Font I Segura, A., 2009, 12-24.



A joint will (except in the foral territories in which it is admitted), which the Spaniards grant in a foreign country, although it is authorized by the laws of the nation where it was granted, will not be valid in Spain.

- Will in accordance with Spanish law: Spaniards who are in a foreign country may also grant their will, open or closed, before the diplomatic or consular official of Spain who exercises notarial functions at the place of granting.

This official must send the will to the Ministry of Foreign Affairs for deposit and upon the death of the testator, the Ministry will publish the death in the BOE so that those interested in the inheritance can collect the will and manage its notarized. Its open, closed and holographic form is admitted, as well as an ordinary and extraordinary form in the event of shipwreck.

On the other hand, the foral or special civil rights have their own rules in each of these territories on testamentary dispositions, recognising different and specific figures in each of these territories. Some of them are familiar with the joint will and the pact of succession or contractual succession.

- **Cataluña** regulates open, closed and holographic wills; adding to art. 421-21 of the Civil Code of Catalonia the testamentary memories signed by the testator on all the leaves or, if applicable, by means of a recognised electronic signature and alluding to a previous will, are valid as a codicil, whatever their form, if their authenticity is demonstrated or recognised at any time and meet, if applicable, the formal requirements that the testator demands in his will. In testamentary memories, provisions may only be ordered that do not exceed 10% of the relicted estate and that refer to money, personal objects, jewellery, clothes and household goods or to obligations of moderate importance at the expense of the heirs or legatees.

- **Aragon**, the figure of the joint will stands out, on which art. 410 of Legislative Decree 1/2011 of 22 March states that Aragonese, whether or not they are spouses or relatives, can test as a joint, even outside Aragon. Within the joint will, two subtypes can be differentiated: the closed joint will, which is included in art. 410, of Legislative Decree 1/2011, of 22 March, and the holographic joint will, which is dealt with in art. 411, of Legislative Decree 1/2011, of 22 March.

- **Galicia** regulates under Law 2/2006, of 14 June, of Galician civil law the open will, joint will, succession pacts in art. 182 and following of Chapter II.

- **Navarra**: Compilation of the Foral Civil Law of Navarra or Fuero Nuevo (Law 1/1973, of 1 March; it also regulates the notarial open will in Law 188; the brotherhood will under Law 199 where it is said that this will is granted in the same instrument by two or more persons". Therefore, the brotherhood will can be granted by the spouses, two brothers, etc.

In reality, as stated in judgement no. 9/2011 of TSJ Navarra (Pamplona) of 19 May 2011: El Fuero does not give a definition of the will of brotherhood, limiting itself to saying, law 199, that it is "granted in the same instrument by two or more persons". As has been highlighted doctrinally, by means of this law what was intended more than giving a concept was a proclamation of its validity as opposed to common law, where as is known, article 669 of the Civil Code, joint wills are prohibited. One of the most common forms of this will is the mutual institution of heirs between spouses and with broad powers in the survivor to dispose of property, but this does not preclude that its content may be another. In addition, according to the best doctrine, a brotherhood will is not a kind of will but a way of ordering the succession of two or more persons together in a single act or instrument, which may take any of the forms admitted in the Compilation, with the exception of the holographer. Law 200 of the Compilation of the Foral Civil Law of Navarre allows Navarrese to grant a will of brotherhood both in Navarre and abroad, as well as in Spain and abroad. It should be noted that if one of the spouses dies, the sibling's will is irrevocable, unless otherwise established in the will and the cases governed by LAW 202 of the Compilation of the Civil Law of Navarre.

- **País Vasco**: According to article 22 of Law 5/2015, of 25 June, on Basque Civil Law, this Autonomous Community is governed by all forms of testing regulated in the Civil Code and also by the will known as "*hilburuko*" or in danger of death. And then it regulates in art. 23 the Will in danger of death or "*hilburuko*" and in art. 24 the joint will.

- **Baleares Islands**: Law 7/2017, of 3 August, modifying the Compilation of Civil Law of the Balearic Islands. People who have the right to inherit and the rights over the inheritance, it is necessary to

process a voluntary jurisdiction file such as the declaration of heirs ab intestat, which in Mallorca and Menorca is mandatory when there is no will or pact of succession, and when these are declared null and void or ineffective, while in Ibiza and Formentera it is also necessary when the succession of the deceased has been deferred by will or pact of succession only in part.

**3.3.1.5. Is there a (public) register of wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

Yes, for the entire national territory. We refer to the **Register of Acts of Last Will**, which is the one in which the wills are registered, in order to ensure knowledge of their existence after the death of the people who had granted or in life by the grantors themselves.

The aforementioned Registry depends on the General Directorate of Registries and Notaries, and within the same of the Subdirector General of Notaries and Registries.

**It is the Registry that has the most important functions:**

- Incorporate weekly into the database of the Registry the information sent by the Notary Associations on the wills granted before all Spanish Notaries: When a will is granted, the Notary communicates to his Notary Association that a certain person has granted a will before him and the date of this granting, and at the same time the Association sends this information to the General Registry of Acts of Last Will.
- The same function corresponds to the information sent to it by the Directorate General of Consular Affairs on wills issued abroad before Spanish Consuls.
- It is also responsible for registering foreign wills made before foreign Notaries, by any citizen who wishes to have them registered in Spain.
- Registration of authorised wills in any of the signatory countries of the "Convention on the Establishment of a System of Registration of Wills", carried out in Basel on 16 May 1972.
- Certificates of acts of last will are issued from the register: The certificate informs of the existence of will(s) and, in the case of will(s), of the place and date of granting and of the name of the Notary(s) before whom they were granted.

The legalization of certificates issued that are going to take effect abroad, being able to apply in person, by mail or by internet through the Electronic Headquarters.

**Certificates of last resort shall be issued:**

- To possible heirs: this certificate is usually requested for the completion of certain procedures, such as: the declaration of heirs, to collect insurance policies, in court proceedings, to collect bank accounts and generally in any procedure in which it is necessary to know the identity of the heirs of the deceased person. With the certificate they can go to the corresponding Notary Public, who will provide a copy of the will.
- To the grantors of wills who request it during their lifetime.
- To any Spanish citizen or foreigner who needs to know whether or not there is a will and who requests it from abroad.

**3.3.2. Succession agreement (*negotia mortis causa*). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.**

In **Spain**, the pact of succession is the "agreement or contractual convention that limits the faculties of disposition *mortis causa*". With regard to the various types of inheritance agreements, the following typology should be highlighted, based on the traditional classification maintained by ROCA SASTRE:

- Institutional or successor pacts, through which the deceased orders by pact the institution of heirs and/or legacies.

- Resignation or non-occurrence pacts imply that the intervening parties renounce, totally or partially, before the succession is opened, the rights that could correspond to them based on the succession.

- Dispositive pact or on the inheritance of a third party. The pact occurs in relation to the assets included in the inheritance of a third party other than the contracting party.

On the other hand, it is necessary to bear in mind that, in spite of the fact that art. 1271 of the Civil Code establishes that all the things that are not outside the trade of men, even the future ones, can be object of contract and that on the future inheritance it will not be possible, nevertheless, to celebrate other contracts that those whose object is to practice between alive the division of a flow and other partitional dispositions, according to the dispositions of Art. 1271 of the Civil Code. 1056 of the Civil Code it is necessary to contemplate the existence of some exceptions with respect to the stipulation of pacts of succession, in such a way that: pacts of improvement exist, foreseen in the Art. 826 and 827 of the Civil Code. The promise to improve or not to improve, made by public deed in marriage settlements, will be valid, in such a way that the disposition of the testator contrary to the promise will not produce effect. For its part, the following precept considers that the improvement, even if it has been verified with the delivery of goods, will be revocable, unless it has been made by marriage settlements or by onerous contract entered into with a third party.

- According to Art. 1341 of the Civil Code, by reason of marriage, future spouses may donate present goods. Likewise, future goods may be donated before marriage in capitulations (married contract), only in the case of death, and to the extent marked by the dispositions referring to the tested succession.

- For the rest, the possibility of entrusting to the spouse the faculty to improve in matrimonial capitulations (married contract) or in testament (will), as stated in art. 831 of the cited legal text, is contemplated.

**Six Autonomous Communities have with their own civil regulations do regulate succession agreements:**

**ARAGÓN<sup>1350</sup>:**

Title II of Book Three of Legislative Decree 1/2011, of 22 March, of the Government of Aragon, by which it is approved, with the title "Code of the Foral Law of Aragon foresees "Of the agreed succession", which occupies Title II of Book Three providing art. 377, "are valid the pacts on the succession itself are agreed in public deed, as well as those in relation to such succession granted by other persons in the same act". Regarding the required capacity, the law specifies that "the grantors of a pact of succession must be of legal age" (art. 378), and the pact must be formalized personally (very personal character), and therefore representation is not allowed (art. 379).

With regard to the types of pacts of succession, art. 380 of the Legislative Decree lists the following: Of disposition *mortis causa* of one or several contractors in favour of one or others of them; Of reciprocal institution; Of disposition *mortis causa* of the contractors in favour of third or third parties, and Of renunciation of one or several contractors to the inheritance of the other or others.

On the other hand, to conventional modification and revocation cases, art. 400 states that "contractual stipulations can be modified or revoked by means of an inheritance agreement entered into by the same persons or their heirs". In addition, "when there were only two grantors of the agreement, it may also be modified or rendered null and void by a subsequent joint will granted by both.

The art. 401 provides for the particularity of unilateral revocation, which is only permitted in certain cases:

- For the reasons expressly agreed upon.

- For serious breach of the charges and benefits imposed on the institute, as well as when the institute, with its conduct, prevents normal family life if it had been agreed.

- For having incurred the institute in a cause of indignity or in a situation which, if legitimate, would imply a cause of disinheritance.

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<sup>1350</sup> Cazorla González, M. J., 1998, 218-333.

Finally, it should be remembered that the law regulates in detail, in addition to the "pact in favour of a third party" (Art. 397-398 of Legislative Decree 1/2011, of 22 March) and the "renunciation pacts" (Art. 399), the following institutions:

- Institution in favour of this contracting party (Art. 389-391).
- Institution in favour of the contracting party after the days (Art. 397-398).
- Reciprocal institution or pact with the most living (Art. 397-398).

#### **CATALUÑA:**

Articles 431.1 to 431.17 of the Catalan Civil Code regulate in detail all matters relating to the pact of succession in Catalonia. As for the regulation of the pact of succession in Catalonia, the provisions of Law 10/2008, of 10 July, of the fourth book of the Civil Code of Catalonia, relating to successions and, specifically, the provisions of Title III, entitled "Contractual succession and donations due to death", shall apply.

Thus, a pact of succession is defined as one in which "two or more persons may agree to succession by reason of the death of any of them, through the institution of one or more heirs and the carrying out of attributions in a private capacity", and may "contain provisions in favour of the grantors, even reciprocally, or in favour of third parties" (art. 431.1, Catalan Civil Code).

As for the grantors, Art. 431.2 of the same legal body determines that only with the following persons is it possible to grant succession agreements:

- The spouse or future spouse.
- The person with whom he or she lives as a stable couple.
- Relatives in direct line without degree limitation, or in collateral line within the fourth degree, in both cases both by consanguinity and by affinity.
- Relatives by consanguinity in direct line or in collateral line, within the second degree, on the other spouse or cohabitant.

On the other hand, article 431.5 relative to the object of the pact of succession, establishes that it may order "succession with the same amplitude as in a will, so that the grantors may make particular inheritances and attributions, including universal usufruct, and subject the dispositions, whether made in favour of them or of third parties, to conditions, substitutions, trusts and reversions. Executors, administrators and partisan accountants may also be appointed.

Similarly, art. 431.6 states that "in a pact of succession, charges may be imposed on the favoured parties, which must be expressly included in the pact", and may consist of "the care and attention of any of the grantors or third parties". Likewise, "if applicable, it must also be stated, if it has a determining character, the purpose that the granting of the agreement is intended to achieve and the obligations that the parties assume to that effect", which may refer, among others, to the "maintenance and continuity of a family business or in the undivided transfer of a professional establishment".

Finally, article 431.17 establishes that the nullity of the marriage, matrimonial separation, divorce or extinction of a stable couple, "of any of the grantors does not alter the effectiveness of the succession agreements, unless otherwise agreed". However, as an exception to this, "the inheritances or particular attributions made in favour of the spouse or cohabiting partner, or of their relatives, become ineffective in the cases regulated in the sections. 1, 2 and 4 of art. 422.13, unless otherwise agreed or as a result of the context of the agreement".

#### **NAVARRA:**

Succession agreements in Navarre are regulated by Law 1/1973 of 1 March 1973, which approves the Compilation of the Civil Law of Navarre (arts. 172-183 of Law 1/1973 of 1 March). Thus, and before dealing with the specialities of "institution agreements", articles 172-176 of the aforementioned text deal with offering a series of general provisions on pacts or inheritance contracts:

Thus, by pact of succession, it is possible to establish, modify, extinguish or renounce rights of succession mortis causa of an inheritance, or part of it, during the life of the deceased. When these acts involve the assignment of such rights to a third party, the consent of the deceased shall be necessary.

The grantors of any pact of succession must be of legal age. For the contents of matrimonial settlements, however, the provisions of art. 78 of the law shall be observed.

The granting of the pact of succession is a very personal and formal act, since the pacts of succession not granted in marriage settlements or in another public deed will be null and void. However, its formalization may be delegated to another person, provided that the corresponding instrument of power essentially states the content of the will.

**BALEARES:**

Arts. 50, 69, and 70 of Legislative Decree 79/1990, of 6 September, (TR. Compilation of Balearic Civil Law), deal with the regulation of inheritance pacts in the Balearic Islands. On the one hand, it is necessary to distinguish the regime applicable in Ibiza and Formentera, and on the other, that which governs the Island of Mallorca.

In this sense, and with respect to the rules applicable to the Island of Mallorca, art. 50 of the Legislative Decree cited indicates that the pact of succession known by definition, means that the descendants, legitimate and emancipated, can renounce all inheritance rights, or only the legitimate that, in their day, could correspond in the succession of their ascendants, of Majorcan neighbourhood, in consideration of any gift, attribution or compensation that they receive or have received previously. As far as its particularities are concerned, it should be pointed out: that the definition without fixing its scope shall be understood to be limited to the legitimate one; that the change of civil residence shall not affect the validity of the definition, and that the definition shall be pure and simple and formalised in a public deed. The provisions of section 47(3) shall apply to the death of the deceased for the purpose of establishing the legitimate definition.

On the other hand, for the Islands of Ibiza and Formentera, the provisions of articles 69 and 70 of the aforementioned text shall apply. Thus, art. 69 indicates that both the will and the pact of succession will be valid even if they do not contain the institution of heir or if it does not include all the assets.

For its part, art. 70 contemplates the possibility that the will may be revoked by the subsequent granting of another or a valid pact of succession unless they provide that it subsists in whole or in part.

**GALICIA:**

Along with delivery by inheritance and by bequest, pacts of inheritance are the third major title for the transfer of property by cause of death.

Succession pacts are expressly prohibited in the Spanish Civil Code, however, they are widely used in the rights of various Autonomous Communities. Specifically, in the succession pacts in Galicia there are two types of succession pacts in force: the improvement pact and the separation pact. The first of these is established in favour of children and descendants by their ascendants, with all or some of them, jointly or separately: and the detachment agreement is established in favour of those who were legitimate at the time the succession was opened (forced heirs).

**PAIS VASCO:**

The regulation of succession agreements in the Basque Country, specifically in chapter III of Law 5/2015, of 25 June, on Basque Civil Law; and in a general manner to that stipulated in articles 100 to 103.

Beginning with the general regulation of pacts of succession in the Basque Country, specify that through a pact of succession the owner of the assets may dispose of them mortis causa, provided that the grantor is of legal age and is granted in a public deed, in accordance with article 100 of Law 5/2015. Add that the inheritance rights of an inheritance or part of it may be waived during the life of the deceased; in the same way that the inheritance rights belonging to the inheritance of a third party may be disposed of with the consent of the latter.

Next, art. 101 indicates that the designation of successor in assets by inheritance pact annuls any previous testamentary disposition on the assets covered by the pact, and this designation can only be modified or resolved by means of a new pact between the grantors or their successors or for the reasons established by the parties. Specifying in 101.3 that it is extinguished by the causes that the parties have established or those legally established.

Article 102 considers both the mortis causa gift of singular goods and the *inter vivos* universal donation (gift) to be a pact of succession, unless otherwise stipulated.

On the other hand, art. 103 establishes that the pact of designation of successor, can be gathered as much through a disposition of the inheritance universal title as particular; as in a renunciation to the same one. In both cases, the grantors may fix the reserves, substitutions, charges, obligations and conditions to which it is to be subject.

With regard to the regulation of the designation of succession with the transfer of present and post mortem assets, the provisions of arts. 104 to 106 of Law 5/2015, of 25 June, will apply, respectively, while for community agreements it will be necessary to refer to art. 107 of the aforementioned Law.

Articles 108 and 109 regulate the causes of revocation and resolution of the pact of succession.

Finally, it is necessary to take into account what is regulated in art. 88 of Law 5/2015, of 25 June, which determines that the civil law of the Ayala valley governs the municipalities of Ayala, Amurrio and Okondo, and the villages of Mendieta, Retes de Tudela, Santacoloma and Sojoguti in the municipality of Artziniega. In this sense, those who hold the local civil vicinity ayalesa can freely dispose of their property as they wish and whether they have by will, donation (gift) or pact of succession, universally or singularly, setting aside their legitimates with little or much (Art. 89, Law 5/2015 of 25 June). Therefore, the regulation of apartheid and powerful usufruct in the Ayala Valley, the provisions of Art. 90, Art. 91, Law 5/2015, of 25 June, respectively, will apply.

### **3.3.3. Are conditions for validity of wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

- They are governed by the Civil Code for territories under common law; and by the specific civil laws in Catalonia, Galicia, Basque Country, Navarre, Aragon and the Balearic Islands, in their respective territories.

**The Civil Code includes as causes affecting testamentary validity:**

1. Challenging the identity of the testator (Article 686: If the person of the testator cannot be identified in the manner provided for in the preceding article, this circumstance shall be declared by the Notary, or by the witnesses if applicable, outlining the documents that the testator presents with said purpose and the personal details of the same. If the will is challenged for this reason, the testator's proof of identity shall correspond to the person who sustains its validity.

2. Closed will that appears with broken covers or broken seals in the domicile of the testator unless it is proven that there was no will of this or knowledge: (Article 742: The closed will that appears in the domicile of the testator with broken covers or with broken seals, or erased, scraped, or amended signatures that authorize it, is presumed revoked.

This testament will be, however, valid when it is proven that the damage occurred without the will or knowledge of the testator, or when the testator is in a state of disability; but if the cover is broken or the seals are broken, it will also be necessary to prove the authenticity of the will for its validity.

If the will is in the possession of another person, it will be understood that the defect comes from that person and it will not be valid unless its authenticity is proven, if the cover is broken or if the seals are broken; and if one and the other are found intact, but with the signatures erased, scraped or amended, the testament will be valid, unless it is justified to have delivered the document in this form by the same testator.

### **3.3.4. Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

Succession interests in **Spain (Spanish Civil Code)** are protected with respect to certain family members (legitimate or forced heirs) through the regulation of legitimate ones (articles 806 et seq. of the Spanish Civil Code). Specifically, art. 806 states that the legitimate one is "the portion of property

that the testator cannot dispose of because the law has been reserved for certain heirs, thus called forced heirs". According to **article 807 of the Civil Code**, they are in this order of priority:

1. Children and descendants with respect to their parents and ascendants.
2. In the absence of the foregoing, parents and ascendants with respect to their children and descendants.
3. The widow or widower in the manner and to the extent set forth in this Code.

The freedom to make will has legitimate limits in the Civil Code, hence article 913 states that in the absence of testamentary heirs, the law defers the inheritance to the relatives of the deceased, to the widow or widower and to the State, and article 914 establishes that: the provisions on the inability to succeed by will are equally applicable to intestate succession.

The rules on succession and donations are to be found in the common law (Civil Code) and in provincial law. In each case it will be the civil vicinity that determines the application of the common law or the corresponding foral law.

Any person can dispose of his last will as he wishes. The appropriate channel for this is to draw up a will in which he will decide how to distribute his assets and rights and to whom, once he dies. However, there is a part of the inheritance that the deceased cannot freely dispose of because it is reserved by law for certain persons who are called legitimate, and who have the right to receive it regardless of the will of the deceased. Its amount is also legally established.

**The persons are recognized by law as legitimate or forced heirs and they are entitled to receive a share of the inheritance under ordinary law are:**

- The "children and descendants": those of the nearest degree have preference over those of the farthest degree, and two thirds (2/3) of the hereditary goods are reserved for them, one of which is called strict legitimate (1/3), which will be distributed in equal parts, and another, of improvement (1/3), which will be distributed by the causer to improve the children or descendants as he wishes.
- The "parents and ascendants": subsidiarily and in the absence of children or descendants, the law reserves for the parents of the deceased half (1/2) of the hereditary property, unless they concur to the inheritance with the widowed spouse, in which case their legitimate will be one third (1/3).
- The "widowed spouse": his legitimate spouse is always in usufruct, and the amount of the same varies depending on the existence of other relatives who concur with him to the inheritance. Thus, when there are children or descendants, the widowed spouse has the usufruct of the third of improvement (1/3); if he concurs with ascendants, the usufruct of the half (1/2); and if there are neither descendants nor ascendants, the legitimate of the spouse is the usufruct of two thirds (2/3). However, there are autonomous communities with specific legislation to order the inheritance, which will apply preferentially to common law, which means that depending on the civil vicinity of the testator, the portion of legitimate with respect to the value of the inheritance will vary<sup>1351</sup>.

**ARAGÓN:**

It is regulated by **Legislative Decree 1/2011 of 22 March 2011, of the Government of Aragon, which approves, under the title "Code of the Foral Law of Aragon", the Revised Text of Aragones Civil Laws**. In this Community, only the descendants (children, grandchildren, great-grandchildren, etc.) are legitimate, so that if a person does not have descendants he can do with his goods whatever he wants.

Its amount corresponds to half of the inheritance (1/2), resulting in the other half (1/2) of free disposal, as opposed to the legitimate one foreseen in the Civil Code in which it is established in two thirds of the total of the *relictio* flow. The legitimate one regulated in the Foral Code of Aragon presupposes a greater freedom of disposition of the causer, since it is also attributed to the same one the faculty to hand it over to a single legitimate heir, or to distribute it proportionally among all of them.

**BALEARES:**

**Legislative Decree 79/1990, of 6 September, which approves the Consolidated Text of the Compilation of Civil Law of the Balearic Islands, is applied.**

<sup>1351</sup> Calatayud Sierra, A., 2013, 125-145.

In relation to the legitimate one, in Mallorca and Menorca it is not only the children who are legitimate, but the legitimate one also reaches the parents and the widowed spouse. The legitimate of the children constitutes one third (1/3) of the inheritance without four or less children and half of the inheritance (1/2) if there are more than four children. If there are no children, the parents who are entitled to a quarter (1/4) of the inheritance are entitled to legitimacy. To the spouse corresponds in concept of legitimate the usufruct of the half of the inheritance (1/2) when there are descendants and two thirds (2/3) of usufruct if it concurs with the parents; and to lack of parents and children it corresponds the universal usufruct.

In Ibiza and Formentera, the legitimate usufruct corresponds to the children and, failing that, to the parents. The legitimate of the children consists of a third of the inheritance (1/3) if there are four or less children and half (1/2) if there are more than four. The parents' inheritance is, as in the Civil Code, half (1/2) of the hereditary property, unless they concur in the inheritance with the widowed spouse, in which case their legitimate inheritance will be one third (1/3).

**CATALUÑA:**

**Law 10/2008, of 10 July, of the fourth book of the Civil Code of Catalonia, relating to successions, is applicable.**

The legitimate one corresponds to the children in equal parts and in the absence of these to the parents, and the widowed spouse is not legitimate, although both he and the common-law couple can claim the so-called fourth viudal if certain requirements are met. The amount of the same is a quarter of the inheritance (1/4), and its calculation includes the donations made in life by the testator during the ten years prior to his death.

**GALICIA:**

**Law 2/2006, of 14 June, on Galician civil law is applicable.**

The following are legitimate: the children and descendants of deceased children, justly disinherited or unworthy; and the widowed spouse who is not legally or de facto separated.

The legitimate descendants constitute a quarter of the value of the liquid inheritance (1/4) to be divided between the children or their lineages.

As for the legitimate widowed spouse: a) if it concurs with the descendants of the deceased, it consists of the life usufruct of a quarter of the hereditary credit, and b) If it does not concur with descendants, the widowed spouse will have the right to the life usufruct of half of the capital. As long as it does not exceed its usufructuary quota, the widowed spouse will be able to choose to make it effective on the habitual residence, the place where he exercised his profession or the company that came developing with his work.

**NAVARRA:**

**Law 1/1973 of 1 March 1973, approving the Compilation of the Civil Law of Navarre, is applicable.**

The legitimate Navarre consists of the formal attribution to each of the forced heirs of five "febles" or "carlines" salaries for movable property and one stolen from land in the common hills for real estate. This legitimate property does not have the required patrimonial content nor does it attribute the quality of heir, and the instituted in it will not be responsible in any case for the hereditary debts nor will it be able to exercise the own actions of the heir.

However, in testaments and pacts of succession, the following must be instituted in the legitimate foral: matrimonial children, non-matrimonial children and children adopted with full adoption. In the absence of any of them, their respective descendants of the closest degree. In some cases, the testator may decide not to leave anything to the legitimates, but must mention them in the will expressing that it leaves them what is indicated in the legitimate foral. If he does not do so, they can be considered as preterite and challenge the will asking for the annulment of the institution of heir. In practice, the legitimate foral of Navarre as indicated implies that the testator has absolute freedom to leave his goods to whomever he wants.

**PAÍS VASCO (BASQUE COUNTRY):**

**Law 5/2015 of 25 June on Basque Civil Law is applicable.**



The following are legitimate: children or descendants to any degree and the widowed spouse or surviving member of the unmarried couple for their usufructuary quota, in concurrence with any kind of heirs.

The causer may dispose of the legitimate one in favour of his grandchildren or subsequent descendants, even if their parents or ascendants live there. He may also choose between them one or several and set aside the others, expressly or tacitly, without having to give any explanation. However, in the event that the deceased has only one child and has no grandchildren, separation is not permitted, i.e. the deceased would be entitled to the legitimate third and could only be disinherited if any of the causes listed in the Civil Code were to occur<sup>1352</sup>.

The amount of the lawfulness of the children or descendants is one third of the estate (1/3).

The deceased or disinherited children will be replaced or represented by their descendants.

The widowed spouse or surviving member of the common-law couple shall be entitled to the usufruct of half of all of the deceased's property if he or she concurs with descendants. In the absence of descendants, he shall have the usufruct of two thirds of the property.

The widowed spouse or surviving member of the unmarried couple, in addition to his or her legitimate spouse, shall have the right to live in the conjugal home or in the unmarried couple's home, as long as he or she is widowed, does not live in a marital capacity, does not have a non-marital child or does not constitute a new unmarried couple.

Except where expressly provided by the deceased, there shall be no legitimate rights of residence in the conjugal home or in the home of the unmarried partner, the spouse separated by final judgement or by mutual agreement that is reliably established, or the widowed spouse making marital life or the surviving member of the unmarried partner who is linked by an affective-sexual relationship with another person.

### 3.3.5. Cross-border issues.

Spain is characterized by the concurrence in its territory of several succession regimes that coexist with the common regime, those of Aragon, Balearic Islands, Catalonia, Galicia, Navarre and the Basque Country.

In order to resolve internal conflicts of laws, art. 16 of the Civil Code establishes that it must be resolved taking into account, in the first place, the criterion of civil neighbourhood, which is a particular concept that combines domicile<sup>1353</sup> with a kind of sub nationality and which can only be attributed to Spaniards.

Likewise, article 36 of the Succession Regulation 650/2012 establishes two systems for determining the law applicable to transnational succession in these cases. Its number 1 contains an indirect system of determination, when the deceased is Spanish and its number 2. a direct system, when the deceased is foreign.

Faced with this regulation, professor FONT points out that in certain cases discrimination based on nationality may occur, because when the applicable law is Spanish, the determination of the specific domestic legislation applicable is based on the criterion of the nationality of the deceased, whereas in the case of a Spanish citizen, the same attribution will be based on a different criterion, such as that of civil neighbourhood<sup>1354</sup>.

#### 3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?

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<sup>1352</sup> Iriarte Ángel, F. B., 2014, 389-407.

<sup>1353</sup> Tribunal de Justicia de la Unión Europea (Sala Segunda). Caso Vincent Pierre Oberle contra. Sentencia de 21 junio 2018. TJCE 2018\140

<sup>1354</sup> Moretón Sanz, M. F., 2010, 1282-1297.

The European Certificate of Succession<sup>1355</sup>, which allows citizens to prove their status as heirs or legatees throughout the EU, will greatly facilitate the formalisation of transnational inheritances<sup>1356</sup>, will be incorporated into the daily life of all those who are affected by it and will function, to a certain extent, as an "heir's passport". It will be yet another manifestation of the free circulation and acceptance of authentic acts issued by EU states, since it does not require the legalization or Apostille of this type of document.

Until now, Spanish notaries had to compile the documents required by the different States to prove the existence of inheritance calls (declaration of heirs of a French notary, the English grant of probate or the German Erbschein). With the entry into force of the Regulation, once the declaration has been made in the corresponding State (since it does not replace it but complements it), heirs, legatees, executors or administrators may request that a European Certificate of Succession be issued to accredit their status and their hereditary quota in any other Member State, and thus take possession of the corresponding hereditary assets. This certificate is not enforceable but is considered a valid title for registration in the Land Registers.

The issuance of the certificate is not obligatory, being able the interested parties to continue operating with the internal documentation to which we referred before, but it is certain that it possesses certain kindnesses that will make it attractive. Article 69 of the Regulation, without going any further, protects the appearance created by the certificate, considering that any person who, relying on the content of the CSE, makes payments, delivers or receives goods or, in short, deals with a person who is empowered to such acts by virtue of the information resulting from the certificate, must be protected and maintained in his acquisition provided he has good faith, consisting of bad faith in having knowledge that the certificate does not respond to reality.

### 3.3.5.2. Are there any problems with the scope of application?

In Spain there are already several cases of application by the Directorate General of Registries and Notaries (DGRN) of the aforementioned provision.

The DGRN embodies its attitude towards the new regime and its willingness to promote its correct application by those to whom it binds (in the first line, notaries and registrars). We refer in this sense to the Resolution of 15 June 2016, on the current role of art. 9.8 CC<sup>1357</sup>; on the non-absolute nature of the connection to habitual residence; on the antecedent in the Haya Convention of 1989.

In relation to the **practical problems analysed, relating to the applicable law, rules of jurisdiction and certificate of succession, we can point out the following:**

- First, the lack of coordination in the RES (European Successor Regulation) of the applicable law and jurisdiction. This problem, derived from the form of negotiation of the text, affects notarial competence. Especially in two cases: in the declaration of heirs, where the notary's own extrajudicial function hinders an adjustment to the forums of articles 4, 7, 10 and 11 RES; or when the law applicable to the succession is that of the causer's closest links with a State, in the terms of article 21 RES in fine, which establishes a residual escape rule.
- The problem is repeated in relation to the issuance of the corresponding European Certificate of Succession (ECS) to these acts, since, once again, Article 64 RES refers to judicial forum.

It should also be remembered that the Regulation prevails over Article 22 LOPJ, which only states that the domestic judge has jurisdiction in contentious successions. That is to say, it selects the competent one within the national territory.

On the other hand, the practice of the European Certificate of Succession raises some practical problems such as the making of a copy and footnote, in which personal data must be extended - limiting them to those expressly indicated in Article 70, which obtained a favourable report from the Committee of the Union on personal data -; the validity of the simple copy; the duration or the

<sup>1355</sup> TJUE SENTENCIA DEL TRIBUNAL DE JUSTICIA (Sala Segunda) ST 12 - october- 2017. Subject. C-218/16

<sup>1356</sup> Iglesias Buuigues, I. J., 2015, 111.121.

<sup>1357</sup> Iriarte Ángel, F. B., 2009, 111-136 and Iriarte Ángel, F. B., 1989, 3561-3582.

possible translation. This last element was ignored in the Regulation, on the contrary, to the process of recognition that may require translation (DF 26º LEC; DF 2ª LCJIC; art. 4º 2 -could- arts. 39, 40 and 78 RES)<sup>1358</sup>.

The idea is that form VI - Annex VI Regulation (EU) 1329/2014 - should be sufficiently detailed to avoid fields susceptible to translation, as happens in Regulation (EU) 2016/1191, on simplification of the legalisation of public documents, which will enter into force in February 2019. For this reason, the requirement for translation cannot be understood as obligatory. In this way, and following the resolution of the General Directorate of Registries and Notaries of 4 January 2019, the European Certificate of Succession, being a standardised model, does not require translation; although the aforementioned resolution admits a simple translation made under the responsibility of the notary, without it being necessary to provide any other document. This area is very important for Spanish notaries, since the general doctrine of the DGRN is that, if the notary translates the succession document, he must do so in its entirety (and not in extract) which will make transnational successions very difficult (for example, if there is to be translated into a German will, we cannot limit ourselves to the relevant part, but we must do it word for word, even if it refers to a legacy of a reliquary in Germany).

**3.3.5.3 How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country have experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?**

There is a lack of coordination in the Regulation between applicable law and jurisdiction. This problem, deriving from the form of negotiation of the text, affects the notarial competence and extends to the issuing of European certificates of inheritance by notaries who are considered by the Court".

**3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?**

In the same way, the above-mentioned problem, derived from the form of negotiation of the text, affects notarial competence. Especially in two cases: Firstly, in the declaration of heirs, where the notary's own extrajudicial function makes it difficult to adjust to the forums of articles 4, 7, 10 and 11 RES. This will be the case in the case of an amicable inheritance, the execution of which can be transferred to a State other than that of habitual residence (recital 29) without being able to apply the rules based on the *professio iuris*, which by definition does not exist in an intestate succession. The same applies when the law applicable to the succession is that of the closest links of the deceased with a State, in the terms of Article 21 RES in fine, which establishes a residual escape rule. The problem arises again in connection with the issue of the corresponding European Certificate of Succession (ECS) to these acts, since once again, article 64 RES refers to the courts. It has also been raised whether, in wills prior to the entry into force of the Regulation, it may be understood that there is a tacit *professio iuris*, if the testator made a material disposition according to the law of his nationality; or, on the other hand, if the unit of succession law also implies, as the DG in principle understands, a unit of succession title, posing problems with the usual practice of making foreign wills in Spain only for assets located in our country (for example, with regard to their revocability by wills made in his country).

<sup>1358</sup> <http://www.elnotario.es/practica-juridica/7102-aplicacion-del-reglamento-ue-650-2012-de-sucesiones> (18.5.2019).

**3.3.5.5. What's issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?**

1. Resolution DGRN of 2 August 2016: Possibility of noting preventively in the property registry the right of the legitimate Galician law 2006 by instance, without the need of judicial providence. Naturaleza de la legítima en Galicia: Law 2006 and 1995. Right to credit under the 2006 law. Pars valoris bonorum according to the 1995 law.
2. DGRN Resolution of 6 October 2016: Ineffectiveness of the legacy of legitimate made to ascendants in a will granted in accordance with the Basque Country Civil Law of 1992, the causer having died after the entry into force of the new Law 5/2015, which abolishes the condition of legitimate ascendants. Timeless law and interpretation of the will. Provision 12ª Civil Code. Application of this doctrine to the Galician case: will with provisions relating to the legitimate fact under the validity of the 1995 Law, after the death of the testator in force of the 2006 Law.
3. Resolution DGRN of July 13, 2016: Pact of improvement without current attribution of goods and on goods of the post-ganancial community. Registered.
4. Resolution DGRN of 29 September 2016: Subjection of the improvement to the civil neighbourhood of the breeder. The civil neighbourhood of the breeder cannot be questioned with data from the liquidation office. Application of presumption of place of birth.
5. DGRN Resolution of 5 April 2016: Succession pact of reciprocal attribution of the usufruct. Not registrable.
6. DGRN Resolution of 26 October 2016: Partition Galicia. Distinction partition and rules for partition. Adjudication of the testator's participation in marital property: surviving spouse and successful bidder. No need for intervention of the heirs of the deceased spouse. Article 207 LDCG.

**3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?**

Through the figure of the Notary, who once the succession is regulated in Spain, issues, at the request of the heirs, a European certificate of succession.

**3.3.5.7. Are there any national rules on international jurisdiction and applicable (besides the Succession Regulation) concerning the succession in your country?**

The issue addressed in this study is the scope of Article 38 of the Regulation, according to which "Member States comprising several territorial units with their own rules of law on succession shall not be bound to apply this Regulation to conflicts of law arising exclusively between those territorial units". The answer to this question will depend on whether Articles 9.8, 16.1 and 16.2 of the Civil Code applicable to the succession of Spaniards<sup>1359</sup>, who died before 17 August 2015 continue to apply in all their extremes to the succession of Spaniards who died after that date or who may become so, but not necessarily to all Spaniards and, in the latter case, only after their integration with the other rules contained in Chapter III of the Regulation<sup>1360</sup>.

**1. Does article 38 permit the exclusion of the application of all or part of the Regulation?**

The rules on jurisdiction in the Regulation have completely replaced the rules on jurisdiction in matters of succession contained in Article 22 of the LOPJ. It is therefore surprising that LO 7/2015, of 21 July, which amends the LOPJ, has introduced in its article 22 quater, letter g, rules of jurisdiction in matters of succession which appear to be a transposition of the rules of the Regulation, some of which in their literal sense are, however, incompatible with what is established in the European norm. Obviously, the primacy of the Regulation could not raise any doubts, but this legislative

<sup>1359</sup> Mariño Pardo, F., 2015, 1-10.

<sup>1360</sup> Martorell García, V., 2015, 3-7.

technique only adds difficulties to the correct application of the sources that make up our legal system. A regulation must not be transposed, and even less so if it only serves to create confusion. With regard to the rules governing the recognition and enforcement of judgments, as well as the effects of authentic instruments, including the effects of the European Certificate of Succession, it seems clear that they also fall outside any possible exclusion.

The only purpose of Article 38 would therefore be the possible exclusion of the rules of the Regulation on the determination of the applicable law (Articles 20 to 38) in cases where the conflict of laws arises exclusively between territorial units of the same State, the rules of jurisdiction of the Regulation being applicable in any event.

## **2. Relationship between Article 36, as regards the succession of a Spaniard, and Article 38 of the Regulation**

Article 36 of the Regulation regulates the problem arising from the fact that the law applicable by virtue of the Regulation is that of a State with different territorial units and its own legal system in matters of succession. In order to determine which of these systems should be applied, Article 36 first refers to "the internal rules of conflict of laws of that State". In the absence of such rules, if the point of connection which has referred to the law of a multi-legislative State is habitual residence, the law in force in the territorial unit in whose territory the deceased had his habitual residence at the time of death must be applied; if the point of connection had been nationality, the law of the territorial unit with which the deceased had the closest connection must be applied.

Its analysis does not seem to allow it to state that omitting the existence of Article 38 by a Spanish "court" and resolving the question of the law applicable to the succession of a Spaniard by resorting to the provisions of Article 36.1 necessarily leads and in any case to the same result as if this "court" applies Article 38 and excludes the succession of Spaniards from the application of Chapter III of the Regulation. All the more so since the application of the rules of internal origin in the context of Chapter III of the Regulation can easily give rise to different decisions in similar cases, depending on the "court" hearing the case.

## **3. What should be understood by conflicts of laws that arise exclusively between territorial units of the same State?**

The rules of the Regulation governing jurisdiction always apply. This means that, in order for a Spanish "court" to hear a succession, it is necessary, as a general rule, that the habitual residence of the deceased at the time of death was in Spain or in a State not bound by the Regulation and, in the latter case, possessed property in Spain and his nationality was Spanish or, failing that (although this is not a Spanish citizen, it is irrelevant here), he would have resided in Spain and at the time the question of succession was raised, no more than five years would have passed since he had established his habitual residence in a State not bound by the Regulation. Otherwise the Spanish 'courts' would lack jurisdiction.

In short, it can be stated that, with respect to deaths that occurred on or after 17 August 2015, we are faced with a conflict of laws exclusively between Spanish territorial units in cases in which, by virtue of the Regulation, a Spanish "court" has jurisdiction, that is, the deceased had his last habitual residence in Spain (wherever his property is located) or in a State not bound by the Regulation (and, in the latter case, having property in Spain), the deceased has Spanish nationality. In such cases, the Regulation allows the application of the rules of conflict of state origin, i.e. Articles 9.8 and 16 of the Civil Code. The question, at this point, is to discern whether Spain has in any way manifested the will to make use of the power granted by Article 38 of the Regulation.

## **4. Is Spain to be regarded as making use of the power provided for in Article 38 of the Regulation?**

The Spanish legislature has to deal once and for all with the question of whether or not to apply to internal conflicts the EU Regulations that incorporate such exception clauses. A double system should not be maintained, one for cases classified as "international" and the other for cases classified as "interregional".

The rules of interregional law should not be understood as rules different from those of private international law, but only as a mere extension of the same to specify, in those cases in the latter refer to the application of Spanish law, which of the systems that coexist in Spain should be applied.

Thus, the provisions of article 38 of the Regulation, as well as any other similar formulation, are totally incompatible with the conception of an interregional law understood as a mere prolongation of private international law.

Following this line of thought, it would be appropriate for the Spanish legislator to ignore the provisions of Article 38, repealing for this purpose Articles 9.8 and 16.2 of the Civil Code and confining himself to establishing which of the systems that coexist in Spain should be applied to the succession of a Spaniard, using for this purpose the connection "civil neighbourhood".

Thus, in cases in which, according to the conflict rules of the Regulation, Spanish law would not apply to the succession of a Spaniard, action would be taken in accordance with article 36.1 of the Regulation and the rules suggested in footnote 14; and in cases in which, according to these same conflict rules, Spanish law would apply to the succession of a foreigner, action would be taken in accordance with the provisions of footnote 36.2. In both cases, complying with all the rules that make up Chapter III of the Regulation.

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## Sweden

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### *1. Social perspective.*

#### **1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without affectio maritalis).**

Keeping to the formal legal definitions, Swedish legislation acknowledge the family formations marriage, cohabitants with partner relation and single people. The legislation also acknowledges parents, with sole or joint custody, as well as adoptive parents. There is also legislation on family home parents, taking care of other parents' children. Furthermore, Swedish legislation in some situations gives legal relevance to other relations without formally defining them as family. To name a few, there are friends and siblings sharing household, reshaped families including children with different parents, community households of two or more persons and community housing. There are also other relations not legally acknowledge, such as partners living separately, serial monogamy and relation to ex-partners, multi-generational and extended families, polyamorous relations and children with more than two parents or parental figures.

In practice, family practices are complex and diverse. Thus, there exist very many other different types of living lifestyles and family formations.

#### **1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.**

The population in Sweden are approximately 10 230 000 people (2018). About 3 400 000 persons are married, which mean 44 % of the adult population. About 1 500 000 persons, 20 % of the adult population, are living in cohabitant partner relations. The number of people living in one-person households, or one adult with children, are about 2 600 000, 34 % of the adult population. There are also a number of people living in other households, such as friends sharing a flat.

The number of marriages entered have varied between 50 000-65 000 per year in the 1930s-1960s, decreased to 30 000-45 000 in the 1970s-2005 and then increased again to 50 000-60 000 in 2005-2018. This may be compared to the number of divorces that have slowly increased in the 1930s-1960s from 2 000 to 10 000 per year, a more rapid increase in the 1970s from 10 000 to 20 000 per year, and then varied between 20 000-25 000 in 1975-2018. Looking at the marriages that were dissolved through divorce in 2017, they had lasted 11.4 years on average. Those who ended by death had lasted 47.2 years on average. Despite these fluctuations over the longer time, during 2011-2017

the proportion of the adult population in Sweden being married is comparatively stable, about 43-44 %. The proportion of people in cohabitant relations is also stable, about 20 % over the same period. It has been possible for same-sex couples to register partnership in Sweden during the period 1995-2009. Then marriage was made gender neutral. After that, registered partnerships may be converted to marriage, but do not have to. The number of registered partnership existing had a peak of 5 300 in 2008, and have thereafter decreased to about 2 000, by dissolution or conversion in to marriage. Today about 10 000 people are in same-sex marriages or registered partnerships not converted in to marriage. The proportion is about 60% female same-sex unions and 40 % male same-sex unions.

**1.3. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.**

See above.

**1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).**

Given the limited time we have had to answer this questionnaire we have not been able to find the time to answer this question.

## **2. Family law.**

### **2.1. General.**

#### **2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?**

There is no formal definition of, or boundaries for, what is considered Family Law in Sweden. However, according to the established legal tradition, the main legal sources of Family Law are the Marriage Code, the Children and Parents Code, the Inheritance Code and the Cohabitees Act. Often, the Name Act is also considered as Family Law. These codes and acts provides a comparatively exhaustive regulation on many legal family matters. Court practice have some legal effect regarding those matters, but not very substantial. Additionally, there are also several acts in private law having significant legal effects on families, as for example the acts on gifts and on joint ownership.

The Swedish constitution does not have any substantial regulation on families. However, Sweden has incorporated the European Convention on Human Rights and Fundamental Freedoms, which have legal effects on families. In January 2020, Sweden will also incorporate the UN Convention on the Rights of the Child. Sweden has also ratified several other international conventions concerning Family Law. There are also acts on International Family and Private Law.

Concerning parenthood there are regulations on assisted reproduction in the Genetic Integrity Act. There is also the Abortion Act. There are furthermore regulations on parents' allowance, child benefit, maintenance support and other benefits in the Social Insurance Code, as well as an act on parental leave. There are also regulations on social support for families in the Social Service Act, and on preventive detention in Care of Young Persons Act. Moreover, there are different instructions with legal authority issued from the Family Law and Parental Support Authority<sup>1</sup>.

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<sup>1</sup> Mägi, E., Zimmerman, L., 2015.

### 2.1.2. Provide a short description of the main historical developments in FL in your country.

The modern Family Law in Sweden was formed in the beginning of the 1900s, as a result of cooperation between the Nordic Countries. One result of these reforms was increased equality between men and women. Sweden introduced a new Marriage Code in 1920 where the spouses are independent in economic matters, keeping their own property. The new Code also allowed divorce to a greater degree. In the same period, a married woman was now allowed to be guardian to her children, together with the man. Before, the man had sole authority over the children. Free divorce was introduced in 1973. Sweden also introduced a new Inheritance Code in 1920. Inheritance between spouses was introduced in 1928 and from 1987 the spouses inherit in priority before their common children. In more recent history, the legislator has also made efforts to give men incentives to take parental leave. From 1995, each parent had to take at least one month of parental allowance, which in practice meant the father. This has been increased step by step to three months in 2016. Another aspect of gender equality is strengthened legislation against child marriage and forced marriage since 2014.

There has also been a development regarding non-married parents and their children. Children born out of marriage did inherit from their mother from 1867, from their mother's relatives from 1905 and equal right to inheritance from their father from 1970. Since 1977, two non-married couples could have joint custody. There is similar development regarding non-married couples. A first elementary Cohabitee Act was introduced in 1973, and a more comprehensive act in 1987. Since the 1970s the Swedish legislator has a "neutrality ideology" towards married and non-married couples. Among other things, joint income taxation for married couples was abolished in 1971.

Another trend is inclusion of same-sex couples. In 1987, an act on same-sex cohabitants was introduced, legally equivalent to the Cohabitees Act for different-sex couples. Both Cohabitees Acts were merged into a gender-neutral act in 2003. Registered partnership was in force from 1995 with almost equivalent rules as marriage. In 2009, marriage became gender neutral.

The first legislation on parenthood was introduced in 1917-1920 acknowledging presumption of paternity, confirmation of paternity, paternity by court's judgement and adoption. The different acts were merged into the Children and Parents Code in 1949. Another side of legislation on parenthood is that there has been widespread forced sterilisation in Sweden since the 1930s, forbidden by law from 1975. Adoption in Sweden is "strong" since 1959, setting almost all legal ties between the adoptive child and the adoptive parents. Lone adoption is allowed, both for women and for men. Joint adoption has required marriage until 2018, now also cohabitants are allowed to adopt. The development of assisted reproduction technology, together with ethical re-evaluations, led to legislation on insemination and sperm donation in 1985, in vitro fertilization in 1988, egg donation in 2001 and also combined egg and sperm donation in 2019.

There has also been inclusion of same-sex parents. In 2003, same-sex spouses were allowed to adopt. Not many national adoptions take place inside of Sweden without a prior relation between the child and the adoptive parents, and very few international adoptive organisations accept same-sex couples. However, the possibility to adopt has had significant consequences making it possible for same-sex couples to become legally recognised as parents after carrying out assisted reproduction or surrogacy arrangements not recognised by the Swedish Law. Same-sex couples with two women are also allowed assisted reproduction since 2005, but with less favourable rules than different-sex couples. Most of this difference in the rules between different-sex and same-sex parents carrying out sperm donation was abolished in 2019. At the same time, the child's right to information about their genetic origin was strengthened. There is also a government proposal to introduce presumption of paternity for married same-sex couples in 2021.

Single women are allowed assisted reproduction since 2017. At the same time period, there were intensive debates on surrogacy motherhood. At the moment, the government has come to the conclusion to not recognise surrogacy. Still, it is not forbidden to carry out surrogacy arrangements

abroad and to adopt the child afterwards. The number of children born out of such arrangements are on the rise.

Sweden were internationally first with legislation on change of legal sex in 1972. In 2013, sterilization as a requirement for change of legal sex was abolished by court's decision. Now, (trans)men may give birth and (trans)women may produce sperms. Legislation on parenthood after change of legal sex was subsequently introduced 2019.

Another aspect of Family Law are rights of the child. The past right to physically punish children and other offensive treatment was abolished 1966 and explicitly forbidden in 1979. Sweden ratified the UN Convention on the Rights of the Child 1989, which have led to significant legal changes on setting the best interest of the child as first priority<sup>2</sup>.

### 2.1.3. What are the general principles of FL in your country?

Concerning relations between adults, one fundamental principle of Family Law in Sweden is the liberal freedom of independent individuals, free to join in marriage or as cohabitants, and free to leave as well. There are also principles on mutual consent as well as protection against child marriage and forced marriage. Many family institutes also require fundamental legal capacity. Deputies may not enter marriage, confirming paternity or make a will in another's name.

In law, there are still some traces of the Christian tradition of marriage as a holy communion. For example, even civil marriage is entered by a ceremony. However, most aspects of marriage nowadays are secular and more resembles an economic contract. The Marriage Code and Cohabitee Act mainly serves as help with conflict resolution and property distribution when a relation ends (by separation or by death). Spouses inherit each other prior to common children. Besides that, inheritance is distributed along genealogy.

At the same time, Family Law in Sweden is mostly oriented on couple relations. Two adults in a romantic/sexual couple relation have most possibility to legal protection. Two people living together on other grounds than a couple relation has less possibility, and more than two people living together even less. Marriage is also centered on complete, exclusive and life-long couple relations. There are possibilities to adapt marriage to more partial, open and changeable relations, by active legal action.

Another principle of Family Law between adults are gender neutrality. The Marriage Code and the Cohabitee Acts includes same-sex relations, as well as transgendered and intersex people. Although this legislation is formally neutral to gender, marriage between a man and a woman have effects in practice on gender equality. As men generally have more economic resources than women do, marriage mean equalization of wealth, especially in the situation it dissolves by divorce or by death.

On the contrary, Family Law in Sweden regarding parents and children is still oriented on heterosexual nuclear families. The legislation assumes that people at first hand get only common children, and within marriage. There is also an assumption that children come of sexual intercourse. This means that biologic/genetic, social and legal parenthood coincides with the same two people. Other family formations, such as reshaped families and same-sex families, are covered by exemption rules.

Most effects on gender equality between parents are also within marriage. Children within marriage mean joint custody, and thereby formal equality on parental responsibilities. Outside marriage, unmarried mothers get sole custody, with sole responsibility and authority, over the child. On the other hand, if both parents agree, there are easy ways to register joint custody. With joint custody follows incitements on gender equality in practice, mainly regarding parental leave.

Another fundamental principle is the best interest of the child. What is considered the best interest of a child is however assessed by adults, mostly the legal parents. As a main rule, parents have complete and exclusive responsibility for their children. Exceptionally, there are different ways for

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<sup>2</sup> Mägi, E., Zimmerman, L., 2015.

society to support children and parents, as well as possibilities for compulsory care if a child get hurt or abused<sup>3</sup>.

**2.1.4. Define “family” and “family member” in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

There are no formal legal definitions of “family” or “family member”. There are only legal definitions on some specific family relations.

**2.1.5. Family formations.**

According to the Swedish legal system, family formation is represented by married couples (either opposite-sex or same-sex), same-sex registered unions not converted into marriage yet and de facto cohabitation partners (either opposite-sex or same-sex).

**2.1.5.1. Define the “spouse” in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

The Marriage Code defines “spouses” as the two people who marry each other. Marriage is gender neutral. “Spouse” have the same definition in the legal system.

Marriage is entered by a ceremony with the two people being simultaneously present giving consent to marry each other, in front of an authorised civil or religious officiant. People under 18 years are not allowed to marry. Marriage is also not allowed between parents and their children (including adopted children) or between full siblings. Polygamy is forbidden.

There are no formal barriers on divorce, although in some cases the spouses are required to a six month period of consideration before the divorce can be completed.

**2.1.5.2. What types of relationships/unions between persons are recognised in FL of your country? In particular, formal (registered) and informal (de facto) unions, heterosexual and same-sex unions, unions with and without affectio maritalis. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

Cohabitee relation is a recognised de facto family union, also gender neutral. Two people are considered cohabitants by having a (sexual) couple relation, habitually living together and sharing a common household. No active or conscious action is needed. “Cohabitant” according to the Cohabitee Act only includes non-married couples, while a person married might be considered “cohabitant” according to other regulations.

**2.1.6. What legal effects are attached to different family formations referred to in question 2.1.5.?**

According to the Marriage Code, the spouses keep their own property and debts during marriage. They are free to make their own decisions about their property, with the exception of some restrictions concerning divesting the spouses’ common housing and household goods. The spouses

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<sup>3</sup> Mägi, E., Zimmerman, L., 2015.

are assumed to contribute to each other needs. If one fails to do that, the other may request maintenance support.

In the event of divorce, the estate division as a main rule include all their property, and also as a main rule the spouses split the property in equal parts. There are possibilities to get maintenance support also after divorce, mainly during a transition period.

In the event of death, firstly there is estate division. Secondly, the surviving spouse inherit the other, prior to common children but not prior to children only of the deceased spouse. At the death of the surviving spouse, the heirs to the first deceased spouse get their share.

Registered partnership for same-sex unions are not in use anymore. People who have entered registered partnership are allowed to converse them into marriage. There are still some partnerships not conversed, why there is provisional regulations still giving partnership legal effect as marriage.

In the Cohabitee Act, there are also some restrictions on divesting the cohabitant's common housing and household goods. However, there are no rules on maintenance support. In the event of separation, the estate division only includes common housing and household goods acquired for common use. In the event of death, there is also estate division, but no inheritance without testament.

**2.1.7. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/*de facto* family formations? Explain briefly.**

There have been some initiatives in the public debate on proposals to introduce a legal institute on family unions neutral towards relation form and towards number of participants. However, such proposals do not have sufficient support. There are no formal proposals of legal reforms on family formations at the moment.

**2.2 Property relations.**

**2.2.1. List different family property regimes in your country.**

The statutory matrimonial property regime is the deferred community of property regime, regulated in the Swedish Marriage Code (*Äktenskapsbalken* (1987:230)). The rules statues that each spouse's property become *marital property* (Ch. 10 Art. 1 and Ch. 7 Art. 1 of the Marriage Code) in the sense that each spouse continues to own and administrate his or her own property, and is responsible for his or her own debts (Ch. 1 Art. 3 of the Marriage Code), throughout the marriage regardless of the type of property or the time and manner of the acquisition. The deferred property regime gives each spouse a claim to half of the marital property's net value upon the dissolution of the marriage (Ch. 11 Art. 3 of the Marriage Code). Thus marital property is not the same as ownership rights. The spouses may also have *separate property*, which is not included in the deferred community property regime and is excluded from any future property division. The property becomes separate property due to stipulations in the marital agreement (see question 2.2.3), or due to a stipulation by a third party who has donated or bequeathed property to a spouse, upon a condition that the property shall be the recipient's separate property (Ch. 7 Art. 2 of the Marriage Code). Swedish law also knows the concept of *personal property*, for example certain kinds of pension rights, which belongs to the category of marital property although special rules may apply regarding its treatment in a property division between the spouses.

Cohabitation outside marriage is regulated by the Cohabitees Act (*Sambolagen* (2003:376)). The division of property is based on the matrimonial property regime in the Marriage Code. However, the property which may be subject to division, *cohabitee property*, is limited to covering joint dwelling and household goods acquired for joint use (Art. 3-7 of the Cohabitees Act).

According to the Act (1994:1117) Registered Partnership, which expired in April 2009, registered partners were given the same rights as spouses (Ch. 3 Act 1). The Act expired in April 2009 when

same sex couples were given the same right to enter into marriage as heterosexual couples. The Registered Partnership Act continues to give rise to legal effects in respect of couples who entered into partnership before the end of April 2009 and have not converted their partnership into a marriage (see question 1.2, 2.1.2 and 2.1.5.2).

**2.2.2. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?**

See above, under 2.2.1.

**2.2.3. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a “new regime just for them”?**

Yes, according to the Swedish Marriage Code spouses and prospective spouses may through a marital property agreement determine that certain property belonging or accruing to either one of them shall be that person’s separate property instead of marital property. A marital property agreement must be in writing and registered with the Tax Agency, according to Ch. 7 Art. 3 of the Marriage Code. The same applies to cohabitants, according to the Cohabitees Act art. 9, with the difference that the agreement does not have to be registered.

**2.2.4. Explain briefly the rules on the administration of family property and compare if there are difference for different property regimes.**

As stated above (question 2.2.1) marriage or cohabitation does not affect the ownership to property. Each person continues to be the sole owner of the property that he or she acquired before entering the marriage/cohabitation as well as property acquired during the marriage/cohabitation (Ch. 1 Art. 3 of the Marriage Code). Each person manages freely all his or her property with the exception of property that constitutes the couples joint dwelling or joint household goods (Ch. 1 Art. 3 and Ch. 7 Art. 5 of the Marriage Code, and Art. 23 of the Cohabitee Act).

General principles of the law of obligation are applicable to spouses and cohabitants. As a result spouses and cohabitants can acquire property jointly and thus become joint owners. A principle of “hidden” joint ownership of property has developed in Swedish case law. This means that, under certain circumstances, even though only one of the spouses or cohabitants bought the property the property is considered joint property. These circumstances are that the property has been acquired for joint use, on condition that the spouses or cohabitants can be deemed to have aimed that the property was to be owned jointly by them and that the other spouse or cohabitant also has made some financial contribution to the acquisition. The principle of “hidden” joint ownership of property is limited to spouses and cohabitants.

**2.2.5. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

Yes, the Swedish Tax Agency has marriage records, in which the marital property agreements are registered. Only when registered is the marital property agreement binding between the spouses. Ownership cannot be transferred through such an agreement.

**2.2.6. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

Upon marriage each spouse continues to own and administrate his or her own property, and is responsible for his or her own debts, throughout the marriage regardless of the type of property or the time and manner of the acquisition. The agreement has no effect on third party rights, since you cannot transfer ownership through a marital agreement.

All debts are personal debts, it does not make any difference if the debt refers to marital, separate or personal property, or when or for what purpose it was taken upon by a spouse or cohabitant.

**2.2.7. Describe allocation and division of property in case of divorce, separation or dissolution of the union.**

A divorce leads to the dissolution of the deferred community property regime and property division needs to be performed. The decisive date is the date when the proceedings were commenced (Ch. 9 Art. 2 Marriage Code, 'the critical time'). The property that is divided is the marital property. The spouses' shares in the marital property shall first be calculated (Ch. 11 Art. 1 Marriage Code). When calculating the shares a deduction shall be made from each spouse's marital property sufficient to cover the debts the spouse had. Debts that carry a preferential right in that spouse's separate property, or was incurred for the purposes of keeping up his or her personal property or improve it, shall only be covered by that spouse's marital property if the payment cannot be obtained out of his or her separate property (Ch. 11 Art. 2 Marriage Code). The combined balance of the spouses' marital property, after deduction to cover the debts, shall then be calculated. The value is then divided equally between the spouses (Ch. 11 Art. 3 Marriage Code), although the rule of dividing the value equally is dispositive and can be set aside by an agreement between the spouses.

The rules concerning cohabitants are based on the Marriage Code with some differences. A division of property only takes place on request of one (or both) cohabitant(s) (Art. 8 of the Cohabitee Act) and instead of marital property it is the cohabitee property that is divided, which only include joint dwelling and household goods acquired for joint use (see question 2.2.1).

**2.2.8. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation? <sup>[1]</sup><sub>SEP</sub>**

There are no special rules concerning the property relationship between spouses or partners with reference to culture, tradition, religion etc. The property division rules can be set aside by an agreement between the spouses upon divorce. This means that cultural, religious etc. customs can play a role in the final division agreement. There are, however, certain limitations regarding what spouses can and cannot enter into binding agreements regarding. Given the limited time we have had to answer this questionnaire we have not been able to find the time to answer this question to full extent.

**2.3. Cross-border issues.**

**2.3.1. Is your country participating in the enhance cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?**



Yes, it is. The Council authorised Sweden, jointly to other requesting Member Countries, to take part in the enhanced cooperation by Decision (EU) 2016/954 of 9 June 2016<sup>4</sup>.

**2.3.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as “marriage”, “matrimonial property agreement”, “partnership property agreement” etc.?**

As with every application of latest laws, there shall be problems.

On one hand, the regulations allow the States to maintain some domestic matters, as much as some internal definitions. For instance, there are not any specific definitions of marriage or registered union, so that Countries are allowed to maintain their ones<sup>5</sup>. Such discretion may prevent some legal conflicts.

On the other hand, we assume that it is too early to confirm that problems will not arise.

**2.3.3. Are you expecting any problems with the application of the rules on jurisdiction?**

As we answered in 2.3.2., we assume that problems might arise, but we have to wait until the regulations enter into real effect, with a tangible impact, in order to confirm it.

**2.3.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

Both the regulations are almost clear about the rules on the applicable law. In fact, they are established precisely in order to prevent the legal conflicts.

However, it is not possible to deny any problems in the future.

Since the rules entitle the parties to enter into patrimonial and jurisdiction agreements, the more exhaustive legal advises will be given, the less the conflicts will arise.

**2.3.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

Under the definition of recognition and enforcement, both judgments and registrations of the agreements must be considered.

In these respects, the two regulations recognise the automatic recognition in all the cooperative Member States, despite they are different from the Country where the acts have been formed.

There are only few exceptions. They are strictly defined by the two Regulations, but the public order is an open clause. In fact, the latter one is a concept which is differently applied by each Country, since it is related to its constitutional values<sup>6</sup>.

Nevertheless, for what concerns the recognition of the judgments among the Member States, the European case law must be taken into consideration.

Starting from Brussels I, the CJEU states that there can be a contrast to the public order when a judgment is not the result of a fair trial, according to the values of the constitutional traditions and the ECHR. This interpretation means that not all the proceeding differences can involve the denial of the automatic recognition.

At the same time, it must be considered that judicial practice among the cooperative Member States has reduced the inherent limits of the public order concept<sup>7</sup>.

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<sup>4</sup> Cons. 11-12, Reg. UE 1103/2016.

<sup>5</sup> Reg.UE, n. 1103/2016, Cons. 17; Reg. (UE) n. 1104/2016, Cons. n. 17.

<sup>6</sup> Angelini, F., 2007, 44.

<sup>7</sup> Tuo, C., 2010.

As regards to the registration of the agreements, the aforesaid concerns should be also considered. In facts, the statements of the CJEU are a general reflection of the mutual recognition. Besides, Sweden has signed the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.

### **2.3.6. Are there any national rules on international jurisdiction and applicable (besides the Regulations) concerning the succession in your country?**

Yes, they are. Other Regulations have been transposed. In addition, Sweden is a party to Hague Convention and it concluded some agreements with specific Northern Countries.

As regards to the marriage matters, the Regulation No. 2201/2003, regarding the mutual recognition and enforcement of the matrimonial and parental judgments, is applied in Sweden.

Also, Sweden has signed the Hague Convention of 1 June 1970 on the recognition of divorces and legal separations and the Hague Convention of 2 October 1973 on the recognition and enforcement of decisions relating to maintenance obligations. However, Sweden did not sign the Hague Convention of 1985 concerning the law applicable to Trusts and their recognition. Thus, the concept of trust is not recognised in Swedish jurisdiction.

Meanwhile, Sweden is a party to the Nordic Conventions, jointly to Denmark, Finland, Iceland and Norway. Thus, it has transposed the Convention of 6 February of 1931, revised in 2006, regarding international law provisions on marriage, adoption and guardianship, the Convention of 19 November 1934, revised in 2012, containing private international law provisions on succession, wills and estate administration and the Convention of 11 October 1977 on the recognition and enforcement of judgment in civil matters. Such agreements are still applied, despite the Regulations, if they provide simplified procedures for recognition and enforcement on matrimonial property matters.

As regards to children, Sweden signed the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children, the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption.

In addition, it has applied the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance and its Protocol of 23 November 2007.

## **3. Succession law**

### **3.1 General.**

#### **3.1.1. What are the main legal sources of Succession Law (SL) in your country? What are the additional legal sources of SL?**

The main legal source of SL in Sweden is the Inheritance Code (*Ärvdabalken 1958:637*). It covers the rights and requirements to inherit, the conditions for testament and spousal inheritance rights. Additional legal sources of SL are for example The Act (1937:81) on International Legal Relations Concerning Estates of Deceased Persons and the Act (2015:417) of Inheritance in International Situations, both concerning inheritance and principles for administering an international estate.

The Act (1994:1117) Registered Partnership, entitled same sex couples to register their partnership and they were then given the same rights as spouses (Ch. 3 Art. 1), which among other things meant a right to inherit in accordance with the Inheritance Code. The Act expired in 2009, when same sex couples were allowed to enter into marriage as other couples. The Registered Partnership Act continues to give rise to legal effects in respect of couples who entered into partnership before the end of April 2009 and have not converted their partnership into a marriage (see question 1.2, 2.1.2 and 2.1.5.2).

In Sweden, cohabitants do not have the right to inherit one another, but the rules of division of property are applicable upon death of one of the cohabitees. The result of a division of property may affect the size of the estate, although the rules about division of property are not succession rules. For further explanation concerning division of marital property and division of cohabitee property, see questions under section 2.

### **3.1.2. Provide a short description of the main historical developments in SL in your country?**

Before 1958 the rules of succession were found in two Acts: the Inheritance Act and the Testament Act. In 1958 these two Acts were joined, slightly altered and made into the Inheritance Code. Over time, rules were altered. One of the biggest changes was a reform, with the purpose of balancing the right of the spouses' common children to inherit (especially regarding the statutory share of inheritance, a possibility for children to inherit at least half of their share from a deceased parent, see question 3.1.5) with the interests of a surviving spouse. Before the reform, the right to inherit could in some cases affect surviving spouses in a harsh way. The reform gave the surviving spouse primary inheritance possibilities, where the surviving spouse inherits before common children and the heirs in the second class (see question 3.1.3), with a right to free disposal. Right to free disposal means that the surviving spouse can use, spend and give away the property of the property of the estate (be it money, real property, stocks etc.) but cannot in a will dispose of the share held with right to free disposal. The surviving spouse is considered to have one established wealth, of which the amount the free disposal constitutes a quota. This quota, the common children or heirs in the second class will have a right to inherit before any other actions are made when the surviving spouse dies (in Swedish called "efterarv", which can loosely be translated as "delayed inheritance").

### **3.1.3. What are the general principles of succession in your country?**

The principles of Succession in Sweden are divided into three inheritance classes. The first class of inheritance comprises of the children (adopted and biological) of the deceased, so called direct heirs (heirs of the body). All direct heirs are entitled to equal shares of the estate. If there are no direct heirs, the right to inherit falls upon the parents of the deceased, who also are entitled to equal shares of the estate. This is the second class of inheritance. If one or both of the parents are deceased, the right to inherit goes on to siblings of the deceased, of the share that was to befall their parent. In such a scenario, the estate is first divided in half, one half to befall the living parent and one half to be distributed among the heirs of the deceased parent. It is the family branches, the branches in any class of inheritance that affect the division, not the number of persons. If there are no parents, nor siblings to the deceased, the right to inherit falls to the third class – grandparents of the deceased, who also have a right to equal shares of the estate. If there are no grandparents, siblings of the deceased's parents have the right to inherit. Again, the division will first be in half with equal shares to the deceased grand-parents. These shares will then be distributed in equal shares between the siblings of the deceased's parents (uncles or aunts of the deceased). Beyond this, the succession law does not state any other heirs. See further in question 3.1.5.

The principle of *successio ordinum* means that an estate will be divided in one inheritance class completely before moving on to the next class, which can mean that if there is but one heir in a class, that heir is entitled to the whole inheritance.

**3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines etc.**

When someone passes away, juridical speaking, the first thing is an estate inventory. This is to be finalized, with the properties and debts of the deceased as well as information about any gifts, wills, the wealth of a surviving spouse and number of heirs, within 3 months of the passing, Ch. 20 Art. 1, the Inheritance Code. In some cases, this period can be extended. The estate inventory is to be filed by the Tax Agency, Ch. 20 Art 8, the Inheritance Code.

On the basis of the estate inventory, divisions are to be made. Debts of the deceased are not inherited but are to be dealt with, before the net worth is divided between the relevant parties. The estate will go bankrupt in case the assets of the estate are not enough to cover the debts.

If there is a surviving spouse or a surviving cohabitant, they may as stated above have a right to division of property. For a surviving cohabitant, there is a need to claim division before six months have passed. This is to be done before the division of the estate. (For more information about division of property, see section 2).

If a surviving spouse from a former marriage is the now deceased, and the deceased had any share of the combined property with right to free disposal (see question 3.1.2), the share of that is to be divided before any other actions are made among the heirs with the claim of “delayed inheritance”, “delayed heirs” one could say (in Swedish called “*efterarvingar*”, the heirs who have “waited” on the inheritance of the primarily deceased spouse). Then, if the now deceased have a new spouse or cohabitant, there is a division of property according to the Marriage Code or Cohabitee Act.

Lastly, in any case, a division of the estate among the heirs will take place.

The purpose of the division of the estate is a financial end to the inheritance proceedings. The division of the estate is an agreement among the parties of the estate. If the parties are not able to reach an agreement, an estate administrator can be appointed by the court, Ch. 19 Art. 1. The estate administrator is to investigate the estate, administer the estate and try to make the parties of the estate reach an agreement (Ch. 19 Art 11, 12 and 15). There is no direct time frame for this. If it is not possible to reach a consensus concerning the division of the estate, the estate administrator has the right to make a decision concerning the division of the estate (as follows from Ch. 23 Art 5 the Inheritance Code, together with Ch. 17 Art 6 Marriage Code). Such a decision can be appealed to court within 4 weeks from the service of notification, if any of the parties claims that the division is not valid, in which case court proceedings will commence (Ch. 17 Art 8 Marriage Code). If none of the parties of the estate appeals the decision, the estate administrator will in accordance with the decision divide the property among the heirs (Ch. 19 Art. 15).

**3.1.5 Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?**

Intestate succession

The general thought in Swedish succession law is that the legal succession rules are the general rules. If someone wishes to determine the division of one’s estate by other means, they are to draw a will. The general rule for inheriting Sweden, regardless of intestate och testate succession is that one has to be alive when the deceased passes away, according to the Inheritance Code, Ch. 1 Art. 1 and Ch. 9 Art. 1, (regarding the right to inherit in accordance with a will).

If someone does not leave a will, succession is divided into three classes according to the legal order of succession (see question 3.1.3).

The first is direct heirs, Ch. 2 Art. 1 of the Inheritance Code, children. The different direct heirs are entitled to equal shares of the estate. In a deceased direct heir’s place, the direct heirs of the deceased direct heir comes.

If there are no direct heirs, the next class is the parents of the deceased, Ch. 2 Art. 2 of the Inheritance Code. The parents of the deceased also take equal shares of the estate. In a deceased parent's place the children of the parent follows (which means siblings, both whole and half siblings, of the deceased may in this way be entitled to inherit). Children of the deceased parent are entitled to equal shares of the deceased parent's share.

In case there are no heirs in the first or second class, the third class to inherit is the grandparents of the deceased, Ch. 2 Art. 3 of the Inheritance Code. They are entitled to equal shares. In a deceased grandparent's place children of the deceased grandparents follows (aunts and uncles of the deceased may in this way be entitled to inherit). Children of the grandparents of the deceased are entitled to equal shares. Children of uncles and aunts do not have the right to succession, which means that cousins do not inherit each other by the legal order in Sweden. This follows from Ch. 2 Art. 4 of the Inheritance Code, which states that other than direct heirs, parents and grandparents (with the mentioned subcategories, the right for family members, in Swedish "*istadarätten*") do not have a right to inherit.

The shares are equal between the parties of the classes of inheritance, or branches of inheritance, due to the equal division ground principle (in Swedish *stirpalgrundsatsen*).

If the deceased was married, a spouse has inheritance rights stated in Ch. 3, entitled "*The inheritance rights of a spouse and the rights of heirs of the first-deceased spouse in the property left by the subsequently deceased spouse*". The rules of the Marriage Code may need to be taken into account. When a marriage is dissolved by the death of either spouse, the starting point is that the whole estate of the deceased spouse goes to the surviving spouse, Inheritance Code Ch. 3 Art. 1. This applies irrespective of whether the spouses' property is marital property or separate property. No property division need therefore take place. The estate may however not befall the surviving spouse with full ownership, because both the first and second class of inheritance has a right to delayed inheritance. Then the surviving spouse has a right to free disposal. If the first deceased spouse leaves children who are not the spouses' joint children or if the deceased spouse has left a will, the surviving spouse is not entitled to the whole estate. Instead a property division shall be carried out in accordance with the Marriage Code to materialize the rights of the surviving spouse and the direct heirs (the deceased spouse's children) and residuary testamentary beneficiaries of the deceased spouse, Ch. 9 Art. 5 of the Marriage Code.<sup>8</sup>

#### Testate succession

Testate succession follows the will and desire of the deceased, Ch. 9 of the Inheritance Code regards "*The right to draw and take part of a will*", Ch. 10 of the Inheritance Code concerns "*About the drawing and withdrawing of a will*", Ch. 11 of the Inheritance Code is about "*The interpretation of a will*", Ch. 12 regards "*Testamentary beneficiaries rights in certain cases*", Ch. 13 is about "*The invalidity of a will*" and Ch. 14 concerns "*The serving and disputing a will*".

If someone has direct heirs and have written a will which leaves them nothing, they can ask for an adjustment of the will by communicating this to the beneficiaries of the will which is usually done at the estate inventory meeting. The adjustment of the will is needed to gain the direct heir's statutory share of inheritance according to Ch. 7 Art. 3 of the Inheritance Code, which is half of their share of inheritance, as stipulated in Ch. 7 Art. 1 of the Inheritance Code. For example if the deceased had two children, their shares of inheritance is half each. Their statutory share of inheritance is then half of their own half, in other words 25 % of the complete estate. If the deceased in a will stated that one of the children shall have the entire estate, the other child can ask for an adjustment by stating this to the child favored by the will to get the 25 % that is allocated to that heir by law. Only direct heirs are entitled to a statutory share of inheritance, provided that they make such a claim to the beneficiaries of the will.

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<sup>8</sup> See Boele-Woelki, K., Braat, B., Curry-Sumner, I., 2005, 43.

### 3.1.6. What happens with an estate of inheritance if the decedent has no heirs?

The estate then, after deductions of debts, falls to the General Inheritance Fund, which is a Fund that grants funding to organizations and unions devoted to the interests of children, young adults and people with disabilities.

### 3.1.7. Are there special rules or limitations concerning succession with reference to the deceased or heirs' culture, tradition, religion or other characteristics?

No, there are no special rules or limitations concerning succession in reference to the deceased or heirs' culture, tradition, religion or other characteristics.

## 3.2 Intestate succession.

### 3.2.1 Are men and women equal in succession? Are domestic and foreign nationals equal in succession? Are decedent's children born in and out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?

Yes, men and women are equal in succession. The legislation is gender neutral. Domestic and foreign nationals are entitled to the same rights of succession in Sweden, according to Ch. 1 Art. 3 of the Inheritance Code. Since 1970 all children, born in and out of wedlock are equal in right to succession. Adopted children are equal with biological children of the deceased, which follows Ch. 4 Art. 21 of the Parental Code (*Föräldrabalken 1949:381*). An adoption in Sweden ends all bonds between the biological parents of the child, and grants the child ties to the adoptive parents with regards to maintenance rights and succession rights for example, see Ch. 4 Art. 21 of the Parental Code. A child conceived before the death of the deceased is capable of inheriting, provided the child is thereafter born alive, see Ch. 1 Art. 1 of the Inheritance Code.

Spouses have the right to succession, see question 3.1.5. The Code of Inheritance Ch. 3 Art. 1, section 2 safeguards a certain fixed minimum protection for the surviving spouse from the estate of the deceased spouse, irrespective of any children or testamentary dispositions of the deceased spouse. This so called basic amount rule (in Swedish *basbeloppsregeln*) is however of very limited financial value (4 times the base amount, which in 2019 would be approximately 182 000 Swedish crowns, equivalent to around 18 000 euros). Apart from the limited value, the base amount rule is also applied only under certain conditions. The surviving spouse shall always be entitled to receive from the estate of the deceased spouse, as far as the estate suffices, property which, together with the property received by the surviving spouse in property division or constituting that spouse's separate property corresponds to the value of the basic amount.<sup>9</sup> Therefore the result of the division of property, together with separate property will be regarded in determining if the basic amount rule is applicable and then to what state.

As stated above (question 3.1.1) registered partners were given the same right as spouses, according to the Registered Partnership Act, which continues to give rise to legal effects in respect of couples who entered into partnership before the end of April 2009 and have not converted their partnership into a marriage.

Unregistered partners, in Swedish legislation called cohabitants, are not equal in succession. They are not entitled to any part of the heritage. Unregistered cohabitants, regardless of sexual orientation,

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<sup>9</sup> See Boele-Woelki, K., Braat, B., Curry-Sumner, I., 2005, 44.

do not have the right to inherit by law. Cohabitees are free to draw a will and thereby entitle one another to testate succession.

### **3.2.2 Are legal persons capable of inheriting? If yes, on which basis?**

Yes, legal persons can inherit through a will.

### **3.2.3 Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.**

Yes, unworthiness of succession is present and stipulated in Ch. 15 *About forfeiting the right of succession and the right to inherit according to a will*. According to Ch. 15 Art. 1, the Inheritance Code, the general rule is that a person who deliberately kills or injures the deceased with death as a result does not have a right to inherit, that person has forfeited the right of succession. According to Ch. 15 Art. 2, if someone has forced, misused someone's position and persuaded that person to act in a situation with a will, in drawing or changing a will, that person does not have the right to inherit or to inherit by a will. Also if someone is merely an accessory to the actions in art. 1 and 2, that person does not have the right to inherit. The consequence of such actions is that the estate is divided as if the forfeiter had passed away before the now deceased.

### **3.2.4 Who are the heirs ex lege? Are there different classes of heirs ex lege? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?**

If someone does not leave a will, succession is divided into three classes according to the legal order of succession (see question 3.1.3 and 3.1.5).

The first is direct heirs, Ch. 2 Art. 1 of the Inheritance Code, children. The different direct heirs are entitled to equal shares of the estate. In a deceased direct heir's place, the direct heirs of the deceased direct heir comes.

If there are no direct heirs, the next class is the parents of the deceased, Ch. 2 Art. 2 of the Inheritance Code. The parents of the deceased also take equal shares of the estate. In a deceased parent's place the children of the parent follows (which means siblings, both whole and half siblings, of the deceased may in this way be entitled to inherit). Children of the deceased parent are entitled to equal shares of the deceased parent's share.

In case there are no heirs in the first or second class, the third class to inherit is the grandparents of the deceased, Ch. 2 Art. 3 of the Inheritance Code. They are entitled to equal shares. In a deceased grandparent's place children of the deceased grandparents follows (aunts and uncles of the deceased may in this way be entitled to inherit). Children of the grandparents of the deceased are entitled to equal shares. Children of uncles and aunts do not have the right to succession, which means that cousins do not inherit each other by the legal order in Sweden. This follows from Ch. 2 Art. 4 of the Inheritance Code, which states that other than direct heirs, parents and grandparents (with the mentioned subcategories, the right for family members, in Swedish "*istadarätten*") do not have a right to inherit.

The shares are equal between the parties of the classes of inheritance, or branches of inheritance, due to the equal division ground principle (in Swedish *stirpalgrundsatsen*).

If the deceased has given a gift to a direct heir during their lifetime, there is a general presumption in Sweden is that the gift is viewed as an inherited in advance, Ch. 6 Art. 1 the Inheritance Code, and the value of the gift will be included when assessing the equal shares amount, Ch. 6 art. 4 the Inheritance Code. The giver can state that a gift is not viewed as inheritance in advance to break the presumption. If the gift is considered as inherited in advance, the worth of the gift at the time of the disposition (meaning when the gift was given) will be withdrawn from the share of inheritance for

that heir, Ch. 6 Art. 3 and Art. 4, the Inheritance Code. If the assets of the estate, with the amounted increase of the inheritance in advance, do not suffice to balance the inheritance in advance, the receiving heir is not obliged to reimburse the value of the gift.

### **3.2.5 Are the heirs liable for the deceased's debts and under which conditions?**

No, debts are not inherited. The division of an estate is made with the net worth, which means after reduction of debts. Any administration or division of property must take into account the debts of the deceased prior to any division. See Ch. 21 of the Inheritance Code "*The debts of the deceased*". The debts of the deceased are prioritized and handled within the estate. If the estate would become bankrupt, the heirs are never liable for the debts of the estate.

If an heir is to inherit real property for example and that property is indebted, the creditor must allow the heir to take over the debt that is following the property. It is only in those cases the debt would follow the inherited property but debts as such are not inherited.

If the interests of creditors are not taken into account and debts are not payed, creditors can ask the court to appoint an executive administrator of the estate in order to cover and retrieve payment for such debts, according to Inheritance Code Ch. 19 Art. 1.

### **3.2.6 What is the manner of renouncing the succession rights?**

There are two ways of renouncing succession rights. Resignation of succession, stipulated in Ch. 17 Art. 2 of the Inheritance Code, and abandoning of succession. Resignation ends the right of succession for all heirs of that branch. Abandoning the succession means that the heir does not wish to get his or her share and the share moves on to whoever is in line to inherit the heir, see question 3.2.4 regarding general rules of succession. This was more common before 2005, when Sweden had succession tax.

## **3.3 Disposition of property upon death.**

### **3.3.1. Testate succession.**

#### **3.3.1.1. Explain the conditions for testate succession.**

A will can only be drawn up in accordance with the conditions stated in the law. The will can be for the testator him- or herself, or can be a joint will between spouses or cohabitants.

The will needs to be written, signed and witnessed by two impartial witnesses present at the same time, as stipulated in Ch. 10 Art. 1 of the Inheritance Code. The witnesses cannot be testate heirs in the will. The witnesses needs to be over the age of 18, not suffer from any mental health problems and know that they are witnessing a will, Ch. 10 Art. 4 Inheritance Code. The witnesses need to be present, both at the same time to witness the signing of the will. The will can, if it does not take into account the statutory share of inheritance for a direct heir be adjusted by court, Ch. 7 Art. 3, Inheritance Code.

In case of emergency, the conditions of drawing a will can be different, see Ch. 10 Art. 3 of the Inheritance Code. The assessment of whether the situation has constituted an emergency is made through the eyes of the testator. If there is an emergency, for example if someone is in the hospital, kidnapped, engaged in a dangerous or possibly dangerous activity or otherwise endangered, a will can be nuncupative to at least two witnesses. The demands on the witnesses are the same as for a regular will. In case of emergency a will can also be written by hand by the testator and signed by the testator him- or herself. The testator needs to write and sign it him- or herself. A will through a text message has not been accepted in court practice.



The testator cannot legally bindingly promise, for the testator, that a certain will shall be applicable at the time of decease, since the testator has the right to change, revoke or make alterations to a will up to the time of decease, according to Ch. 10 Art. 5 of the Inheritance Code.

#### **3.3.1.2. Who has the testamentary capacity?**

Anyone who has turned 18 years old can draw up a will, Ch. 9 Art. 1. It is a strictly personal right. Anyone who has turned 16 can make a will regarding assets they themselves have the disposal right of.

#### **3.3.1.3. What are the conditions and permissible contents of a will?**

A will can only be drawn up in accordance with the law, see question 3.3.1.1. The will can be for the testator him- or herself, or can be a joint will between spouses or cohabitants. The will needs to be written, signed and witnessed by two impartial witnesses present at the same time, as stipulated in Ch. 10 Art. 1 of the Inheritance Code. The witnesses cannot be testate heirs in the will. The witnesses need to be over the age of 18, not suffer from any mental health problems and know that they are witnessing a will, Ch. 10 Art. 4 Inheritance Code. The witnesses need to be present, both at the same time to witness the signing of the will. The will can, if it does not take into account the statutory share of inheritance for a direct heir be adjusted, Ch. 7 Art. 3, Inheritance Code.

#### **3.3.1.4 Describe the characteristics of a will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a will?**

The types of wills that are recognized are in order with the conditions and provisions in the legislation. The form is written and the condition is witnessing, except for certain cases of emergency wills (see question 3.3.1.1). Wills are not divided into public and private. No public parties take part in drawing a will.

#### **3.3.1.5 Is there a (public) register of wills established in your country? If yes describe briefly the proceedings for registration and legal effects of registration.**

No, there is no public register of wills established in Sweden. There are one or two private companies that have registers of wills, which they check with the National Population Register (in Swedish "folkbokföring"). If a testator has passed away, the will is most often sent to the registered address of the deceased.

The only time a will is registered is when it is attached to the estate inventory, which is sent and registered at the Tax Agency. When an estate inventory is drawn, the assets and debts, according to Ch. 20 Art. 4 of the Inheritance Code, as well as beneficial dispositions such as gifts, and marital property agreements and wills, according to Ch. 20 Art. 5 the Inheritance Code, be stated and sent in with the estate inventory to the Tax Agency. If the deceased was married, the assets and debts of the surviving spouse shall also be mentioned in the estate inventory, Ch. 20 Art. 4 section 2, Inheritance Code.

#### **3.3.2 Succession agreement (negotia mortis causa). Is there another way to dispose of property upon death other than the will? If yes explain the conditions for and permissible contents of successions agreements.**

No, succession agreements are not valid according to the Inheritance Code, Ch. 17 Art. 1 and 3.

As stated in question 3.2.4, there is a presumption about inheritance in advance regarding gifts from the deceased to direct heirs.

There is, however, a special rule concerning certain gifts, gifts given with the succession in mind. The gifts in question can be called death bed dispositions (in Swedish the gifts can be called "dödsbäddsgåvor"). The beneficial disposal is for example a gift, given by the deceased either on the death bed or with the succession in mind. The gift shall also not mean any real consequence for the deceased during his or her lifetime. Such dispositions can interfere with the right of a statutory share of inheritance and therefore there is a possibility to extended protection for the statutory share of the inheritance. If the deceased has by a beneficial act disposed of property that harms the heir's statutory share, such a beneficial act can be revoked and the current value of the object be counted with when determining the statutory share of the estate, according to Ch. 7 Art. 4 of the Inheritance Code. If viewed as such a beneficial act, the receiver is obliged to pay or reimburse the affected heir if the estate does not suffice to cover the increased statutory share of inheritance. The dispositions are not succession agreements as such, but is viewed as a beneficial act that was made with the succession at thought.

### **3.3.3 Are conditions for validity of wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

Wills are governed by SL rules. Gifts and beneficial disposals are as stated above not succession agreements, but rather private law agreements and as such governed by general private law rules. There are also insurance questions, for example regarding life insurance with beneficiaries, which are governed by insurance law, The Act (2005:104) of Insurance Agreements.

### **3.3.4 Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? Who are those family members, against which dispositions and under what conditions?**

As stated above, direct heirs right to statutory share of the inheritance is protected if the heir makes this claim to the beneficiaries of the will. Both wills and gifts given with succession in mind fall within the scope under certain conditions. Concerning the spouse's rights, see question 3.2.1. The testator cannot legally bindingly state that a certain will shall be applicable at the time of decease, since the testator has the right to change, revoke or make alterations to a will up to the time of decease. The right to govern the will and the contents of the will is exclusive to the testator (see question 3.3.1.1). Other than that, no protection is granted for dispositions.

### **3.3.5. Cross-border issues.**

#### **3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?**

The EU Regulation n. 650/2012 applies to the Kingdom of Sweden.

The competence of the authorities involved is determined on the basis of the place where the succession was opened.

The authority authorized to assign executive force to foreign measures is the Local Court.

#### **3.3.5.2. Are there any problems with the scope of application?**

At present there are no problems with the purpose of the application.

**3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country have experience with declining the jurisdiction under article 6 or accepting jurisdiction based on article 7?**

Following the opening of cross-border successions<sup>10</sup>, the requests in the jurisdictional court are governed by the EU Regulation n. 650/2012.

The succession is governed by the law of the place of last domicile of the *de cuius*.

The inheritance is devolved according to the law of the place where the succession is opened.

This involves the transition from the principle of nationality previously adopted in the Swedish system<sup>11</sup> to that of domicile.

The main rule of the regulation is that the courts of the country where the deceased was domiciled upon his death must be competent to deal with inherited matters. Even the courts of the country whose law was chosen by the deceased may under certain conditions be competent<sup>12</sup>.

However the debate is open and interpretative doubts have been found regarding what is meant by "domicile".

**3.3.5.4. Are there problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences of choosing the applicable law?**

If the requirements are fulfilled, the succession regulation pursuant to Regulation no. 650/2012 applies to the inheritance of subjects starting from 17 August 2015.

Therefore, the succession of subjects who died before August 17, 2015 will be governed by the national rules existing before the regulation and the Convention of November 19, 1934 between Sweden, Denmark, Finland, Iceland and Norway.

The succession is governed by the law of the place of last domicile of the *de cuius*.

However, the regulation recognizes an exception to this rule.

The person whose inheritance is in fact recognizes the faculty to choose the law to be applied to his succession, by testament or by express provision within the succession contract.

The law designated as applicable law must be used regardless of whether it is the law of an EU Member State that is bound by the regulation or if it is the law of another state.

The application of a provision of the law chosen by the deceased may be refused only if this rule is manifestly incompatible with the legal system as contrary to public order.

**3.3.5.5. What issues arise regarding recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?**

At present there are no problems with regard to recognition and execution and public policies referred to by the parties or the court regarding recognition and execution are not found.

However, the legal debate is open regarding the criterion for determining the law to apply to regulate the succession with specific reference to the criterion of the last domicile of the deceased.

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<sup>10</sup> Bogdan, M., 2006, 445, Örtenhed, K., 2006, 175.

<sup>11</sup> Bogdan, M., 2008.

<sup>12</sup> Jänterä-Jareborg, M., 1997.

### 3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?

The issuing of Certificates of Succession is handled by the Tax Agency. The same division that deals with registering and handling estate inventories are in charge of issuing and administering Certificates of Succession.<sup>13</sup> Since estate inventories and estate inventories with international, cross-border character are handled by this division the thought was that the same division should administer Certificates of Succession, according to conversations with the Tax Agency.

Since 2015 there has been a steady increase of applications for Certificates of Succession. There are different applications, but overall the number of applications concerning a vast definition of application for Certificate of Succession has increased. In 2016 there were 177 applications in total, in 2017 there were 387 applications in total and in 2018 there were 487 applications in total.<sup>14</sup>

### 3.3.5.7. Are there any national rules or international jurisdiction and applicable (besides the Succession Regulation) concerning the succession in your country?

The regulation replaces the Swedish law n. 81 of 1937 on private international law which regulated the succession of the subject of whose inheritance it is based on the principle of nationality. That is, the law of the State was applied, of which the subject was a citizen at the time of death.

The Convention of 19 November 1934 between Sweden, Denmark, Finland, Iceland and Norway concerning succession and will is also replaced.

The convention regulated the relationship of the citizens of a Nordic state residing in another Nordic state.

The succession on the basis of the Convention was regulated on the basis of the subject's residence principle at the time of death.

If the requirements are fulfilled, the succession regulation pursuant to Regulation no. 650/2012 applies to the inheritance of deceased persons starting from 17 August 2015.

The succession is also regulated by the Ordinance n. 422 of 2015, of the Ministry of Justice. This contains rules that integrate the provisions of EU Regulation no. 650/2012 in terms of jurisdiction and taxation.

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## United Kingdom

Roberto Garetto, Federico Pascucci and Elisa Sgubin

Roberto Garetto (1.1.; 2.1.-2.2.8.)

Federico Pascucci (1.2.-1.4.)

Elisa Sgubin (2.3.1.-2.3.8.; 3.)

### 1. Social perspective

#### **1.1. Provide the list of different types of living lifestyles/family formations (multi-generational families, nucleus families, couples without children, single-person household, families with one or more members are living separately such as in case of economic migrants, common household of two or more persons without *affectio maritalis*).**

During the past decades, a remarkable evolution of family and household structures have occurred in the United Kingdom: patterns of family formation and dissolution indeed have significantly changed since the late 1960s. Until that date the traditional family consisted mainly of family unit containing two generations, parents and their biological children: it is the nuclear family.

The nuclear family is composed of husband, wife and one or more children cohabiting.

They generally share economic resource. Its diffusion is gradually decreasing. The nuclear family presents several typologies. The most common is the couple of parents who are married with minor or non-emancipated children; it must be pointed out, anyway that marriage is no more considered as the only framework in which it is possible to live as a family and to have children.

Less widespread is the so-called "long" nuclear family, formed by parents with young adults already independent from an economic perspective, who however decide to go on living in family, or who decide to come back living in family after a failed marriage or cohabitation. The social model of early independence of children discourages this typology of family.

For the same reason the complex family, that in the past was more diffused, is now less common. Complex family presents itself in the variant of multiple forms and of extended form. In the multiple form households of different generations coexist in the same family line (e.g. young spouses who live with the family unit of one of the spouses, during the time they are waiting to be able to have an independent home). In the extended form a pre-existent household coexists with possible ascenders and collaterals (e.g. widowed parents who permanently move to live into the family unit of one of their sons). For these characteristics, both variants can be considered as kinds of large multi-generational families.

Nuclear families, as well as the variants of this model, are deeply influenced by new life-styles.

The progressive equalization of roles between men and women encouraged the diffusion of symmetrical families, where all responsibilities are equally divided between the partners: both share roles and make decisions together.

The evolution of life-styles in the UK changed the attitude of society towards marriage, cohabitation, single parenthood and divorce. A more tolerant and flexible mentality fostered the occurrence of new models of family formations. Single parent families are becoming evermore common. This kind of "incomplete" families are composed of a single parent with children. Unless in case of premature death of the other spouse, they are the result of the dissolution of a conjugal relationship. One of the main effects on the change of families in the UK is indeed the divorce rate. In the early 1960s a

divorce was not so common and was socially stigmatized. Social attitudes towards divorce have changed and have now become more acceptable, a normal part of family experiences<sup>1</sup>.

Other family formations that derive from the dissolution of a conjugal relationship are the reconstructed families and the recomposed ones. The reconstituted families are composed of two adults, who are married or cohabit. At least one of them has one, or more, children who come from a previously established marriage or cohabitation; these children now live in the new family. The recomposed families are a variant of the family formation previously described: adults, married or in cohabitation, generate new children living with them, together with children from previous relationships.

Another type of family that is spreading in the last decades is the cohabitation in partnership. It is characterized by a strong emphasis on self-fulfillment and equality between the partners.

In this type of family the life in couple represents the main aim, and children sometimes are absent.

Other type of cohabitation can be the one of elders, sometimes without *affectio maritalis*, and the one of couples of young people who experience a period of life in common before marriage.

Among the “new” types of households now common in UK can be included the Living-Apart-Together relationships: couples that have an intimate relationship but live at separate addresses.

In addition to these, we must mention the same-sex couples. The social acceptance of same-sex relationships gradually grew in the past decades in the UK.

The first step in the formal recognition of same-sex couples is represented by the civil partnerships. But in the last five years England and Wales, as well as Scotland, legalized same-sex marriage. At the moment Northern Ireland allows same-sex partners to enter into a civil partnership, but not to marry.

In the whole UK the number of people living alone has increased. The unipersonal family is characterized by the improper denomination of “family”, as it is constituted by a single member. It includes people with disparate personal situations. Its diffusion is linked often to the lengthening of life, as the survived party, after the death of the spouse or partner, starts living alone. A single-member family can also be formed of young people who leave their families and start living alone after they obtained a job. In other cases subjects previously engaged in relationships, or married, start living alone in consequence of the crisis of the couple.

## **1.2. Provide statistical and descriptive demographic and social data regarding the number of marriages and other formal/informal unions in your country.**

### 1.2.A. - ENGLAND and WALES.

1) **Marriages:** Marriages for same-sex couples were introduced in UK in March 2014.

In 2015 in England and Wales 239,020 marriages between opposite-sex couples were celebrated, with a decrease of 34% from 2014, and of 0.8% from 2013. Marriage rates for opposite-sex couples in 2015 were the lowest on record: 21.7 marriages per 1000 unmarried men and 19.8 marriages per 1000 unmarried women, compared with 2005, marriage rates were lower at all ages, except for women aged 55 and over, and men aged 65 and over. In 2015 in England and Wales 6,493 marriages between same-sex couples were celebrated. Among them, 56% were between female couples. In the same year 9,156 same-sex couples converted their civil partnership into a marriage. Among couples that celebrated same sex marriages in 2015, 85% were forming their first legally recognized partnership; for opposite-sex couples the rate drops at 76%. In 2016 there was a slight increase of the marriage rate with a total of 249,793. That meant an increase of 1,7% from the previous year (2015), but still a 1.0% less than the 2014. Of the whole number, 97.2% were between opposite sex couples, while 2.8 were between same sex spouses. On the last subject, the total number of marriages between same sex couples in 2016 was 7,019, with an increase of 8.1% from 2015, and of these marriages more than half (55.7% to be exact) has been of female couples.

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<sup>1</sup> Cockett M., Tripp, J. H., 1994.

In 2016 marriage rates for opposite sex couples have been lower at all ages compared to the rates of 2006, with the only exception of men aged 60 years and over and female aged 50 years and over. For the first time ever in 2016 less than 25% (24% in fact) of marriages have been religious ceremonies.

The overall data state that marriage rates remain at historical lows despite the slight increment from 2015, and that most people prefer a civil ceremony than a religious one (less than 25% of the spouse married before a religious minister). The data show also the trend of increasing age of the spouses with more and more over 50s get married. There are still no data for marriage regarding years 2017 and 2018.

II) **Civil partnerships:** Despite the introduction of marriages for same-sex couples in March 2014, the number of same-sex couples choosing to form civil partnerships has increased in 2016 and 2017. There were 908 civil partnerships formed in England and Wales in 2017. Two-thirds (66%) of them were between men. The increase, compared with 2016, is of 2.0%, and it is the second annual increase since the introduction of marriages of same-sex couples in 2013. If we compare the number of civil partnerships between women and between men in the years 2016-2017, we note a rise of 8.0% (23 civil partnerships) in civil partnerships between women, and a decrease of 0.8% in civil partnerships between men (5 civil partnerships).

Regarding the age of couples entered in civil partnerships in 2017, more than half (51%) of them were aged 50 years and over. If we compare this data to the age of couples entered in civil partnerships in 2013, before the introduction of same-sex marriages, couples of 50 years or more were just 19%. Civil partnerships are mainly related to urban areas: 37% of all civil partnerships in England and Wales in 2017 took place in London. In 2017 1,217 civil partnership dissolved in England and Wales, with a prevalence (57%) of female couples. There are no data on civil partnership for year 2018 yet.

#### 1.2.B. - SCOTLAND.

I) **Marriages:** Data for marriages in Scotland show that during year 2017 there were 28,440 marriages with a loss of 2.7% (789) in comparison with year 2016. Of all these, 982 (3.5%) were same sex marriages involving same-sex couples, with a fall of 1.6% respect the year 2016. Among these 982 couples, 407 were between males ones and the remaining – 575 - between females. Around 1/8 of same-sex marriages (127, it means 13%) have been of couples that decided to change their civil partnership to marriage. Overall, the average age of marriage in year 2017 is 34.2 for males and 32.5 for females. About the marriage ceremony, data show that almost half of the marriages (49.9%) have been civil ones, 11.1% were celebrated by the Church of Scotland, only 4.2% were Roman Catholic and the remaining (34.8%) belonged to other religions or other believes. The data show an almost constant decline of marriages from over 40,000 for year in the early 70's with bottom reached in year 2009 with only 27,524 marriages. Data for marriages in 2018 are still not aggregate, but there are data for every single quarter of the year. Everyone interested can see them on the link n. 5.

II) **Civil partnerships:** there was only 70 civil partnerships registered in Scotland for 2017, the same number as 2016. Data show a sudden collapse of civil partnerships just from year 2007 (in 2006, the first year of civil partnerships registration they were 1,047) with only 688, and a continued fall, worsened by the introduction in Scotland of same-sex marriage in 2014. Since then, as data say, civil partnerships' numbers remain very low. As for marriage, there are no aggregate figures for year 2018, but everyone interested can follow the link n. 5 and check the data for every single quarter of the year.

#### 1.2.C. - NORTHERN IRELAND.

I) **Marriages:** First, it must be pointed out that in Northern Ireland same-sex marriage is not allowed, so all the figures reported concern only opposite-sex unions. This said, in 2017 there have been 8,300 marriages with 4/5 first time ones, where both spouses were not divorced or widowed, while for 7.3% of the unions both partners had been previously married. The average age of the groom is 34.7 and 32.7 for the bride. Of the total number 5,357 marriages were religious ones, while 2,943 were



civil ones. On the whole, data show a floating trend, with a massive increase (14%) from the bottom of 2001 (7,281) and a little drop (4%) from the peak reached in 2007 (8,687). There are still no figures for marriages in 2018.

II) **Civil partnerships:** during 2017 there were 92 civil partnerships, 8 more than 2016. Of these ones 38 were male partnerships and 54 female ones. The average age for males entering a civil partnership was 36.7, while for females it was 35,8. There are no data for civil partnerships in 2018.

### 1.3. Provide statistical and descriptive demographic and social data regarding the number of divorces and dissolution of other formal/informal unions in your country.

#### 1.3.A. - ENGLAND and WALES.

I) **Divorces:** In England and Wales in 2017 101,669 opposite-sex couples divorced. If compared to 2016, there is a decrease of 4.9%. The percentage of opposite-sex divorces in 2017 is anyway almost the same of 2015 (101,055). About same-sex couples, 338 of them divorced in 2017 in England and Wales; divorces in 2017 are more than three times the number in 2016 (112 divorces). Couples composed of women that divorced are three-quarters (74%) of same-sex couples that divorced in 2017. The divorce rate in England and Wales in 2017 was 8.4 per 1,000 married men and women (16 years and over). That represents the lowest divorce rates since 1973, with a decrease of 5.6% from 2016. The average age of opposite-sex couples that divorced in 2017 is 45-49 years for men and 40-44 for women, the average duration of their marriage at the time of divorce was 12.2 years.

The number of divorces among same-sex couples tripled between 2016 and 2017. This is not surprising: marriages of same-sex couples have only been possible in England and Wales since March 2014. Most common cause of divorce in opposite-sex couples is unreasonable behavior, with 52% of wives and 37% of husbands petitioning on these grounds. Unreasonable behavior is the most common cause of same-sex couples' divorce too, with an account of 83% of divorces among women and 73% among men. There are no data for divorces in 2018.

II) **Civil partnerships' dissolutions:** the number of civil partnership dissolutions in England and Wells decreased in 2017. They were 1,217, compared with 1,313 in 2016: a decrease of 7.3%. This is the first year that the number of dissolutions has fallen since 2007. Male couples accounted for 43% of all dissolutions in 2017. As a trend since 2007, in the years more civil partnership dissolutions have occurred between female than male couples, this is despite the fact that in the same years a greater number of men have formed civil partnerships. As for divorces, there are no data for dissolution in 2018.

#### 1.3.B. - SCOTLAND.

I) **Divorces:** In 2017/2018 the total number of divorces granted in Scotland was 6,873, with a drop of 13% from 2016/2017 (7,983) that presented already a drop of 11% from 2015/2016 (8,875), but there are no complete data for periods 2017/2018 and 2016/2017, so the attention will be focused on period 2015/2016. In addition, data does not provide a distinction between same-sex and opposite-sex couples' divorces. This said, figures show that the most part of divorces was caused by two years of non cohabitation (if one does not agree to divorce) with 6,068 cases, followed by one year of non cohabitation (if the defender consents to divorce). Also, the most divorced couples (5,915) were single before their marriage. The average age of the majority of divorcing couples was the same (45-49) for both males and females. On the whole data show that divorces in Scotland are decreasing during years, from the 9,871 of 2011, and the peak reached in 2012 (9,889) until the final figures of 2015 that provide a total of 8,974 divorces.

II) **Civil partnerships' dissolutions:** during 2017/2018 dissolutions of civil partnerships amount to 61, with a constant drop from period 2016/2017 that had 83 dissolutions, and 2015/2016 with 96. As for the divorces, there are still no final data on the periods 2017/2018 and 2016/2017, so the figures relate to the 2015/2016 period. Still as for divorces, the major cause of dissolutions was to be found in non cohabitation with 46 cases for both two years and one year period. Figures show also that most part of these dissolution regarded females couples (69) than males (27). The average age of ex

civil partners was 30-34 for both males and females, so lesser than the divorced counterparts. The overall figures show that, instead of divorces, dissolutions are constantly increasing during years, from the number of 2 in period 2007/2008 until the number of 96 in 2015/2016.

#### 1.3.B. - NORTHERN IRELAND.

I) **Divorces:** first, it must be pointed out that in Northern Ireland same-sex marriage is not allowed, so all the figures reported concern only opposite-sex couples' divorces. During 2017 there were in Northern Ireland 2,089 divorces, with a decrease from 2016 (2,572) and a drop of 28% from the peak number of 2,913 reached in 2007. As for Scotland non cohabitation remains the most frequent reason for divorce with 71.5% of all the cases. The average length of the marriages ended was 18 years, and the average ages of men and women involved were respectively 47.4 and 45.3 years. For 9,4% of the subjects involved the divorce was not the first one. There are still no data for divorces in 2018.

II) **Civil partnerships' dissolutions:** there were only 13 registered civil partnerships dissolutions during 2017 in Northern Ireland; 4 were male partnership, while the others (9) were female couples. The average ages of subjects involved were 43.5 years for both males and women. Even for dissolution of civil partnerships there are no 2018 data.

#### 1.4. Provide statistical and descriptive demographic and social data regarding the percentage of these marriages/divorces and unions/dissolutions, which have cross-borders elements (if possible separately for those marriages and unions where the members are not of the same nationality and those which have moved abroad during their life).

##### 1.4.A. - ENGLAND and WALES.

During the period 30 September 2016-30 September 2017 about 48,000 non-EU nationals immigrated long term to the UK to accompany or join others, with the intention of staying for one year or more. That represents a slight increase compared to the previous year, when they were about 45,000. Considering the visa statistics, the combined total number of family-related visas granted in 2017 (including EU family permits granted to non-EU nationals, and visas granted to dependents of other visa holders) was 134,857, almost the same as the previous year (134,694).

In family-related visa granted in 2017, the ones issued to partners were 32,986 (while in 2016 they were 28,938), with an increase 14% (4,048 more). The EU long-term immigration to accompany or join others in 2017 had no increase (134,694 in 2016 and 134,857 in 2017), while the non-EU long-term immigration for same reasons increased 7% (45,000 in 2016 and 48,000 in 2017).

Considering couples, either married, in a civil partnership, or cohabiting, whose spouses belong to a different ethnic group, we detect patterns and trends of an increasingly ethnically diverse population. In 2011 about 1 in 10 people who were living as part of a couple (9% or 2.3 million) were in an inter-ethnic relationship, an increase from 2001.

People from the mixed ethnic groups are inclined to be in an inter-ethnic relationship (85%), outside of this groups, white Irish (71%), other black (62%) and gypsy or Irish Travellers (50%) were the most likely to be in an inter-ethnic relationship. White British (4%) are the least inclined to be in inter-ethnic relationships, followed by Bangladeshi (7%), Pakistani (9%) and Indian (12%) ethnic groups.

The greatest difference between the sexes can be observed in the Chinese group, where women were inclined almost than double (39%) than men (20%) to be in an inter-ethnic relationship. 40% of inter-ethnic relationships include someone who is white British; the most common is between other white and white British (16%).

About 7% of dependent children live in a household with an inter-ethnic relationship; Pakistani (3%), Indian (3%) and Bangladeshi (2%) have the lower rate of dependent children that live in a household with an inter-ethnic relationship. There are no data after 2011 on the matter for England and Wales.

#### 1.4.B. - SCOTLAND.

As stated before, there were 28,440 marriages in Scotland during 2017. Of these 76.1% had both spouses residing in Scotland, 1,2% (349) with one of the spouse residing in another UK and 1% (275) with one spouse residing outside UK, for a total of 22,281 (78.3%) of married couples having almost one of the spouse resident in Scotland. As for the spouses residing both outside Scotland, 17.8% of married couples had their residence in another UK country, 0,3% (95) had one of the spouses residents in UK country (outside Scotland) and the other outside UK, and 3,5% (1,008) had both couples' members resident outside UK, for a total of 6,159 (21.7%) married couples with no Scotland residence.

As for birth country of spouses data show that 25,640 marriages had at last a spouse born in UK. Of these ones 105 had the outer spouse born in Ireland, 784 born in another EU country, 845 born inside the Commonwealth (with a majority in Canada or Australia, 363, followed by African Commonwealth, 252, and the ex British India with 140 marriages), and 1,168 with the spouse born in other countries.

Data make no difference between opposite-sex and same-sex marriages, so numbers must be considered cumulative of both opposite-sex marriages and same-sex ones.

There are no data for transnational marriages in Scotland for year 2018.

#### 1.4.C. NORTHERN IRELAND.

Of 8,300 marriages celebrated in Northern Ireland in 2017, 6,440 had the husband born in the country, 902 had him born in the rest of UK, 396 born in Ireland, 121 in A8 countries (Czech Republic, Baltic Republics, Hungary, Slovakia and Slovenia) and 441 born in all other countries. As for wife, 6,907 had her born in Northern Ireland, 495 born in the rest of UK, 228 born in Ireland, 182 in A8 countries, and 488 in all other world's parts. There are data on the countries of residence too. In detail, 7,073 had Northern Ireland as husband's country of residence, 629 had rest of UK, 406 had husband resident in Ireland, 1 in A8 countries, and 191 in the rest of the world. As for wife, 7,200 had the bride resident in Northern Ireland, 576 in the rest of UK, 339 in Ireland, only one in A8 countries and 184 in the rest of the world. There are no data for transnational marriages for 2018 in Northern Ireland.

There are no data for transnational divorces, transnational civil partnerships or transnational civil partnerships' dissolution for the entire UK.

## 2. Family law

### 2.1. General.

#### 2.1.1. What is the main source of Family Law (FL) in your country? What are the additional legal sources of FL?

In respect to Family Law in the UK, there are significant legislative and cultural differences between England and Wales, Scotland and Northern Ireland. We will examine the family law issues focusing mainly on England and Wales, and making references to Scotland and Northern Ireland only in order to point out remarkable differences.

Common law is the basis of the legal system of England and Wales. There is no codified system of law. Family law, as the laws and the legislation that relate to issues dealing with family relationships, is found in acts of Parliament, applied and interpreted by the Higher Courts to create legal precedent.

- The Matrimonial Causes Act 1973 (MCA 1973) is the primary legislation related to divorce and financial proceedings.
- The Children Act 1989 (CA 1989) is the core legislation related to children, their raising and welfare.

Other important statutes are the:

- Married Women's Property Act 1882 (declaration of existing property rights).
- Domicile and Matrimonial Proceedings Act 1973 (DMPA 1973) (jurisdiction disputes within the related jurisdictions of England and Wales, Scotland, Northern Ireland, Jersey, Guernsey, Alderney, Sark and the Isle of Man).
- Matrimonial and Family Proceedings Act 1984 (MFPA 1984), Part III (financial relief in England and Wales after an overseas divorce).
- Family Law Act 1986 (FLA 1986) (jurisdiction and recognition of orders).
- Child Support Act 1991 (CSA 1991) (statutory child maintenance).
- Family Law Act 1996 (FLA 1996) (Part IV, in relation to family homes and domestic violence).
- Human Rights Act 1998 (incorporating the European Convention on Human Rights (ECHR) into English law).
- Adoption and Children Act 2002 (ACA 2002).
- Civil Partnership Act 2004 (CPA 2004) (allows same sex couples to form registered civil partnerships).
- Marriage (Same Sex Couples) Act 2013 (M(SSC)A 2013) (allows same sex couples to form marriages).
- Children and Families Act 2014 (CFA 2014).
- The Civil Partnerships, Marriages and Deaths (Registration Etc.) Act 2019 (allows opposite-sex couples to enter a registered partnership).

Northern Ireland legal system broadly mirrors that of England and Wales. As a separate jurisdiction however, primary legislation in the area of family law includes Acts or (more frequently) Orders in Council supplemented by a body of delegated legislation, which includes statutory rules and regulations.

Important statutes dealing with family law in Northern Ireland are the:

- Matrimonial and Family Proceedings (Northern Ireland) Order 1989.
- Family Law (Northern Ireland) Order 1993.
- Children (Northern Ireland) Order 1995 (as amended), largely based upon the Children Act 1989.
- Family Proceedings Rules (Northern Ireland) 1996.
- Children (Allocation of Proceedings) Order (Northern Ireland) 1996.
- Family Homes and Domestic Violence (Northern Ireland) Order 1998 and Family Law (NI) Act 2001.
- Family Law (Northern Ireland) Act 2001.
- Child Support, Pensions and Social Security Act (Northern Ireland) 2001.

Scots law is the legal system of Scotland, that has its own distinct judicial system and its own jurisdiction. Key legislations on marriage and family in Scotland are:

- Divorce (Scotland) Act 1976 (1976 Act).
- Marriage (Scotland) Act 1977, as amended.
- Family Law (Scotland) Act 1985 (1985 Act).
- Children (Scotland) Act 1995 (1995 Act).
- Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II Regulation).
- Civil Partnership Act 2004 (2004 Act).
- Family Law (Scotland) Act 2006 (2006 Act).

- Marriage and Civil Partnership (Scotland) Act 2014 (2014 Act), that allowed marriage for same sex couples in Scotland on 16 December 2014.

In addition, a number of EU regulations apply in the UK, notably:

- Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II bis Regulation).
- Regulation (EC) 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and co-operation in matters relating to maintenance obligations (Maintenance Regulation).
- The UK has also ratified a number of conventions dealing with the international aspects of family law including:
  - HCCH Convention on the Civil Aspects of International Child Abduction 1980 (Hague Child Abduction Convention).
  - HCCH Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children 1996 (Hague Child Protection Convention).<sup>2</sup>
  - HCCH Convention on the International Recovery of Child Support and Other Forms of Family Maintenance 2007 (Hague Maintenance Convention).

When the UK leaves the EU, in case there is no deal, EU law will immediately cease to apply. The UK government has been introducing a series of statutory instruments to apply in the circumstances. The most significant is:

- The Jurisdiction and Judgements (Family) (Amendments etc) (EU exit) Regulations 2019, of 6 March 2019.

### 2.1.2. Provide a short description of the main historical developments in FL in your country.

The brief indications of cultural and legal differences within the UK pointed out in 2.1.1. suggest the difficulties of generalizing about “the family” across the UK. Until the beginning of the 20th century, for what concerns England and Wales – but the situation was not remarkably different in Scotland and Northern Ireland - the Family Law was still founded on three great pillars. The first pillar regards the basis of the family, that at the time was intended as a lifelong marriage. It is meaningful, in that sense, the definition of marriage that we get reading *Hyde v Hyde*: “the voluntary union for life of one man and one woman, to the exclusion of all others.”

The second pillar is represented by the fundamental inequality in the relationship of the husband and the wife within that marriage. In *Durham v Durham*: the essence of marriage was summarized saying: “protection on the part of the man, and submission on the part of the woman.” The third pillar concerns the unregulated control that the father had on the relationship of parent and child. As a consequence, the mother’s rights in relation to her children were rather uncertain<sup>3</sup>. We must keep in mind anyway that prior to World War Two, a significant number of people in England and Wales, Scotland and Northern Ireland never married, partly because women were a majority of the population<sup>4</sup>. The situation changed after World War Two: until the early 1970s, people married earlier, marriage rates increased and marriage diffused more and more. A turning point is represented by the end of the 60s: from that time, that implies significant cultural changes, the mean age of marriage rose and marriage rates started falling to historically low levels. From those years family law has been in a state of constant flux.

<sup>2</sup> For details of the contracting states to this Convention, see [www.hcch.net/en/instruments/conventions/status-table/?cid=70](http://www.hcch.net/en/instruments/conventions/status-table/?cid=70) (15.5.2019).

<sup>3</sup> Munby, J. Sir, 2018.

<sup>4</sup> Thane, P., 2011.

Divorce law was liberalized in 1969 in England and Wales, in 1976 in Scotland and 1978 in Northern Ireland: at that time the concept of irretrievable breakdown of the marriage as the sole ground for divorce was introduced.

A significant change in family law in the whole UK deals with same-sex relationships. The Sexual Offences Act 1967 decriminalized, at least in the jurisdiction of England and Wales, consensual sexual acts in private between two males, so long as both were aged over 21 and no other persons were present. Such limited decriminalization of same-sex acts did not formally occur in Scotland until 1980. Same-sex conduct between two consenting adult males was not decriminalized in Northern Ireland until 1982. The age of consent to such intercourse was equalized with that for opposite-sex intercourse in the whole UK at 16 in 2000. In 2004, the Civil Partnership Act was passed. It extends across the UK and makes provision about the formation and status of a civil partnership. It took effect from 5 December 2005. It created civil partnerships, which gave same-sex couples who entered into them basically the same rights and responsibilities of marriage. The Marriage (Same Sex Couples) Act 2013 legalized same-sex marriage in England and Wales; the vast majority of the provisions which allowed same-sex couples to marry entered into force on 13 March 2014. Legislation to allow same-sex marriage in Scotland was passed by the Scottish Parliament in February 2014 and took effect on 16 December 2014. Same-sex marriage is not performed, nor recognized in Northern Ireland. According to the Civil Partnership Act of 2004, even after marriage was extended to same-sex couples, opposite-sex couples were not allowed to enter a civil partnership. In June 2018 the Supreme Court ruled in the *Steinfeld-Keidan* case that this provision was discriminatory and mandated that the Government change the law. The Civil Partnerships, Marriages and Deaths (Registration Etc.) Act 2019 allowed opposite-sex couples to enter a registered partnership, getting so the same rights of a same-sex couple about that. The legislation came into effect on 26 May 2019. This expansion of civil partnerships to opposite-sex couples applies only in England and Wales, and not in Scotland or Northern Ireland.

### 2.1.3. What are the general principles of Family Law in your country?

A fundamental principle that can be observed as regards to family law in UK is equality.

The equalization of position of men and women in the family is a progressive phenomenon through the whole 20<sup>th</sup> century. It started with the abolition of position of the husband as “possessor” of his wife and owner of her property<sup>5</sup>.

We must point out possible tensions between the principle of equality between husband and wife, that implies financial aspects as well, and the relevant principle of autonomy in the couple. The principle of autonomy fits with a general cultural emphasis on liberalism and individuality in British society.

These tensions emerge from the House of Lords' decisions in *White, Miller and MacFarlane*, and the Supreme Court's decision in *Radmacher v Granatino*, that recognizes a principle of contractual autonomy to the spouses.

Alongside the equalization of the wife to the husband, we have the equalization of the mother to the father in respect to the children: the mother has the same rights over the children that the father had traditionally possessed.

About the children, we must point out that a general principle in family law in UK deals with the shift in the attention from the adult to the children in the family, as they are the most vulnerable family members. In the family a special protection to the weakest party needs indeed to be provided.

Another general principle of family law in UK that can be pointed out is the attitude to recognize new family formations that in the past were considered “atypical”. We had a large increase in the number of couples living together outside the marriage. That depends on different reasons. Some regard marriage as irrelevant and decide to cohabit, others reject the same idea of traditional marriage. Until recently, cohabitation outside marriage did not give the parties any right. Some limited rights, in

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<sup>5</sup> Lowe, N., Douglas, G., 2015.

restricted fields, since the approval of the Family Law Act of 1996, started being provided to two persons that “are living together as husband and wife”.

Different is the situation of the partners in Civil Partnerships: from 26 May 2019 both same-sex and opposite-sex couples are entitled to enter a civil partnership, that basically provides rights corresponding to marriage.

The major shift in the attitude towards the acceptance and the recognition of new family formations regards same-sex partnerships.

The position of homosexual partners has been assimilated with that of heterosexuals.

The Civil Partnership passed in 2004 and enabled same-sex couples to achieve a recognized legal status with the same rights and duties as spouses.

In 2013 the Marriage (Same Sex Couples) Act was passed in England and Wales, to enable homosexual couples to marry.

**2.1.4. Define “family” and “family member” in your country. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?**

In the UK legal systems, there is no legal definition of “family” and “family member”. We can draw up a minimal definition of family like a social formation in which there is care for each other. This social formation, being subject to possible unfavorable economic circumstances, deserve for that protection.<sup>6</sup>

In acts which cover the social formation called “family”, we can obtain an indirect definition.

- Home Office, Detention service order 1/2014 (replaced DSO 11/2011): “Two parents, married or unmarried, and their dependent children, including dependent children who may be 18 or over. A single parent or other adult carer/guardian with dependent children, including dependent children who may be 18 or over. An extended family unit that may include, for example, one or two parents, grandparent(s), aunt(s), uncle(s) or any combination of extended family members with dependent children. A couple, married or unmarried, without dependent children. A same sex couple, with or without dependent children. An older sibling (18 or over) with dependent younger siblings under 18 or 18 or over but vulnerable by reason of mental or physical disability.”

- Rent Act 1977, Schedule 1: “The surviving spouse (if any) of the original tenant, if residing in the dwelling-house immediately before the death of the original tenant, shall after the death be the statutory tenant if and so long as he or she occupies the dwelling-house as his or her residence. (2) For the purposes of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant. (3) If, immediately after the death of the original tenant, there is, by virtue of sub-paragraph (2) above, more than one person who fulfills the conditions in sub-paragraph (1) above, such one of them as may be decided by agreement or, in default of agreement, by the county court shall be treated as the surviving spouse for the purposes of this paragraph.

1) Where a person who – (a) was a member of the original tenant’s family immediately before that tenant’s death, and (b) was a member of the first successor’s family immediately before the first successor’s death, was residing in the dwelling-house with the first successor at the time of, and for the period of 2 years immediately before, the first successor’s death, that person or, if there is more than one such person, such one of them as may be decided by agreement or, in default of agreement, by the county court shall be entitled to an assured tenancy of the dwelling-house by succession. (2) If the first successor died within the period of 18 months beginning on the operative date, then, for the purposes of this paragraph, a person who was residing in the dwelling-house with the first successor at the time of his death and for the period which began 6 months before the operative date and ended at the time of his death shall be taken to have been residing with the first successor for the period of 2 years immediately before his death.”

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<sup>6</sup> Herring, J., Probert, R., Glimore, S., 2016.

- Human Rights Act 1998 c. 42: “Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

### 2.1.5. Family formations.

#### 2.1.5.1. Define the “spouse” in your country and describe briefly the marriage requirements (in particular as to the sex/gender). Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?

The archaic formula used to define marriage and – indirectly – the spouses in *Hyde v Hyde and Woodmansee* (“the voluntary union for life of one man and one woman, to the exclusion of all others”) is considered, since several decades, misleading and distracting.<sup>7</sup>

In England and Wales, as well as in Scotland, marriage is available to both opposite-sex and same-sex couples. In Northern Ireland, on the contrary, marriage is legally defined as between a man and a woman, but civil partnerships are available to same-sex couples since 2005.

The parties must be at least 16 years old to get married or form a civil partnership in the UK.

If they are under 18 years old in England, Wales, and Northern Ireland, they will need parental permission. Scots law still has no requirement for parental consent.

Neither party may already be party to a civil partnership or marriage (although in England, Wales, and Scotland it is possible to change a civil partnership to a marriage).

The parties must not be too closely related (“forbidden degrees of relationship”), they must be capable of understanding the nature of marriage or civil partnership, and be able to validly consent to it being created.

Parties must give at least 28 days notice at the local register office. This notice will remain public at the office for that 28-day period before the wedding date.

Civil marriage and partnership ceremonies can be held at a register office or another approved site. Religious weddings can take place at a church, or any other registered religious building.

The Civil Partnership Act 2004 extends across the UK and makes provision about the formation and status of a civil partnership. Civil partnerships are created by registration.

“Spouse” and “civil partner” definitions are assimilated in succession law and tax law.

As the civil *status* affects the rights to inherit from the spouse or partner, spouses and civil partners have the same rights on intestacy.

In tax law, the civil *status* is relevant in order to apply for the Marriage Allowance, that lets transfer a part of the Personal Allowance to the other party of the couple. In that case husband, wife or civil partner can apply.

#### 2.1.5.2. What types of relationships/unions between persons are recognized in Family Law of your country? In particular, formal (registered) and informal (de facto) unions, heterosexual and same-sex unions, unions with and without *affectio maritalis*. Please define and explain. Is a single definition valid for the entire legal system or are there different definitions for different purposes (family law, succession law, tax law, etc.)?

As pointed out in 2.1.1, there are significant legislative differences in Family Law between England and Wales, Scotland and Northern Ireland.

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<sup>7</sup> Poulter, S., 1979.



The opposite-sex marriage is the traditional family formation in the UK, but recently same-sex marriage was allowed in England and Wales, with the Marriage (Same Sex Couples) Act 2013, entered into force on 13 March 2014, and Scotland, with the Marriage and Civil Partnership (Scotland) Act 2014, entered into force on 16 December 2014. Same-sex marriage continues instead to be unrecognized in Northern Ireland.

The Civil Partnership Act 2004 extends across the UK and makes provision about the formation and status of a civil partnership (for requirements see: 2.1.5.1).

Same sex couples can form a civil partnership in England, Wales, Scotland and Northern Ireland. In England, Wales and Scotland they can convert their civil partnership into a marriage.

In England and Wales opposite-sex couples can form a civil partnership, after the Civil Partnerships, Marriages and Deaths (Registration Etc.) Act 2019 entered into force on 26 May 2019. In Scotland and Northern Ireland civil partnerships are reserved to same-sex couples.

Cohabitation outside marriage has no recognized *status* in England and Wales, nor in Scotland and Northern Ireland. It appears in the context of specific issues, such as, in England and Wales law, domestic violence (“provision prohibiting a person [“the respondent”] from molesting another person who is associated with the respondent”, Family Law Act 1996; inheritance (“the person was living (a) in the same household as the deceased, and (b) as the husband or wife of the deceased”, Inheritance (Provision for Family and Dependents) Act 1975; adoption (“two people [whether of different sexes or the same sex] living as partners in an enduring family relationship”), Adoption and Children Act 2002. This particular recognition contributed to widespread confusion in general public about a “common law marriage”, according with cohabitation for a certain period would lead to be treated like a married couple.

#### **2.1.6. What legal effects are attached to different family formations referred to in question 2.5.?**

There is an effective equivalence between marriage and civil partnership. Some differences can however be pointed out. They deal with adultery in dissolution/divorce suits and non consummation in annulment suits.<sup>8</sup> Other difference arises in pensions, where survivor benefits in some pension schemes may be lower for some surviving civil partners when compared with some surviving spouses. That depends, in some cases, on the fact that not all of the service in the pension scheme will be taken into account (this is also the case for same sex surviving spouses, in relation to whom survivor benefits are generally aligned with civil partners).

In England and Wales both same-sex and opposite-sex couples can enter into a civil partnership.

In Scotland and Northern Ireland only same-sex couples can enter into a civil partnership (and in Northern Ireland a same-sex couple cannot marry).

Marriage and civil partnership entail a specific status. This implies a set of rights, obligations and expectations.

Each spouse or partner in a civil partnership has a legal duty to support the other.

If one of the spouses, or partners in a civil partnership, does not support the other, and the spouses or partners are still living together, a court can impose him or her, the denied support.

Regarding to the property regime between the spouses, England and Wales has no regulation concerning the property regime between spouses<sup>9</sup>. A marriage therefore has no effect on the patrimonial relations between the spouses. However, in the event of divorce, a court that decides on the consequences of the end of the marriage may at its discretion order a redistribution of assets, a maintenance payment and other measures, including the sale of assets. Noteworthy is the fact that the judge can decide not only the distribution of the patrimony that has been constituted in the constancy of marriage, but also the redistribution of the personal assets acquired prior to the marriage, of assets inherited or received in donation during the marriage and even of the assets

<sup>8</sup> Gilbert, A., 2018.

<sup>9</sup> Scherpe, J. M., 2015.

acquired after the end of the marriage. In other words: the entire assets of the parties can be subjected to a provision of the judge. Even prenuptial agreements cannot guarantee legal certainty in this regard, since, at least at the present time, in England and Wales they are neither binding nor enforceable in patrimonial relations between spouses.

We must point out that the judicial decision, in case of divorce, is based on a holistic view. Therefore, patrimonial consequences of the decision are not predictable according to a predetermined order. There is only the possibility that one or more of the usual recurring measures are adopted. It is not unusual at all that, for example, the judge decides that the family house, that constitutes almost all of the existing family assets, must be transferred to the housewife who dedicated to the care of children, but in addition to this, other measures, such as maintenance payments for the wife or pension expectations, can be avoided.

Other legal effects attached to marriage or civil partnership deal with:

- succession: a surviving spouse or civil partner is entitled to prior and legal rights;
- the right to obtain civil protection orders to protect against domestic abuse;
- recognition for immigration and nationality purposes (reserved to the UK Government).
- Cohabitation outside marriage are not recognized in the UK.

Specific right to cohabitants are recognized in the context of circumscribed issues (see 2.1.5.2).

**2.1.7. Have there been proposals to reform the present legislation in the context of marriage and formal/registered or informal/de facto family formations? Explain briefly.**

Reform of civil partnership in Scotland

Following the Supreme Court judgement in the *Steinfeld and Keidan* case in June 2018, the Scottish Government consulted at the end of 2018 on the future of civil partnership in Scotland.

The consultation was focused on the arguments for and against two options for change, after the Supreme Court decision, that declared the Civil Partnership Act 2004, that reserved civil partnerships to same-sex couples, incompatible with the European Convention on Human Rights. The Scottish Government said that “either option would be effective in removing the current discrimination from the law”. The Ministerial Foreword summarised the two options: the first option would be no new civil partnerships could be entered into in Scotland from a date in the future; the second option would be the introduction of opposite sex civil partnership. Opposite sex civil partnership would be along the same lines as same sex civil partnership. Once the responses to the consultation have been analysed, the Scottish Government intends to take a decision and legislate. As in England and Wales on 26 May 2019 came into effect the Civil Partnerships, Marriages and Deaths (Registration Etc.) Act 2019, that allows opposite-sex couples to enter a registered partnership, we can suppose that the Scottish Government’s choice could be influenced.

Reform of marriage in Northern Ireland: same-sex marriage

Northern Ireland does not permit same-sex marriage, allowed in England and Wales, as well as in Scotland. We must otherwise take in mind that same-sex marriage is allowed in the Republic of Ireland too. Being a devolved matter for the Northern Ireland executive, the UK government cannot intervene. The issue at the moment is suspended, despite many political pressures from the Parliament. The last debate on an amendment to the Civil Partnerships Bill which would have extended same-sex marriage legislation to Northern Ireland was in March 2019.

Reform of the Civil Partnership Act 2004: Sibling Couple

In 2015 the Civil Partnership Act 2004 (Amendment) (Sibling Couple) Bill was introduced; the Bill is currently going through Parliament. In case this Bill would become law, a new category of people could enter civil partnerships: two persons who are considered siblings, have lived together for more than 12 years since the date of registering the partnership and are over 30 years old. The

Government announced in April 2019 that divorce laws in England and Wales would be changed as soon as parliamentary time became available.

#### Reform of the Matrimonial Causes Act 1973: No-Fault Divorce

The existing Matrimonial Causes Act 1973 requires, for the start of a divorce proceedings, that the spouse can prove that the partner is at fault through adultery, desertion or unreasonable behaviour. In case the parties want a divorce and neither of them admits blame, they must live apart for two years. If one of the parties does not agree to end the marriage, they must live apart for five years before a divorce is granted. The new laws will include a minimum timeframe of six months from petition stage to the end of the marriage. This timeframe is designed to allow the parties to reflect on their decision. The new law will also prevent a party from refusing a divorce if the other party wants one.

#### The EU Exit regulations on family Law

In the scenario of the failure of the sign of a withdrawal agreement between the UK and EU, governing the terms of the UK's departure from the EU, the UK would immediately leave the EU's institutional structures without a transition period. In many areas, cooperation between the UK and EU will cease, and the applicable legal regime in many practice areas will change. In order to family law, the UK government introduced a series of statutory instruments to apply in the circumstances. The most significant is the Jurisdiction and Judgements (Family) (Amendments etc.) (EU exit) Regulations 2019, of 6 March 2019.

## 2.2. Property relations.

### 2.2.1. List different family property regimes in your country.

England and Wales do not have a matrimonial property regime: there is no community of property and thus marriage in principle does not have a proprietary effect. Northern Ireland does not have a matrimonial property regime either.

Scotland has a modified separate property system. The general rule, that marriage does not affect the ownership of property (section 24 Family Law (Scotland) Act 1985), is modified in some aspects.

### 2.2.3. Define briefly the (default) legal regime under in your country. Which categories of assets are regulated under the legal regime (e.g. community of assets, community of accrued gains, deferred community and personal assets)? What property is included in community of assets, and what property is included in personal assets?

In England and in Wales, as well as in Northern Ireland, marriage does not have a proprietary effect. In Scotland the general rule that marriage does not affect the ownership of property is modified in the following important aspects:

- a spouse has statutory occupancy rights in the matrimonial home, even if the other spouse is the only owner of the home.
- there is a principle of fair sharing, which normally means: equal sharing, of matrimonial property on divorce.
- a surviving spouse has certain protected rights in case of death of the other spouse and, on testacy, he or she will often take the whole estate.

**2.2.4. Is it permissible to conclude a matrimonial/partnership property agreement or agreement related to property within another type of family formation? What are the conditions and permissible contents of these agreements? In particular, may the spouses only choose among offered matrimonial property regimes or can they create a “new regime just for them”?**

Currently, England and Wales have no matrimonial property agreements.

Traditionally pre-nuptial agreements were unenforceable, as being against public policy, but gradually the courts started considering some pre-nuptial agreements as one of the relevant circumstances to be taken into account when deciding the division of assets on divorce or dissolution. In 2010 the Supreme Court, deciding the case *Court Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42, gave effect to a pre-nuptial agreement that is freely entered into by each party, with a full appreciation of its implications, unless, in the circumstances prevailing, it would not be fair to hold the parties to their agreement.

Legislation in Scotland specifically provides that any agreement entered into between two parties to a marriage in respect of financial provision of divorce will be legally binding unless it can be established that the agreement was unfair and unreasonable at the time it was entered into. Section 9 (1) of the Family Law (Scotland) Act 1985 provides the principle of fairly sharing in case of divorce. Section 10 (6) provides that among the "special circumstances" that need to be considered, in case of divorce, there are: "the terms of any agreement between the parties on the ownership or division of any of the matrimonial property." Section 16 (1), entitled "Agreements on financial provision" provides that, "where the parties to a marriage have entered into an agreement as to financial provision to be made on divorce, the court may make an order setting aside or varying.... (b) the agreement or any term of it where the agreement was not fair and reasonable at the time it was entered into."

**2.2.5. Explain briefly the rules on the administration of family property and compare if there are difference for different property regimes.**

In England, Wales and Northern Ireland, marriage does not have a proprietary effect. Section 37 of the Law of Property Act 1925 states that "husband and wife shall, for all purposes of acquisition of any interest in property (...) be treated as two persons", so the general law of property applies. In Scotland there is a presumption that household goods acquired in prospect of the marriage or during the marriage are owned in equal shares, even if they were bought by one spouse (section 25 Family Law (Scotland) Act 1985).

**2.2.6. Is there a (public) register of such agreements established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

In the absence of a matrimonial property regime, there is no public register.

**2.2.7. What are the third party rights in relation to the matrimonial property regime, in particular if there is no public register? Which debts are considered community debts and which are considered personal debts?**

Generally speaking each spouse in England, Wales and Northern Ireland is liable for his or her debt. Only the property of the spouse who has incurred the debt can be used to satisfy a creditor's claim. In Scotland as well each spouse is liable for his or her own debts. The creditors of each spouse can use only that spouse's property to satisfy their claims, but there are special protections for the matrimonial home in the bankruptcy legislation.

**2.2.8. Describe allocation and division of property in case of divorce, separation or dissolution of the union.**

In England and Wales, in case of divorce, the courts have a wide discretion to make a huge range of orders. They can include: reallocation (or even sale) of property; putting assets on trust; periodical payments; orders regarding pensions (sections 21 Matrimonial Causes Act 1973). According with 2006 decisions (see: Miller v. Miller; McFarlane v. McFarlane [2006] UKHL 24), three elements must be considered: needs of the parties and of the children; compensation (of disadvantages generated during the relationship) and sharing of assets. Certain groups of assets, such as pre-marital assets, inherited assets and assets received as gift, as well as “non-matrimonial assets”, should be treated differently from the “fruits of joint labour”, as well as the matrimonial home, for the purpose of sharing upon divorce. But, evaluating such a distinction, the length of the relationship needs to be considered anyway.

In Scotland the spouses can agree about the division. If they cannot find an agreement, they can claim financial provision on divorce on the basis of the section 9 of the Family Law (Scotland) Act 1985. In that case, the “matrimonial property”, as to say the property acquired by the spouses (with exception of gift or succession) during the marriage (but before the date of the separation) has to be fairly shared between the parties (section 9(1)(a) Family Law (Scotland) Act 1985). A fair sharing implies normally that the net value will be equally divided between the parties. Of course the court can consider special circumstances (see section 10(6) Family Law (Scotland) Act 1985).

**2.2.9. Are there special rules or limitations concerning property relationship between spouses or partners with reference to their culture, tradition, religion or other characteristics? For instance, is dowry regulated under your legislation?**

In the absence of a matrimonial property regime, there are no limitations concerning property relationship between spouses or partners with reference to their culture, tradition or religion.

There is no specific piece of legislation under English law to settle dowry disputes, despite some claims may occur, mainly for subjects originating from the South Asian sub-continent (where the practice of dowry is sometimes still diffused).

**2.2. Cross-border issues.**

**2.2.1. Is your country participating in the enhance cooperation with regard to the two Regulations (1103/2016 and 1104/2016)? If not, what is the reason? Is there a likelihood that your country will join in the future?**

No, the UK was not part in the enhance cooperation with regard to the two Regulations (1103/2016 and 1104/2016).

**2.2.2. Are you expecting any problems with the application of the two Regulations? In particular, concerning their scope of application? Or, particular term, such as “marriage”, “matrimonial property agreement”, “partnership property agreement” etc.?**

The UK is not part in the enhance cooperation with regard to the two Regulations (1103/2016 and 1104/2016).

**2.2.3. Are you expecting any problems with the application of the rules on jurisdiction?**

The UK is not part in the enhance cooperation with regard to the two Regulations (1103/2016 and 1104/2016).

**2.2.4. Are you expecting any problems with determining the applicable law? In particular, regarding the choice of applicable law?**

The UK is not part in the enhance cooperation with regard to the two Regulations (1103/2016 and 1104/2016).

**2.2.5. What issues are expected regarding the recognition and enforcement? In particular, concerning the public policy?**

The UK is not part in the enhance cooperation with regard to the two Regulations (1103/2016 and 1104/2016).

**2.2.6. Are there any national rules on international jurisdiction and applicable (besides the Regulations) concerning the succession in your country?**

The English private international law is not codified. In UK, the invested Court has the competence to decide in family matter in the case of English spouses. The Court must follow the doctrine of referral developed over hundreds of years by English ("precedent") jurisprudence, taking into consideration the sentences from the "Court of Appeal" or "House of Lords", as well as the texts written in this field by the experts and academics.

### **3. Succession law.**

#### **3.1. General.**

**3.1.1. What are the main legal sources of Succession Law (SL) in your country? What are the additional legal sources of SL?**

In respect to Succession Law in the UK, there are significant legislative and cultural differences between England and Wales, Scotland and Northern Ireland. We will examine the Succession Law issues focusing mainly on England and Wales, and making references to Scotland and Northern Ireland only in order to point out remarkable differences.

England and Wales are unusual in having no written Constitution. The Parliament is competent to legislate on all aspects of succession law for both England and Wales. In the context of succession law, there are three key pieces of legislation:

- Wills Act 1837, which sets out the conditions for making a will;
- Administration of Estates Act 1925, which provides how the estate should be divided if the deceased died without making a will;
- Inheritance Act 1975, which allows certain categories of persons to claim provision from the estate of the deceased on the basis that the disposal of the estate did not make reasonable financial provision for them.

Administration of Estates Act 1925 and Inheritance Act 1975 have been recently converted in accordance with the Inheritance and Trustees' Powers Act 2014.

Regards the international sources, the impact of EU on the succession law has been limited. In 2005, the EU issued a Green Paper on the conflict of laws in matters of succession (European Commission,

Green Paper – Succession and Wills, COM (2005), 65). Afterwards, the Regulation (EU) No. 650/2012 (Reg. Bruxelles IV) was intended to harmonize the succession laws of EU Member States. However England and Wales have opted out of European Succession Regulation No. 650/2012 applicable from 17 August 2015, even though citizens of England and Wales who are habitually resident at their death in EU member States or hold assets in EU Member States may continue to be affected by the Regulation (even after Brexit).

At last case law can also play an important role, when the succession law is not covered by statute and is left to the application of common law.

In the Northern Ireland jurisdiction of the UK the principal sources of law are:

- Primary legislation in the form of Acts of the UK Parliament and Acts of the Northern Ireland Assembly. Some primary legislation relating to Northern Ireland is also made by the Sovereign in Council as Orders in Council (statutory instruments);
- European Union law;
- Secondary (or subordinate) legislation in the form of statutory instruments and statutory rules of Northern Ireland. Some other subordinate legislation may be made as administrative orders;
- The common law as developed through judicial decisions.
- Acts of Parliament, made by the UK Parliament in London, may apply also in Northern Ireland.

In the context of succession law, there are three key pieces of legislation: the Northern Ireland Act 1974, the Wills and Administration Proceedings (Northern Ireland) Order 1994 and the Administration of Estates Act (Northern Ireland) 1955.

Scotland is a mixed legal system (this legal system has had influence both of Roman law and of English law) and has a separate and distinct legal system from England and Wales. The rules of succession law are different from those in England and Wales: the Scottish Parliament (and not the UK Parliament) is empowered to legislate in succession law under a system of devolution under the Scotland Act 1998. About the sources of succession law, in Scotland is applied the Requirements of Writing (Scotland) Act 1995, that draws a distinction between valid and probative Wills, and Succession (Scotland) Act 1964, that regulates the succession when there isn't a valid Will.

### **3.1.2. Provide a short description of the main historical developments in SL in your country.**

The year 1857 was a key turning point in the history of UK succession law. Prior to that date, the ecclesiastical courts had jurisdiction over the probate of wills and the grant of letters of administration for the estates of those who died without making a will. In 1857 the jurisdiction for succession matters was transferred from the ecclesiastical court to a Court of Probate (see Court of Probate Act 1857). The Court of Probate Act 1857 established a Principal Probate Registry and forty District Probate Registries for England and Wales. Afterwards, the Judicature Act 1873 reformed the existing court system and created a new Court of Probate, Divorce and Admiralty Division.

In a material respect, some reforms of succession law had already been put into effect by 1857.

At first, in 1837 the Wills Act required that all wills be made in writing, thereby excluding the possibility to make a nuncupative will. In any case, the transmission of property on death other than by will remained governed by a bewildering array of rules: the devolution of real property was determined by the common law rules of descent, with limited rights for any surviving husband or wife of the deceased. Personal property instead was subject to an entirely different set of rules under the Statute of Distribution 1670. Only in 1925 (see Law of Property Act 1925 and Administration of Estates Act), the legislation provided a uniform set of rules for both real and personal property and improved the position of the surviving spouse, who now stood to inherit the bulk of the estate upon intestacy.

In UK, only for a relatively brief period, the individuals enjoyed the freedom to leave their property to whomsoever they chose without restriction or fear of later interference, in accordance with the principle of freedom of testation. It was not until 1833 that a husband was able to bar his wife's right to dower by will, and restrictions on the disposal of personal property remained in many parts of the country until 1856. Afterwards, the Inheritance Act 1938 allowed a court to make provision for certain classes of persons on the basis that the testator had failed to make reasonable provision for them. The categories of those who could make an application for such provision were initially limited to the surviving spouse, an unmarried or disabled daughter, and a minor or disabled son. Changes in family form over the course of the century have led to new categories being added, including stepchildren who have been treated as children of the family, cohabitants and civil partners. Regarding the Scotland, the Scottish Parliament (and not the UK Parliament) is empowered to legislate in succession law under a system of devolution under the Scotland Act 1998. Furthermore, on 18 September 2014 Scotland held a referendum on independence and voted to remain part of UK. Consequently to this referendum, tax law as it applies to succession is a matter for the Scottish Parliament. This could involve a possible difference in tax treatments in Scotland from those of England.

### **3.1.3. What are the general principles of succession in your country?**

The English legal system is based on the principle of the universality of inheritance (however, there're some special rules concerning the succession to specific rights too).

There are two types of succession in England and Wales: the intestate succession (Inheritance Act 1975) and the testamentary one (Wills Act 1837). The rules on the intestate succession only apply, if there's no Will or the Will is not valid.

The intestacy rules are based to an extent on assumptions about the way in which the intestate would have wanted the estate to be divided, although convenience also plays a part in distinguishing the categories of those entitled to inherit on intestacy to those related by blood or legal ties. The potential harshness of such rules is, however, mitigated by the ability of the court to make provision for certain specified persons under the Inheritance Act 1975.

Also in Northern Ireland the Will vests the estate of the deceased on death. If the deceased does not leave a valid Will the estate is distributed in accordance with the intestacy rules specified in the Administration of Estates Act (Northern Ireland) 1955.

Individuals can leave property on death to another person by making a bequest in a Will according to the Writings (Scotland) Act 1995. Individuals may also hold moveable and immoveable property in accordance with a survivorship clause (they hold property with the title in joint names and to the survivor) or a special destination clause (they hold property with the title in their own name or with others, in favour of another in the event of death). If the deceased does not leave a valid Will, survivorship clause or special destination clause, property pass in accordance with the rules of the Succession (Scotland) Act 1964.

### **3.1.4. Describe briefly the probate proceedings, including competent authorities, commencement, deadlines, etc.**

In England and Wales, the estate of the deceased vests in the personal representatives of the deceased, who can receive declarations of waiver or acceptance. They may apply to the court for a grant of representation (probate in the case of a will and letters of administration in case of intestacy). The grant will confirm their authority to deal with the estate in accordance with the will or intestacy rules as the case may be. Disputes as to entitlement to succession or the grant can be referred to the court. Proceedings in the court are governed by the Non-Contentious Probate Rules or the Civil Procedure Rules.



The personal representatives are responsible for identifying and collecting the assets of the deceased in the estate, paying the debts of the deceased (including inheritance tax) and distributing the residue to the beneficiaries in accordance with the will or the intestacy rules.

In the same way the estate of the deceased vests in the personal representatives of the deceased in Northern Ireland. The rules are the same as for England and Wales.

Also in Northern Ireland disputes as to entitlement to succession or the grant can be referred to the court, but proceedings in the court are governed by the County Court Rules (NI) 1981 and the Rules of the Court of Judicature (NI) 1980.

According to the Scottish law, in most estates it is necessary to have an executor to administer an estate appointed either under a Will or by the sheriff court (an executor dative) in circumstances where there is no valid Will or if the named executors are unable or unwilling to act. It is necessary for an executor to obtain “confirmation” from the sheriff court. Confirmation provides the executor with legal title to the assets in the estate. Assets to which the executor takes title at date of death will be listed in the confirmation.

Applications for confirmation (i.e. inventory of the estate and, in case of testate succession, the original Will or an official extract of this) in testate and intestate estates take a similar form. The applications must contain a declaration signed by the executor confirming the deceased’s name, the place and date of death, the domicile of the deceased, the value of the estate for the purposes of confirmation and the executor’s capacity to act.

The court grants confirmation in relation to the items of estate in the inventory and that is the executor’s authority to ingather those items.

Once the estate is ingathered, the executor must then pay any debts and tax due before distributing the estate in terms of the Will or, when there is not a valid Will, the Succession (Scotland) Act 1964.

**3.1.5. Describe the types (legal basis) of succession: intestate and testate. Explain the relation between different legal bases for succession and priority existing between them. Is cumulative application of legal titles possible?**

According Wills Act 1837, in England and Wales any adult of sound mind may make a will disposing of his or her property. A person who fails to make a will, or who makes a will that is not valid, is said to die intestate pursuant to the Inheritance Act 1975. Intestacy may also be partial. The intestacy rules are based to an extent on assumptions about the way in which the intestate would have wanted the estate to be divided, although convenience also plays a part in confining the categories of those entitled to inherit on intestacy to those related by blood or legal ties. With Inheritance Act 1975, the potential harshness of such rules was anyway mitigated by the ability of the court to make provision for certain specified persons.

In Northern Ireland the disposition of property upon death may be undertaken by process of law (i.e. where there is no Will) or in accordance with a Will. There is no requirement to draft a Will.

If the deceased doesn’t leave a valid Will the estate is distributed in accordance with the intestacy rules (Administration of Estates Act (Northern Ireland) 1955).

In Scotland individuals can leave property on death to another person by making a bequest in a Will according to the Writing (Scotland) Act 1995. Individuals may also hold moveable and immoveable property in accordance with a survivorship clause or a special destination clause. If the deceased does not leave a valid Will, survivorship clause or special destination clause, property pass in accordance with the rules of the Succession (Scotland) Act 1964.

**3.1.6. What happens with the estate of inheritance if the decedent has no heirs?**

Pursuant to Section 46 (1)(VI) of the Administration of Estates Act 1925, if the decedent has no heirs, then the estate will pass as *bona vacantia* to the Crown or to the Duchy of Lancaster or Cornwall, if the intestate was resident there (see Law Reform (Succession) Act 1995).

According Section 16 of the Administration of Estates Act (Northern Ireland) 1955, *“in default of any person taking the estate of an intestate under the foregoing provisions of this Part, that estate shall pass to the Crown as bona vacantia”*.

According Section 7 of the Succession (Scotland) Act 1964 *“Nothing in this Part of this Act shall be held to affect the right of the Crown asultimus haeresto any estate to which no person is entitled by virtue of this Act to succeed”*.

**3.1.7. -Are there special rules or limitations concerning succession with reference to the deceased’s (or heir’s) culture, tradition, religion or other characteristics?**

No, the English legal system does not know discrimination rules based on the above mentioned criteria (culture, tradition, religion and sex). This was demonstrated by *Official Solicitor to the Senior Courts v. Yemoh* (2010 EWHC 3727, par. 20), in which was held that *“a spouse lawfully married in accordance with the law of his domicile to someone dying intestate, is entitled to be recognised in this country in relation to property, including real property, of the intestate being administered here, as a surviving spouse for the purpose of section 46 of the 1925 Act”*. The application of that principle was extended to the cases of polygamous marriage, even if English law – at the time of abovementioned decision – did not recognise polygamous marriages in any circumstances. Now the law does recognise as valid those marriages celebrated overseas by individuals domiciled in a jurisdiction that permits polygamy.

In Northern Ireland unmarried partners, lesbian or gay partners not in a civil partnership, relations by marriage, close friends and carers have no right to inherit where someone dies without leaving a Will.

**3.2. Intestate succession.**

**3.2.2. Are men and women equal in succession? Are domestic and foreign nationals equal in succession? Are decedent’s children born in or out of wedlock equal in succession? Are adopted children equal in succession? Is a child conceived but not yet born at the time of entry of succession capable of inheriting? Are spouses and extra-marital (registered and unregistered) partners equal in succession? Are homosexual couples (married, registered and unregistered) equal in succession?**

In England and Wales, as well as in Northern Ireland, any person can succeed if he has capacity of inheriting. There are no different succession rights between men and woman, domestic and foreign nationals, children born in of wedlock and children born out of wedlock (following Family Law Reform Act 1987, no distinction has been made between children born within marriage and those born outside it) and adopted children. An adopted child is treated as the child of the adoptive parents and not of the natural parents (adopted child lose the rights to inherit from their biological parents). However, where immediately before the adoption the child’s legal parent has already died, the child’s interest in that parent’s estate is not affected by the change to the child’s legal parentage on adoption. A legitimated child is entitled to take an interest on intestacy as if the legitimated person had been born legitimate. Illegitimate children are regarded as the children of both of their parents for the purposes of their inheritance (or the inheritance of their issue) from their parents or for the inheritance of both of their parents from them under the intestacy rules.

Furthermore the same succession rights competing to the spouse are recognise to the civil partner. Only cohabitants have no rights under the intestacy laws, however long their relationship.

In Scotland a beneficiary of estate may be paid out at any age, but it’s common for Wills to provide that for younger beneficiaries there is the power to pay to parents. A child has capacity only at 16 age: until age 16 the parents (or the guardian) have rights and responsibilities in relation on the receipt of an inheritance.

### 3.2.3. Are legal persons capable of inheriting? If yes, on which basis?

In UK legal systems (England and Wales, Northern Ireland and also Scotland), legal persons are capable of inheriting only by a Will. Except in the case of acquisition of property by State where the inheritance devolves automatically on the State in the absence of other eligible to succeed.

### 3.2.4. Is the institute of unworthiness of succession present in your legal system? If yes, explain the grounds for unworthiness.

There is a general rule of public policy, which states that a person should not profit from his or her own crime. In the law of succession, this has been applied to prevent those who are convicted of the murder or manslaughter of the deceased from benefiting from the death of the deceased. The rule only applies if a crime has been committed: a person who is not guilty by reason of insanity will be allowed to benefit from the death of the deceased (although a lack of legal capacity to hold property will mean that any property inherited will have to be held in trust for him or her), but a person who is guilty of aiding and abetting the suicide of another may not. The rule applies equally to potential benefits under a will or upon intestacy.

The application of the rule will differ according to the level of moral culpability of the killer. A person who is convicted of murder is never entitled to inherit, but a person convicted of manslaughter may be able to. The Forfeiture Act 1982 allowed the court to modify the rule that the killer should forfeit all benefits under the estate of the deceased, but directs that it should not do so unless satisfied that “having regard to the conduct of the offender and of the deceased and to such other circumstances as appear to the court to be material, the justice of the case requires the effect of the rule to be modified in that case” (see Section 5 of the Forfeiture Act 1982).

The Scottish courts have been receptive to the public policy principle that no-one is to benefit from his own wrong, taken from the English common law. The differences between the unworthiness and the public policy approach do not play a role in this situation.

Many of the court’s discussion is focused on cases involving the murder of the deceased. Beyond murder there is hardly any case law. One of the main reasons for this appears to be that other legal devices are available to take care of many, perhaps most, of the practical problems that may be raised in other instances of unworthiness to inherit.

### 3.2.5. Who are the heirs *ex lege*? Are there different classes of heirs *ex lege*? If yes, is there priority in succession between different classes? Describe the relation between heirs within the same class of succession. How are the shares among them determined?

If or to the extent that the deceased does not leave a valid will, the estate will be distributed in accordance with the intestacy rules specified in the Administration of Estates Act 1925 (as amended). Moreover, the rules of intestate succession have been significantly amended, from 1 October 2014, by the Inheritance and Trustees’ Power Act 2014.<sup>10</sup>

Section 46 of the Administration of Estates Act 1925 sets out a comprehensive list of who is entitled to succeed and in what order.

The intestacy rules privilege the surviving spouse or civil partner. Only an existing spouse or civil partner can be entitled, of course: once the marriage or civil partnership has been legally terminated any entitlement comes to an end.

If the intestate leaves no issue the estate passes entirely to the surviving spouse or civil partner. Otherwise, if the intestate left issue (i.e. children, grandchildren or remoter direct descendants, whether born within a formalized relationship or not), the surviving spouse or civil partner is entitled to the deceased’s personal chattels (defined by law as amended), a fixed net sum with simple interest at a proscribed rate from the date of the death, and a one-half interest in the balance of the

<sup>10</sup> <http://www.legislation.gov.uk/ukpga/Geo5/15-16/23/contents> (15.5.2019).

residuary estate absolutely (see Section 46 of the Administration of Estates Act 1925, as amended by Section 1 of the Inheritance and Trustees' Powers Act 2014). The size of the fixed net sum was GBP 250,000 in 2014 and is to be index-linked in accordance with provision contained in the Inheritance and Trustees' Power Act 2014.

Whether the deceased was survived by one spouse or several, the remaining half of the balance is held by the statutory trusts for the issue of the deceased (property that passes to children or remoter issue under an intestacy is held by what are known as the "statutory trusts"). These prescribe that the balance is to be divided equally between those children of the intestate who are living at the time of his or her death, and who attain the age of 18 years or marry or a form a civil partnership under that age. Thus if all of the children are adults they are entitled to the property immediately and absolutely, while if any are still minors the property will be held on trust for them until they reach adulthood.

If the intestate leaves no surviving spouse or civil partner, or issue, then the estate devolves in succession upon surviving parent or parents; brothers or sisters of the whole blood or, if predeceased, their issue on the statutory trusts; brothers or sisters of the half blood or, if predeceased, their issue on the statutory trusts; surviving grandparent or grandparents; surviving aunts and uncles of the whole blood or, if predeceased, their issue on the statutory trusts; surviving aunts and uncles of the half blood or, if predeceased, their issue on the statutory trusts.

If there is no surviving spouse, civil partner, or issue and there are no other relatives of the categories referred to above, the property passes to the State as *bona vacantia*.

In Northern Ireland all estate to which a deceased person was entitled for an estate or interest not ceasing on his death and as to which he dies intestate, after payment of all debts, duties and expenses properly payable there out, be distributed in accordance with Part II of the Administration of Estates Act (Northern Ireland) 1955.

The surviving spouse or civil partner of the intestate shall take the personal chattels. If an intestate dies leaving a spouse or civil partner and issue the surviving spouse or civil partner shall, in addition to the personal chattels, take:

- where the net value of the remaining estate does not exceed £250,000, the whole of the remaining estate;
- where the net value of the remaining estate exceeds £250,000, the sum of £250,000, free of all duties, charges and costs, and shall have a charge upon the remaining estate for that sum with interest thereon at the rate of four pounds per centum per annum (or at such other rate as the head of the Department of Finance may specify by an order made subject to affirmative resolution) from the date of the death of the intestate until the date of payment thereof, together with:
  - a. where only one child of the intestate also survives, one-half of any residue left of the remaining estate after providing for that sum and the interest thereon;
  - b. where more than one child of the intestate also survives, one-third of any residue left of the remaining estate after providing for that sum and the interest thereon.

For the purposes of the last preceding sub-section, if a child of the intestate predeceased him leaving issue who survive the intestate, the surviving spouse or civil partner of the intestate shall take the same share of the estate as if the child had survived the intestate.

If an intestate dies leaving a spouse or civil partner and no issue, but leaving parents or brothers or sisters or issue of deceased brothers or sisters, the spouse or civil partner shall, in addition to the personal chattels, take:

- where the net value of the remaining estate does not exceed £450,000, the whole of the remaining estate;
- where the net value of the remaining estate exceeds £450,000, the sum of £450,000, free of all duties, charges and costs, and shall have a charge upon the remaining estate for that sum with interest thereon at the rate of four pounds per centum per annum (or

at such other rate as the head of the Department of Finance may specify by an order made subject to affirmative resolution) from the date of the death of the intestate until the date of payment thereof together with; and one-half of any residue left of the remaining estate after providing for that sum and the interest thereon.

If an intestate dies leaving no issue, his estate shall, subject to the rights of the surviving spouse or civil partner, if any, be distributed between his parents in equal shares if both survive the intestate, but if only one parent survives the intestate, such surviving parent shall, subject as aforesaid, take the whole estate.

If an intestate dies leaving neither issue nor parent, his estate shall, subject to the right of the surviving spouse or civil partner, if any, be distributed between his brothers and sisters in equal shares, and if any brother or sister predeceases the intestate the surviving issue of the deceased brother or sister shall take *per stirpes* the share that brother or sister would have taken if he or she had survived the intestate.

If an intestate dies leaving neither issue nor parent nor brother nor sister, his estate shall, subject to the rights of the surviving spouse or civil partner, if any, be distributed *per stirpes* among the issue of his brothers and sisters.

If an intestate dies leaving neither spouse nor civil partner nor issue nor parent nor brother nor sister nor issue of any deceased brother or sister, his estate shall be distributed in equal shares among his next-of-kin.

In case of any person taking the estate of an intestate, the estate shall pass to the Crown *as bona vacantia*.

In Scotland property will pass under the Succession (Scotland) Act 1964. A surviving spouse or civil partner has prior rights in his late spouse or civil partner's estate. If the intestate owned a house, and the surviving spouse or civil partner lived there, the surviving spouse or civil partner is entitled to the house and the furnishings and furniture of that house, subject to certain limits. The surviving spouse or civil partner can claim the house, as long as its value is less than £473000, and the furnishings and furniture up to the value of £29000.

If the intestate left children or descendants, the surviving spouse or civil partner is entitled to the first £50000 out of the estate. If the person left no children or descendants, the surviving spouse or civil partner is entitled to the first £89000.

If any estate remains after "prior rights" have been met, a surviving spouse or civil partner and children are entitled to certain "legal rights" from the moveable estate of the intestate.

After the prior and legal rights have been satisfied, the rest of the intestate estate is accounted to: children; half to parents and half to brothers and sisters, if parents and siblings survive; brothers and sisters, if no parents survive; parents, if no brothers and sisters survive; surviving spouse or civil partner; uncles or aunts; grandparents; brothers and sisters of grandparents; other ancestors; the Crown.

### **3.2.6. Are the heirs liable for deceased's debts and under which conditions?**

No. In England and Wales, as well as in Northern Ireland, the estate of the deceased is liable.

In Scotland the executor is liable to pay all debts due by the estate before distributing the estate to beneficiaries. The estate should not be distributed until 6 months from date of death to allow creditors time to make a claim. If a creditor does not make a claim within 6 months and the executor distributes the estate, the beneficiaries are in theory liable for any debts to the extent of their legacy.

### **3.2.7. What is the manner of renouncing the succession rights?**

A beneficiary of an estate, whether by Will or the laws of intestacy, is perfectly within their rights to reject their inheritance. Beneficiaries may wish to vary dispositions of property following death in order to redirect benefits to other family members who are more in need or less well provided for and to save tax. In order to do this there are three options: by gift, by disclaimer or by variation.

A gift by a beneficiary has taxed consequences if the item has increased in value since the date of death and if the beneficiary dies within 7 years of making the gift.

A disclaimer is a simple deed in which the beneficiary gives up all rights to their inheritance. The inheritance then passes to the next person entitled under the will or on intestacy. With a disclaimer the original beneficiary has no control over who receives the asset.

A variation is often preferred to a disclaimer because it allows the original beneficiary to choose who inherits.

Disclaimers and variations are more tax efficient provided they contain a statement regarding the tax consequences of their decision. However variations can cause problems for income tax which disclaimers can avoid so where possible a disclaimer by a parent is favourable to a variation where minor children are the next beneficiaries in line to inherit.

To be effective the variation and the disclaimer must be in writing and must be signed by the person giving up the benefit and the Executors if more inheritance tax is payable as a result. In addition, the variation and the disclaimer must be made within 2 years of death, and must indicate the changes being made and the State whether it is intended to be effective for Inheritance tax and/or Capital Gains Tax.

Also in Northern Ireland and in Scotland a beneficiary of an estate, whether by Will or the laws of intestacy, is perfectly within their rights to reject their inheritance.

### **3.3. Disposition of property upon death.**

#### **3.3.1. Testate succession.**

##### **3.3.1.1. Explain the conditions for testate succession.**

The Wills Act 1837 sets out the statutory formalities for the execution of Wills in England and Wales. In general, Wills must be in writing and the testator's signature must be made in the presence of two witness, who should sign in the presence of each other and in the presence of the testator. Testator and witnesses must be full of age and capacity. The Will need not to be dated, but it is desirable that it should be dated (this to avoid difficulties in proving the date upon which it was executed). Professionally prepared Wills contain usually also an attestation clause recording the formalities for the execution of Will.

If the Will is witnessed by a beneficiary or the spouse of a beneficiary, the Will is valid but the gift to the beneficiary is ineffective, unless there are sufficient other independent witnesses to validate the Will.

The Wills and Administration Proceedings (Northern Ireland) Order 1994 sets out the statutory formalities for the execution of Wills in Northern Ireland. Wills must be in writing and the testator's signature must be made in the presence of two witness. Testator must be full of capacity and age.

The Requirements of Writing (Scotland) Act 1995 sets out the statutory formalities for the execution of Wills in Scotland. The Act draws a distinction between valid and probative Wills. The Scottish Law requires that a valid Will must be made by way of a written document and subscribed by the testator. A valid Will need not be witnessed.

##### **3.3.1.2. Who has the testamentary capacity?**

In England and Wales Wills may generally be made only by persons full age (18 years) or over. However, the capacity to make a valid Will encompasses not only the adulthood of the testator but also other factors. And indeed, the testator must be also mentally capable of making a Will and his choices must not have been brought about by duress or undue influence.

In common law, an individual's capacity to enter into a particular arrangement would depend on the nature and complexity of the particular arrangement. For example, a person who has the capacity to make a simple Will may not have the requisite understanding to make a more complex one (this is so

called “*transactional capacity*”; see Mental Capacity Act 2005, Part I, Ch. 7, par. 127). In practice, the testator must understand what he’s doing, how much property he has and which persons should be considered as possible beneficiaries.

A variety of factors may deprive a person of capacity. The Law Commission (Law Commission, Making a Will, Law Comm. C.P. 231 (2017), par. 2.15) noted that capacity may be impaired by “*medication, pain levels, altered biochemistry, infection, stress, [...] and other temporary conditions or states*” as well as by “*a learning disability, a personality disorder or through mental illness*”.

If the capacity of the testator is challenged, it must be shown that he was capable at the time of Will. This means that if a person who lacks capacity, makes a Will in a lucid interval, the resulting Will will be valid. In the same way, a Will made by a capable person will be not valid, if the testator was not capable when he was making the Will.

In determining whether person lacks capacity, the burden of proof is initially on the person propounding the Will. If a court decides that an individual lacked testamentary capacity, then their Will is invalid and their estate will pass under the rules of intestacy or according to the terms of any prior will made at the time that the person did have capacity.

The Will may be also invalid, if the testator has been unduly influenced to make a Will that does not reflect his real wishes. In these cases, it must be shown both that the influence led to the making of the transaction in question and that the resulting transaction was not the result of the free exercise of an independent Will.

In Northern Ireland no will made by a person under the age of 18 years is valid, unless he is or has been a spouse or civil partner. Similarly, according the Wills and Administration Proceedings (Northern Ireland) Order 1994, no will made before 1 January 1970 by a person under the age of 21 years is valid.

In Scotland a testator must be mentally capable at the time of making a Will. Mental capacity depends upon whether the testator is of sound mind and has the ability to understand the nature and effect of making a Will.

### 3.3.1.3. What are the conditions and permissible contents of the will?

A Will must be made in writing and must be signed or acknowledged by the testator before witnesses who themselves sign the Will. The same formalities must be observed by persons making a joint Will, and if any alterations are made to the original Will. That said, about the permissible contents, there are no compulsory shares that must be left to any person under the law of England and Wales. In the English legal system, there are no restrictions on the freedom to dispose of property upon death, even if specified family members and persons maintained by the deceased may apply to the court for an award of financial provision from the estate (see Inheritance Provision for Family and Dependents Act 1975).

According the Wills and Administration Proceedings (Northern Ireland) Order 1994, no Will is valid unless it is in writing and is executed in accordance with the following requirements:

- it is signed by the testator, or by some other person in his presence and by his direction;
- it appears from the Will or is shown that the testator intended by his signature to give effect to the Will;
- the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time;
- each witness, in the presence of the testator (but not necessarily in the presence of any other witness), either attests the testator’s signature or the testator's acknowledgement of his signature and signs the Will; or acknowledges his signature.

No form of attestation or acknowledgement is necessary.

In general, there are no restrictions on the freedom to dispose of property upon death, but there may be restrictions attaching to the property (i.e. if property is held as Joint Tenants, it passes automatically to the surviving Joint Tenant).

The Requirements of Writing (Scotland) Act 1995 requires that a valid Will must be made by way of a written document and subscribed by the testator. A valid Will need not be witnessed.

There are no restrictions on the freedom to dispose of property upon death, but it is possible for a child or surviving spouse (or civil partner) to claim legal rights from moveable estate on the death of a parent or a spouse (or civil partner) even where the deceased left a Will. Children have a right to share one third of the deceased's moveable estate, if there is a surviving spouse or civil partner or one half if there is no surviving spouse or civil partner. A surviving spouse or civil partner has a right to one third of the deceased's moveable estate, if there are children or one half if there are none.

**3.3.1.4. Describe the characteristics of will in your legal system. What types of wills are recognized? Are they divided into public and private? If yes, what public authorities took part in making a will?**

The English law does not draw any distinction between holographic and typewritten Wills. Holographic Wills must, therefore, be executed in the normal fashion. There is no requirement for Wills to be executed before a notary or other legal authority.

The law permits that two or more persons execute one document as the Will of both of them (so called Joint Wills). In this case, all must sign the Will.

At the end, in English legal system two different types of Will should be considered:

- privileged Wills, may be made by soldier and sailors without the formalities usually required for a valid Will;
- statutory Wills, may be made on behalf of persons who lack capacity to make a Will.

Scotland recognizes holograph Will and don't give special status to Wills signed before notaries. All Wills are secret: until death there is no obligation to publicize or register a Will.

**3.3.1.5. Is there a (public) register of wills established in your country? If yes, describe briefly the proceedings for registration and legal effects of registration.**

There is not a public register of Wills in England and Wales: there is no requirement to register the Will. In fact, the estate of the deceased vests in the personal representatives of the deceased, who can receive declarations of waiver or acceptance.

The Will does not determine immediately the transfer of ownership. The personal representatives will transfer immovable property to the beneficiary entitled in the course of the administration of the estate. Then the beneficiary will present evidence of the grant of representation and the transfer to the Land Registry in accordance with the relevant Land Registration Rules.

In Northern Ireland there is no requirement to register the Will. The estate of the deceased vests in the personal representatives of the deceased, who can receive declarations of waiver or acceptance.

Also in Scotland there is no requirement to register a Will. Anyway, title to immovable property including titles with a special destination or a survivorship clause will be registered in either the Register of Sasines or the Land Register of Scotland. In some instances, furthermore, title to moveable property, including those with a special destination or survivorship clause will be registered, for instance in a company's Shareholder Register.

**3.3.2. Succession agreement (*negotia mortis causa*). Is there another way to dispose of property upon death other than the will? If yes, explain the conditions for and permissible contents of succession agreements.**

According to the English legal system, a number of arrangements may be put by a person in contemplation of their death. Some (i.e. gifts or trusts) may be motivated by the desire to minimize the amount of inheritance tax that is payable. Others (i.e. joint tenancy) may be intended to ensure



the smooth transmission of property, while nominations and insurance contracts are intended to secure payments by a third party to a nominated person.

The legal system knows also the *donatio mortis causa*, that is a gift made in contemplation of death. This gift does not have to comply with the formalities required either for Wills or for the transfer of property during the donor's lifetime. It does, however, have characteristics of both types of transactions. It is an act *inter vivos* by which the donee is to have the absolute title to the subject of the gift not at once but if the donor dies.

In Scotland, gifts *inter vivos* to an heir prior to death are admitted. These gifts not set off against an heir's inheritance under a Will, unless the Will specifies to the contrary.

### **3.3.3. Are conditions for validity of wills and other dispositions of property upon death governed by general civil law rules or by specific SL rules?**

In England and Wales the requirements for ensuring the validity of a Will are governed by specific articles of the Wills Act 1837 which focus specifically on the conditions for validity of Will.

In Northern Ireland the requirements for ensuring the validity of a Will are governed by specific articles of The Wills and Administration Proceedings (Northern Ireland) Order 1994.

In Scotland the requirements for ensuring the validity of a Will are governed by specific articles of the Requirements of Writing (Scotland) Act 1995.

### **3.3.4. Are succession interests of certain family member protected regardless of the deceased's disposition or other agreement? If so, who are those family members, against which dispositions and under what conditions?**

In England and Wales there are no restrictions on the freedom to dispose of property upon death, but specified family members and persons maintained by the deceased may apply to the court for an award of financial provision from the estate (Inheritance Provision for Family and Dependents Act 1975<sup>11</sup>). If the testator dies, the wife or husband of the deceased, or one of the children of the deceased, or any other person who was maintained by the deceased totally or only in part, may ask to the Court for the payment of an annuity or indemnity, or for the transfer of a property, arguing that the testamentary dispositions - or the rules applied to the succession - does not guarantee a sufficient economic sustenance.

In Northern Ireland there are no restrictions on the freedom to dispose of property upon death, but there may be restrictions attaching to the property (i.e. if property is held as Joint Tenants, it passes automatically to the surviving Joint Tenant).

Also in Scotland there are no restrictions on the freedom to dispose of property upon death, but it is possible for a child or surviving spouse (or civil partner) to claim legal rights from moveable estate on the death of a parent or a spouse (or civil partner) even where the deceased left a Will. Children have a right to share one third of the deceased's moveable estate, if there is a surviving spouse or civil partner or one-half if there is no surviving spouse or civil partner. A surviving spouse or civil partner has a right to one third of the deceased's moveable estate, if there are children or one-half if there are none.

### **3.3.5. Cross-border issues.**

#### **3.3.5.1. What are the experiences in application of the Succession Regulation 650/2012 in your country?**

The Succession Regulation 650/2012 is not applicable in UK.

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<sup>11</sup> <http://www.legislation.gov.uk/ukpga/1975/63> (15.5.2019).

**3.3.5.2. Are there any problems with the scope of application?**

The Succession Regulation 650/2012 is not applicable in UK.

**3.3.5.3. How are the rules on jurisdiction applied? In particular, determining the habitual residence and applying the rules on prorogation of jurisdiction? Did the authorities in your country had experience with declining the jurisdiction under Article 6 or accepting jurisdiction based on Article 7?**

The Succession Regulation 650/2012 is not applicable in UK.

**3.3.5.4. Are there any problems with determining the applicable law? In particular, regarding the intestate succession and wills and succession agreements? What are the experiences with choosing the applicable law?**

The Succession Regulation 650/2012 is not applicable in UK.

**3.3.5.5. What issues arise regarding the recognition and enforcement? Has there been any public policy invoked or relied on by the parties or the court?**

The Succession Regulation 650/2012 is not applicable in UK.

**3.3.5.6. How is issuing and relying on the Certificate of Succession operating in your country?**

The Succession Regulation 650/2012 is not applicable in UK.

**3.3.5.7. Are there any national rules on international jurisdiction and applicable (besides the Succession Regulation) concerning the succession in your country?**

The English private international law is not codified. In UK, the invested Court has the competence to decide in succession matter in the case of a testator who was in fact domiciled in this country. The Court must follow the doctrine of referral developed over hundreds of years by English ("precedent") jurisprudence, taking into consideration the sentences from the "Court of Appeal" or "House of Lords", as well as the texts written in this field by the experts and academics.

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## Links

- <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/bulletins/marriagesinenglandandwalesprovisional/2015>
- <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/bulletins/marriagesinenglandandwalesprovisional/2016>
- <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/bulletins/civilpartnershipsinenglandandwales/2017>
- <https://www.nrscotland.gov.uk/files//statistics/rgar/2017/rgar17-corrected-08-04-19.pdf>
- <https://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/vital-events/general-publications/births-deaths-and-other-vital-events-quarterly-figures>
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## PERSONALIZED SOLUTION IN EUROPEAN FAMILY AND SUCCESSION LAW

PSEFS, an acronym that stands for “Personalized Solution in European Family and Succession Law”, is a project co-funded by the European Union’s Justice Programme (2014-2020). It is focused on three EU regulations which deal with jurisdiction, applicable law and the recognition and enforcement of decisions related to property issues arising within a cross-border family: matrimonial property, registered partnership property and succession. The project is intended to raise awareness of the new regulations, in particular their specific mechanisms which are aimed at securing more legal certainty to transnational families when it comes to their property relations. Further activities relate to collecting statistical data and law reports for the Member States, creation of the taxonomy of families, and setting-up of the Atlas summarizing the legal regulation and identifying discriminatory provisions or practices. The important outcomes of the project are hands-on model documents and accompanying material for effective and inclusive implementation of the legal standards.

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*Co-funded by the Justice Programme of the European Union (2014-2020). The content of this e-book represents the views of the authors only and is their responsibility. The European Commission does not accept any responsibility for the use that may be made of the information it contains.*

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