

LEGAL SEPARATION BETWEEN THE LEGAL COMMUNITY AND LIQUIDATION BETWEEN THE SPOUSES ACORDING TO THE CIVIL CODE

Carmen Teodora Popa

*Law and Administrative Sciences Department, Law Faculty, University of Oradea, Oradea, Romania
bnppopacarmen@gmail.com*

Abstract: Due to its cessation the community legal goods are validated by an official notary or by court order. If the regime ceases community goods by divorce, former spouses remain owners of the common property until establishing of the share for each. If the community regime is ceased by the death of a spouse, liquidation is made between surviving spouses and heirs of the deceased spouse. During community liquidation, each spouse takes its own assets and then separation of assets will take place. This paper examines the legal community liquidation and division between spouses and former spouses upon termination community through divorce and death in the light of the current civil code regulations and changes to the rules of the old family code.

Keywords: *Legal community, matrimonial regime, ex-spouses, divorce, community liquidation, division*

JEL classification: K0, K3, M0,

1. Matrimonial regime of legal community - notion and regulatory

Currently, the legal community matrimonial regime is regulated by the Civil Code which entered into force on 1st of October 2011 and was a response to long-standing expectations of the Romanian society in terms of property relations between spouses. Until 01.10.2011, the scheme was regulated by the Family Code, repealed with the entry into force of the new Civil Code.

The old regulation of family law community of property regime consecrated as a single, legally binding, and no matrimonial³⁰ conventions were admitted. The doctrine of the old regulation was a rigid, constraining, without any alternative³¹.

The Civil Code in force introduces a whole new regulatory and innovative regulation, flexible and adaptable to the wishes of spouses, offering them the possibility to choose the matrimonial property regime, establishing the principle of the freedom of the choice of matrimonial regime. The matrimonial regime choice is the consequence of the new visions of the legislature over economic relations between spouses, harmonised with European norms.

Thus, according to art. 312 of the Civil Code, the spouses and future spouses have

³⁰ I.P. Filipescu, *Tratat de dreptul familiei*, Editura All, București, 1998, p.46; I. Albu, *Dreptul familiei*, Editura Didactică și Pedagogică, București, 1975, p.119.

³¹ Al Bacaci, *Considerații în legătură cu regimul matrimonial actual*, în *Dreptul* nr.4/2001, p.92.

the option of opting for one of the following matrimonial regimens³²:

- ❑ legal community;
- ❑ division of goods;
- ❑ conventional community.

Thus, a legal regime is established - a community property regime and two types of conventional regimes - the separation of property regime and the regime of conventional community.

The community property regime, with some modifications remains the legal regime, but is flexible and shall be applied only in cases in which the spouses or future spouses have not opted for another double matrimonial regime by matrimonial convention.

Finally, whenever the spouses do not conclude a matrimonial convention and do not choose another regime of matrimonial property relation, it shall be governed by the rules of Community law. In our current law, this is the **matrimonial property regime**.

The legal regime of community of property belonging to spouses is regulated in art. 339-359 of the Civil Code.

2. The goods of the spouses

As regards to the goods, the spouses have two categories: the common goods and the own personal goods³³. As regards to the debts, the spouses just have two categories of debt: the common and the own debts.

Article 339 of the Civil Code recognises the Community rule of all assets acquired during the community laws, by either of the spouses, on the date of their acquisition.

With article. 343 there is no need to prove the quality of common goods, the legislator establishes a presumption for all assets acquired during the community³⁴. By way of exception, in accordance with article 340 of the Civil Code, are not common but goods of each spouse:

- a) assets acquired by inheritance or donation, except to when the one that disposed them has provided expressly that they will be common;
- b) goods for personal use;
- c) goods destined for one of the spouses to exercise the profession, if there are elements of a trade which is part of the community of property;
- d) economic rights of intellectual property over personal creations and distinctive recorded signs;
- e) assets acquired as prize, reward or scientific or literary manuscripts, sketches and artistic projects, inventions and other such goods;
- f) insurance and indemnity compensation for any moral or material injury brought to one of the spouses;
- g) goods, money or any values that replace an asset, as well as the property acquired in exchange;
- h) their own assets.

³² C. Popa, *Drept civil. Succesiuni*, Editura Universității din Oradea, 2012, p. 64.

³³ T. Bodoaşcă, *Unele opinii în legătură cu bunurile comune ale soților dobândite în timpul căsătoriei, în lumina noului Cod civil*, în *Dreptul* nr.10/2011, p. 84-95.

³⁴ Adrian Alexandru Banciu, *Raporturile patrimoniale dintre soți potrivit Noului Cod civil*, Editura Hamangiu, 2011, p. 100.

To qualify a common good, the effective contribution of each spouse to the acquisition is not a essential, since this contribution is presumed by the law, by the very fact of setting up the legal community.

Direct or indirect contribution of each spouse is relevant only as soon as the question of determining shares parts that is appropriate to each spouse, and to the division of the common property.

Unlike the old regulations³⁵, art. 339 Civil code no longer is considering the acquisition of the property during the marriage, but during "the legal regime of the community". This is explained by the fact that, although the legal community of goods has the vocation to apply throughout the duration of the marriage, it is possible that over time its existence may not always coincide with the duration of the marriage. Thus, it is possible that spouses amend the matrimonial property regime during marriage and opt for a conventional regime.

In relation to assets acquired by spouses during their separation in fact remains the solution dedicated to the doctrine and in jurisprudence, in the sense that these are common goods³⁶. However, the separation of the spouses shows concern with regard to the contribution of each spouse to the acquisition of joint property. In this respect, should be borne in mind art. 385 of the civil Code, which provides that either spouse or both of them together, can ask for divorce Court to certify that the matrimonial property regime ceased from date of separation in fact.

3. Termination and liquidation of the legal community

The legal institution of the liquidation of the community was introduced with the adoption of the present Civil code and is not being regulated by law. It is important to note that the rules concerning the termination and liquidation of the legal community of the Civil code applies only if a divorce occurred after the date of entry into force of the Civil code or if a spouse's death occurred after that date.

Matrimonial property regime of the legal community shall cease through:

- death of one or both spouses
- invalidity or cancellation of marriage
- divorce
- invalidity of marriage or pronouncement of cancelation of marriage
- its change during marriage

Under art. 355 paragraph 1 of the New Civil Code, upon the termination of the community, it must be validated by court order or notarial authentic document. Until the completion of the liquidation, the assets of both subsists and in respect of the good and the obligations.

In case of termination of the marriage by the death of one of the spouses, the cessation of the legal community will take place at the time of death of the person. The legal community expiry date coincides with the time of death of the person, which is also the opening date of the inheritance. The termination operates according to the law, even if it has not yet operated the winding-up of the

³⁵ Under the old Code of the family, it was a common good if it was acquired by either spouse during the marriage and was not one of the categories of personal property provided that such art. 31 C.fam.

³⁶ Cristian Mareş, *Dreptul familiei*, ediția 2, Editura C.H. Beck, București, 2015, p. 10.

community. Liquidation of the community is a separate legal entity which does not affect the existence of the matrimonial property regime.

Thus, the surviving spouse, whether or not he/she accepted the inheritance of the deceased, will complete the Act of liquidation of the community with the spouse's heirs. The liquidation of the community has to have an authentic form. If the only heir of the deceased is the surviving spouse, the notice of liquidation will take the form of a unilateral act (Declaration) stating the share of contribution to the acquisition of joint property. Share for each spouse from the common goods shall be determined in the light of the contribution that each had during the marriage to the acquisition of joint property. The obligations of the deceased spouse are divided between heirs in proportion to their shares from inheritance.

The Act of liquidation of the legal community shall be communicated by the public notary of the Register of matrimonial regimes, for information purposes and to the other registers provided for by law, depending on the asset: the Land Registry for real estate and to the Electronic Archive of Pledges and the Commercial Register for movables³⁷.

In the case of the dissolution of marriage by divorce, cessation of the legal community regime is taking place at the time of the introduction of a divorce action, not at the time of final judgment of divorce or at the time of issue of the certificate of divorce by the public notary or the civil status officer. We consider it opportune this change in relation to the old regulation where the community of property ceased at the time of the dissolution of the marriage, that is, the date on which the divorce judgment was pronounced and remained irrevocable³⁸.

As a result of divorce, the former spouses remain co-owners of property in common until establishing share attributed of each through a document of liquidation. In the old regulation of the family law, divorce proceedings turned into coproperty and the spouses were to establish quotas of contribution relating to assets acquired during the marriage.

Under art. 357 Civil code, in the context of the community, each of the spouses takes on his or her own belongings, after which it will proceed to the division of common property and the common obligations³⁹⁴⁰. To this end, it first determines the share of each of the spouse, based on his/her contribution for both the acquisition of and common obligations.

Therefore, the criterion used in the context of the community of goods is the criterion of the contribution of each spouse to the acquisition of joint property. Until proven otherwise, it shall be presumed that the spouses had an equal contribution. The community will also include the debts of the common goods and the spouses are responsible with the common goods.

If the liquidation of legal community is by court order, the court is obliged to establish, based on the submissions of the parties and the evidence adduced in the case, the contribution of each spouse to the acquisition of common goods, because on the basis of that contribution will establish quotas that the parties will

³⁷ Uniunea Națională a Notarilor publici din România, *Codul civil al României. Îndreptar notarial*, Editura Monitorul Oficial, p.125.

³⁸ Alexandru Bacaci, Viorica-Claudia Dumitrache, Codruța Hăgeanu, *Dreptul familiei*, ediția 4, Editura All Beck, București, 2005, p.154

³⁹ A.A. Banciu, op.cit., p.117.

have to share the goods.

Jurisprudence and doctrine have identified a number of criteria that can be considered when setting quotas contribution to the acquisition of joint property of spouses:

- contribution rates are set based on all of their common goods, and not for goods seen as isolated;
- of the evidence in question may result in practice, different rates of contribution to the acquisition of joint property of spouses, the difference can go up to a 100% quota for a spouse and 0% for the other spouse;
- the contribution rate of the spouses is unique to all common goods, unable to be establish differentiated for certain categories of goods;
- for setting quotas can be considered a number of factors, such as income each spouse, the real work of each spouse in the household and raising children, separation fact of spouses and the single contribution of one of them, during separation, to the acquisition of common goods⁴⁰.

If the marriage is null or annulled, and it appears that both spouses acted in bad faith in marriage, marriage is considered absent, which inevitably attracts the lack of a matrimonial community.

In case of termination of the legal community as a result of the finding or declaration of invalidity of marriage in which at least one of the spouses was in good faith, the same rules will apply as at a dissolution of marriage through divorce. In this sense, art. 304 para. 2 Civil code provides that in the case of putative marriage between former spouses property relations are subject to the provisions relating to similarity through divorce. The date of termination of the community in this hypothesis is the date of the annulment action.

In case of termination of the legal community through regime change, the date of termination of the community will be the date of the end of formalities required by law for publicizing the convention through which is altered the matrimonial regime. Thus, spouses have the option after at least one year after the conclusion of the marriage, to change the existing matrimonial property regime with another matrimonial regime notarized by notarial act.

4. The division between the former spouses

After the liquidation of the community, the public notary or court shall proceed to sharing common assets.

According to art. 670 Civil code, division of property between spouses can be made by mutual consent or Court decision.

The object of division is made by all existent common goods at the moment of division⁴¹.

The division of common property is made in nature, in proportion to the share of each co-owner. If the property is indivisible is not shareable or in nature, the division will be in one of the following ways:

- a) the entire assignment, in exchange for the benefit of one amount of money in favor of one owner or more owners, upon their request;

⁴⁰ G.C. Frentiu, în *Noul Cod civil. Comentarii, doctrină și jurisprudență*, vol. I, Editura Hamangiu, București, 2012;

⁴¹ Lucia Irinescu, *Curs de dreptul familiei*, Editura Hamangiu, București, 2015, p. 101

b) sale of the property as established by co-owners or, in case of disagreement at public auction, under the law and price distribution by co-owners in proportion to the share of each;

b) sale of the property as established by co-owners or, in case of disagreement at public auction, under the law and price distribution by co-owners in proportion to the share of each;

The action of partition is imprescriptible and the competence lies with the Court (District Court) in whose district the property is located, if the goods contain shareable property or if the goods are shareable or are only movable assets.

The act of sharing voluntarily or the decisions concerning separation is constitutive of rights and each co-owner is the exclusive owner of the goods or amounts allocated only as of the date fixed in the division, but not earlier than the closing date of the act if partition is voluntarily or where applicable, the date of the final judgment.

If the goods are buildings, the act of voluntary sharing is made in an authentic form and is registered with a constitutive effect in the Registry of Land.

Bibliography

1. Albu, I., (1975) *Dreptul familiei*, Editura Didactică și Pedagogică, Bucharest;
2. Bacaci, Al., *Considerații în legătură cu regimul matrimonial actual*, în *Dreptul* nr.4/2001;
3. Banciu, A.A., (2011) *Raporturile patrimoniale dintre soți potrivit Noului Cod civil*, Editura Hamangiu;
4. Bacaci, Al., Dumitrache, V.C., Hăgeanu, C., (2005) *Dreptul familiei*, ediția 4, Editura All Beck, Bucharest;
5. Bodoașcă, T., *Unele opinii în legătură cu bunurile comune ale soților dobândite în timpul căsătoriei, în lumina noului Cod civil*, în *Dreptul* nr.10/2011;
6. Filipescu, I.P., *Tratat de dreptul familiei*, Editura All, București, 1998;
7. Frentiu, G.C., (2012) în *Noul Cod civil. Comentarii, doctrină și jurisprudență*, vol. I, Editura Hamangiu, Bucharest;
8. Irinescu, L., (2015) *Curs de dreptul familiei*, Editura Hamangiu, Bucharest;
9. Mareș, C., (2015) *Dreptul familiei*, ediția 2, Editura C.H. Beck, Bucharest;
10. Popa, C., (2012) *Drept civil. Succesiuni*, Editura Universității din Oradea;
11. Uniunea Națională a Notarilor publici din România, *Codul civil al României. Îndreptar notarial*, Editura Monitorul Oficial;