

## **Overview about the property regime of spouses in the German legal system**

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### **Summary:**

*Property relations of spouses in contemporary comparative law are regulated according to any recognized legal regimes (the legal regime of joint property, the legal regime of the conditional joint property, the legal regime of separate property), or according to alternative regimes of contracted spouses property. Which of these property regimes will be implemented depends on whether the spouses in the contract have regulated their property relations. If the spouses have not signed a contract, then by default it will apply the legal property regime.*

*In comparative law there are several models of modern property regimes of spouses. These models have reformed property regimes being inspired by the development of new ideas, especially the idea of equality between spouses that were necessarily taken into account by legislators, adapting to specific situations the right of property relations of spouses as well as to the development and general social transformation.*

*In the countries of the socialist camp, in which the Republic of Macedonia was a part, the property regime of spouses was based on certain principles that were characteristic of the political concept of social order. Although decades have passed from the abandonment of the socialist system, however in this area we do not have necessary reforms, in terms of harmonizing property regime of spouses with property regimes of spouses in European countries. Since, the regulation of property relations of spouses in the legal system of the Republic of Macedonia leaves much to be desired, in this context, this paper aims to address the regulation of property relations of spouses in the light of one of the most important civil codes, European German Civic Code.*

**Key words:** *Spouses, property relations, legal regime, the regime of contract*

## Introduction

The most important source of German Family Law is the German Civic Code (Bürgerliches Gesetzbuch-BGB), which was approved in 1896, and entered into force in 1900. The provisions which regulate family relations are placed in the fourth book of the BGB, between provisions of the Law of Obligations and the Law of Properties. This is because the German legislator considers that the family relationships also contain the elements of property-legal-binding elements, so it is difficult to establish a strict boundary between them.

The German Civil Code property regulates relations of spouses in details in a considerable number of 200 articles.

Original concept for the regulation of property relations of spouses with the provisions of the BGB, was joint management (Verwaltungsgemeinschaft). Otherwise, this was a set a combination of separate property regime of spouses and its common management. In fact, the property of spouses still remains divided, but the husband was ex lege entitled with his wife to jointly administer the property of the wife. (Mitverwaltung).<sup>1</sup> With the Law on gender equality between men and women from (1957), such property regime, became invalid, because it was openly against the idea of equality between men and women, so, since 1958 it was replaced with the legal regime added profit (Zugewingemeinschaft).<sup>2</sup>

BGB, as well as most contemporary legal systems distinguish between legal property regime and the contractor. Thus, the legal provisions regulates the three property regimes:

- The regime of community of added profit (legal procedure)

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<sup>1</sup>Ziegler, Eberhard-Mäuerle, Heinz-Karl, Familienrecht, Baden Baden, 2004, pg. 68

<sup>2</sup>Gesetz über die Gleichberechtigung von Mann und Frau auf dem Gebiete des bürgerlichen Rechts (Gleichberechtigungsgesetz - GleichberG) Vom 18. Juni 1957, Zuletzt geändert durch Art. 127 Erstes G über die Bereinigung von BundesR im Zuständigkeitsbereich des BMJ vom 19. 04. 2006 (BGBl. I S. 866)

- The regime of community of goods (contractor-subsidary regime) and
- The regime of separation of goods (contractor-subsidary regime).<sup>3</sup>

As a legal regime in the German right is supported the regime of community added profit (Zugewingemeinschaft), which according to its legal concept, is nothing other than separate property regime combined with a heat value of the property created during duration of marriage.<sup>4</sup>

BGB grants spouses the right with contract to avoid legal regime defined (Zugewingemeinschaft), or the contract to modify subsidiary desired mode. Spouses with a contract may agree to two possible alternatives. They may agree that their property regime to be community property (Gütergemeinschaft), or that their property remains separate (Gütertrennung).<sup>5</sup>

### **The legal regime of community of profit -added regime (Zugewinnngemeinschaft)**

As a result of the fact that German society accepted the idea of equality between men and women, it was created the concept of legal regime of the community of profit-added regime between spouses (Zugewinnngemeinschaft).<sup>6</sup> German spouses will undergo This procedure only if otherwise defined by contract.

The regime of community of profit added regime during marriage functions as a separate property regime. In fact, although named as a community, however, the duration of marriage, property of man and woman are not considered joint property of spouses. Each of the spouses still holds property from before as well as the wealth he gains during the marriage. The nature of the legal regime of community of profit added regime is considered only after the cessation of marriage. After termination of marriage, it appears as a community within which values are created (Wertschöpfungsgemeinschaft),<sup>7</sup> which

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<sup>3</sup>Rauscher Thomas, Familienrecht, Heidelberg, 2001, pg. 207

<sup>4</sup>Diederichsen, Uwe, Vermögenauseinandersetzung bei der Ehescheidung, Göttingen, 1995, pg.1

<sup>5</sup>BGB-Bürgerlicher Gesetzbuch, Neuste Fassung, Köln, 2003, art. 1408; Gläser-Roßmann, Susanne, Das familiengerichtliche Verfahren, München, 2002, pg.88

<sup>6</sup>Termi - Zugewingemeinschaft - translated as added profit community, but from the content of this institute it can be seen that this is not the property community of spouses

<sup>7</sup>BGB-Bürgerlicher Gesetzbuch, Neuste Fassung, Köln, 2003, art. 1363, abs. 2

only in that case are calculated and divided between the spouses.

For the duration of wedlock, spouses, independently from each other manage their wealth in dispose, but their rights are limited, so that none may take all legal work associated with property, or use household that belong to both partners.<sup>8</sup> If one spouse without the consent of the other spouse disposes with the property of the other spouse, connecting legal work and charges the others property, he could fulfill the obligation to obtain property through legal work only if after the other spouse consent. Even with common household items, each spouse can dispose only in cases when there is consent of the other spouse. Otherwise, when the spouse due to illness or absence is prevented from declaring regarding disposition of common household items, the family court at the request of the healthy spouse or present will replace the spouse's consent.<sup>9</sup>

The notion, " zugewinn, or increase the profit is determined by provisions of the BGB. In fact this is the amount which represents the difference between the initial and final property of each spouses. So, after the cessation of marriage it is carried out the comparison of the initial value, respectively, the value of the property at the time of marriage (anfangsvermögen), and the final, respectively, the value of property after termination of marriage (Endvermögen).<sup>10</sup>

The regime of profit added community can be dissolved by the death of one of the spouses<sup>11</sup>, or in other cases stipulated by law. After termination of the marriage under any basis, the values generated together are divided between the spouses, or the effect of profit added regime is realized (Zugewinnngemeinschaft).

If during the marriage property values has increased, then the added profit (zugewinn) will be equal, so that the spouse whose wealth has increased during marriage is obliged to provide to the other spouse's half of his profit.<sup>12</sup>

The husband, whose wealth has not increased may apply for equalization of values (zugewinnausgleich), unless there are data from the register of state property to spouses from the first day to last day of wedlock.<sup>13</sup>

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<sup>8</sup>Ibidem, art. 1363, abs. 2; Schlüter Wilfried, BGB-Familienrecht, Heidelberg, 2003, pg.73

<sup>9</sup>BGB-Bürgerlicher Gesetzbuch, Neuste Fassung, Köln, 2003, art. 1365, 1369

<sup>10</sup>Ibidem , art. 1373, 1374, 1375

<sup>11</sup>Ibidem, art. 1371, 1372

<sup>12</sup>Ibidem, art. 1373, abs.1, 2, 3, 4

<sup>13</sup>Ibidem, art. 1377, abs. 2

## 2. Subsidiary Regimes

Because it is unlikely that the legal regime of profit added community earnings (Zugewinnngemeinschaft) is appropriate for the regulation of property relations of all couples, and for all life situations, taking into account the specifics of each marital, the civil German code has created the possibility of contracting property regime, which corresponds spouses claim resembles to their situation. So, besides the legal property regime of the community added profit (Zugewinnngemeinschaft), which applies only when the spouses have not signed a contract to regulate their property relations, they are can contract subsidiary alternative regimes, such as : community contracting Goods Regime (Gütergemeinschaft) and contractual regime of allocation of goods (Gütertrennung).<sup>14</sup>

### 2.1. Regime of Community Contracting Goods Regime (Gütergemeinschaft)

Common property regime, ie, joint ownership (gesamthandsgemeinschaft), as a form for union of joint properties between spouses in German positive law, can only be created when the spouses enter into a contract for creation of the community of goods (gütergemeinschaft).<sup>15</sup>

The Marriage Contract (ehevertrag) by which the spouses define the regime of community property assets in marriage shall be entered with the consent of both spouses declared explicitly in their presence, and should be verified by a notary public.<sup>16</sup> In case when spouses contract regime of community of goods, the property of the men and the women join in the common property (Gesamtgut), administered by the husband, wife or together.<sup>17</sup>

Items that constitute the common property of spouses are jointly owned by the spouses. Their right to property extends to over all things, in fact, they have their

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<sup>14</sup>BGB-Bürgerlicher Gesetzbuch, Neuste Fassung, Köln, 2003, art. 1415-1518 and art. 1414

<sup>15</sup>Walter Gerhard, Eigentumerverb in der ehe, Berlin, 1981, pg. 8

<sup>16</sup>BGB-Bürgerlicher Gesetzbuch, Neuste Fassung, Köln, 2003, art. 1410

<sup>17</sup>Ibidem, art.1416, abs. 1; Schlüter Wilfried, BGB-Familienrecht, Heidelberg, 2003, pg.111

indefinite share of any of the items in common ownership, and their transfer from one spouse to another does not need to be done through legal procedure. The joint property of spouses includes items that spouses jointly earned during marriage, either by inheritance, gift, or any other form. If the object that is part of the common property is registered in the public record, or should be recorded, then each spouse is entitled to ask the other influence in the public records book.<sup>18</sup>

From the principle on the existence of community property, or from joint ownership of spouses there are exceptions. A part of property values remain personal property of spouses in the form of the so-called separate property (sondergut) and reservoir property (vorbehaltsgut).<sup>19</sup>

In the joint property of spouses separate property is not included, (sondergut). According to German law in the particular property enter items that can not be transferred by law. Each spouse administers his/her separate property independently. The provision mentioned is relatively new, since up to half of last century, it the man only administered the particular property. This innovation has come as a result of full implementation of the principle of modern individualism, which is manifested by naming the property of husband and wife as property of two entities who have equal rights and obligations.

From the joint property of spouses it is exempted the property earmarked for one of the spouse (vorbehaltsgut). In the reserved property are included property values that through marriage contract were declared as such, as well as inherited property, or the one granted to one of the spouses by third persons, when the last will of the decedent or the granter has been to consider it as such. In the reserved property are included property values earned as replacement of a damaged item, when the damaged item was part of the reserved property.<sup>20</sup>

With the items from reserved property manages the spouse on behalf of his own. The fact that certain items are part of the reserved property the third persons will be notified by the Registry records of ownership, if the spouse is registered in the registry.<sup>21</sup>

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<sup>18</sup> Schreiber Klaus, Sachenrecht, Bochum, 2003, pg.81

<sup>19</sup> BGB-Bürgerlicher Gesetzbuch, Neuste Fassung, Köln, 2003, 1417, 1418

<sup>20</sup> Ibidem, art. art. 1418

<sup>21</sup> Ibidem art. 1418, abs. 3; art. 1412, abs. 1

While spouses independently administer separate property but on behalf of mutual account, in the joint property the spouses administer property independently, but on their own account.

The Institute of reserved property until 1965 has been well known in French law, too. However, despite the same name (biens Réserves) the content has not been identical. The term Biens Réserves implied the property that the woman has earned from her revenue, and managed and disposed of it by her own, while the rest is managed and disposed by the man.<sup>22</sup>

The joint property of spouses included items that had their spouses disposed at the time of marriage, and those that were earned during wedlock. Items that the spouses had at the time of marriage are included in the common property according to the power of the law (Universalsukzession), without having to transfer through the transaction.<sup>23</sup> The object of the joint property of spouses are all items that are convertible into cash, such as real estate (land, residential buildings, shops) movable items (banknotes, coins, various collections, ornaments, clocks, works art, race horses, bicycles, motorcycles, cars, sports equipment), and all the household objects that are created by the spouses during marital duration.<sup>24</sup>

### **2.1.1. Management with Common Property**

Both spouse administer with the common property jointly and by agreement. Spouses have the legal right by marriage contract to assign the common property management each other. If the spouses in marriage contract fail to agree one of them to manage with the common property, in that situation they can administer and manage together with that property.<sup>25</sup>

If with the common property manages one of the spouses, he is obliged to inform the spouse entitled to the course of administration, or for any factual or legal action

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<sup>22</sup>Code civil, Modifié par la Loi n°65-570 du 13 juillet 1965 - art. 1 () JORF 14 juillet 1965 en vigueur le 1er février 1966, art. 216, 226

<sup>23</sup>BGB-Bürgerlicher Gesetzbuch, Neuste Fassung, Köln, 2003, art. 1416, abs. .2

<sup>24</sup>Fredenburg -Schöppe Pedro; Schwolow Peter, Formular Sammlung, Familienrecht, Heidelberg, 2001, fq.65

<sup>25</sup>BGB-Bürgerlicher Gesetzbuch, Neuste Fassung, Köln, 2003,art. 1421

regarding the administration of things in common ownership.<sup>26</sup> The spouse who manages with the common property is entitled to take possession of the items, dispose of them and on behalf of his name to contract legal work with them. The other spouse is not personally liable by management actions taken by the spouse. However, despite the existence of authorization for disposal when it comes to dispose of immovable or ships that are part of joint ownership, the authorized spouse has the right to dispose of these items, respectively to contract legal work associated with these items, only with the consent of the other spouse.<sup>27</sup>

In situations where legal work, which is endangered by the effects of delay, can produce legal effects, only if it's contracted with the consent of other spouse, while the other spouse due to illness or overseas travel is deprived of the opportunity to give consent, upon a request of present spouse the court has the right to replace the consent of the spouse deprived of the opportunity to consent.<sup>28</sup>

The spouse, who does not administer with the common property, can bind legal work associated with the common property only if it has provided the consent of the other spouse. Otherwise, the other spouse has the right to revoke the property alienated by the spouse without the prior consent of the spouse.<sup>29</sup>

If the spouses through the contracts have agreed to administer with the common property, they can hold things in the possession together and only jointly dispose of them.<sup>30</sup>

In principle, the common property represents the main value of the marriage, from which can claim creditors of the husband and the wife. However, this does not apply without exception.<sup>31</sup> Thus, if the common property is jointly administered by spouses, then without exceptions, creditors and others can claim and get requirements from joint ownership. Meanwhile, if joint ownership is managed by one of the spouses, creditors can be provided from the means of common ownership, whether before or during the

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<sup>26</sup>Schlüter Wilfried, situation, pg.113

<sup>27</sup>BGB-Bürgerlicher Gesetzbuch, Neuste Fassung, Köln, 2003, art. 1422, 1424

<sup>28</sup>Ibidem, art. 1426

<sup>29</sup>Lüderitz Alexander, Familienrecht, Munchen, 1999, fq.166

<sup>30</sup>BGB-Bürgerlicher Gesetzbuch, Neuste Fassung, Köln, 2003, art. 1450, abs.1

<sup>31</sup>Schlüter Wilfried, vep e cit, fq.114



duration of marriage the common property regime have agreed so, and if with this action in this direction do not violate the law.<sup>32</sup>

There will be no liability by means of joint ownership, if the spouse who has not administered with joint property, without the consent of the other spouse is obligated for the same by legal action.<sup>33</sup>

Spouses will personally respond via the special property (sondergut) and reserved assets (vorbehaltsgut) for personal obligations created by the legal action, as well as those established by law.<sup>34</sup>

### **2.1.2. Division of joint property**

Common Property regime of spouses in German Law ends in several ways. Thus, it may cease: a) with the contract of the spouses; b) with the final court decision, by which common ownership is retractable and is determined the application of the ownership divided regime for the future (1449, 1470); c) to dissolving of the marriage (with its declaration void, with divorce and the death of one of the spouses).<sup>35</sup>

If the marriage terminates by divorce, each spouse has the right to request to return property values that was transferred to the marriage when the marriage happened. As such are considered: the items that belonged to the spouse at the time of the creation of common property as well as items that spouse has earned through gifts or inheritance. The value of these items is determined by the real value they had at the moment they were transferred to the community.<sup>36</sup>

Spouses may agree by contract that after the death of one of the spouses, common property regimes to continue between the surviving spouse and joint heirs.<sup>37</sup> Such agreement regarding the extension of common property regimes are rarely applied in practice.<sup>38</sup>

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<sup>32</sup>BGB-Bürgerlicher Gesetzbuch, Neuste Fassung, Köln, 2003, art. 1460-1462, art. 1438-1440

<sup>33</sup>Ibidem, art. 1438

<sup>34</sup>Schlüter Wilfried, cited, pg. 114

<sup>35</sup>BGB-Bürgerlicher Gesetzbuch, Neuste Fassung, Köln, 2003, art. 1408, abs. 1; art. 1313-1318; art. 1478, abs. 1; art. 1482

<sup>36</sup>Ibidem, art. 1478, abs. 2, punkt. 1, 2; art. 1478, abs. 3

<sup>37</sup>Ibidem, art. 1483, abs. 1

<sup>38</sup>Henrich Dieter, Familienrecht, Fünfte Auflage, Berlin, 1995, pg. 131

## 2.2. Contractual regime of separation of property goods (Gütertrennung)

Contractual regime of separate property of spouses may be established by contract.<sup>39</sup> According to German law, the regime of separate property, except, may be created under the law. This occurs when the legal regime of community of added profit increases between spouses (Zugewinnngemeinschaft) with a final judicial decision is canceled prematurely. This regime is known as subsidiar legal regime.

BGB does not contain terms which would regulate the content of the separate property regime.<sup>40</sup> So on this particularly there are no legal property provisions. For the regime of separate property of spouses it is characteristic because in the property aspects the spouses are considered as unmarried, which means that the property of one and the other spouse remains divided and administered independently by each spouse.

With marriage in terms of property it does not change anything, the spouses keep for themselves the right of property on property values that have brought into the marriage, and those made during the duration of the marriage. Each of the spouses manages and disposes of its property independently.<sup>41</sup>

However, even the spouses that have chosen separate property regime in the property regime of their property in marriage need to bring a common life in marriage and family, such as, the obligation in terms of common household set up on moral and social norms. To realize their marriage unity and to meet their vital needs and their children needs, spouses with common means create a common household (over which they have the right of joint ownership and not joint property) and take all measures for the establishment and management of common households. Regarding this, among them are co-created reports even about the household items and other items, which are served in everyday life.<sup>42</sup>

Property contracting regime split between spouses ends with the termination of marriage, or when the spouses agree to contract in the future to apply a different regime

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<sup>39</sup>BGB-Bürgerlicher Gesetzbuch, Neuste Fassung, Köln, 2003, art. 1414

<sup>40</sup>Ziegler, Eberhard-Mäuerle, Heinz-Karl, Familienrecht, Baden Baden, 2004, fq.88

<sup>41</sup>Schlüter Wilfried, vep e cit, fq.107

<sup>42</sup>Vlassopoulos, Irene, Der eheliche hausrat im familien und erbrecht, Berlin 1983, fq.22

of property, eg regime of community property assets. If separate property regime ends, while their husbands are not specified in the contract for a new regime, it will be applied by default the legal regime of community of added profit (zugewinnngemeinschaft).<sup>43</sup>

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<sup>43</sup>Schlüter Wilfried, citated pg.107