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Statutory Marital Property Law *de lege lata* and *de lege ferenda*

1. Introduction

In the light of the turbulent changing and reorganisation of the Estonian private law during the last decade, family law has modestly remained in the background and has, apparently to the greatest extent when compared to the other branches of civil law, maintained its decades-old structures and forms.

The applicable Family Law Act[*1] entered into force on 1 January 1995. Its regulation method and prevalent ideology largely rely on the ESSR Marriage and Family Code of 1969[*2] — a fact not concealed by the authors of the Family Law Act of 1995.[*3]

When comparing the applicable Family Law Act of Estonia with the corresponding laws of different West European or American countries, then the general ideology of the Family Law Act of 1995 is not actually outdated or overly ignorant of today's forms of cohabitation. Rather, several structural solutions dating back to the Soviet period have been fairly progressive in their overall regulative content. Western countries have only within the last few decades come close to recognising certain approaches that have been taken for granted in communist and post-communist society for a long time, at least on the legislative level. For example, the Russian SFSR 18 December 1917 Decree on marriage, children and establishment of vital statistics registers stressed the equality of spouses, including their equal freedom to act in obtaining an income, and the equal treatment of children born of marriage and those born outside marriage. The so-called factual marriages were recognised as equal to registered marriages. In Germany, an equality law that granted married women greater rights than before (including a statutory marital property regime based on the equality of spouses instead of the usufructuary right of the husband) was passed only in 1957; but actual equality between spouses was achieved later by the adoption of further laws — the last regulation that provided for the

1 Perekonnaseadus (Family Law Act), adopted on 12.10.1994; entered into force 1.01.1995. – Riigi Teataja (The State Gazette) I 1994, 75, 1326; last amended: Riigi Teataja (The State Gazette) I 1997, 35, 538 (in Estonian).

2 Eesti NSV abielu- ja perekonnakoodeks (Estonian SSR Marriage and Family Code), adopted on 31.07.1969; entered into force 1.01.1970. – ENSV Teataja (The ESSR Gazette) 1969, 31, lisa; last amended: Riigi Teataja (The State Gazette) 1992, 11, 168 (in Estonian).

3 See E. Salumaa *et al*. Perekonnaseadus (kommentaar) (Family Law Act (Commentary)). – Juridica, 1995, No. 1, p. 2 *ff*. (in Estonian).

advantageous position of the husband (the adoption of the husband's family name as the marital name) was repealed only in 1993.*[4] Similarly, Dutch law waived only in 1957 its regulation concerning the status of a married wife which resembled more that of a minor or custodian than that of an equal partner.*[5]

Although the general concept of the Family Law Act of 1995 in the broadest sense also corresponds to the modern understanding of family relations, the fact that a number of problems have arisen from the aspect of practical application cannot be ignored. The main shortcoming of the present Family Law Act is its low degree of regulation. The Act contains a large number of declarative provisions, but frequently lacks specific private law bases for claims to enable a person court protection of his or her interests and rights. Parts of the Act are more like a compilation of programme positions and leave adjudicative bodies such a scope for decision that it is almost impossible to predict the outcome of a specific case from the provisions of law. The second direct need to review the Family Law Act of 1995 arises from the general reforms of civil law (including amendments to regulation of active legal capacity in the draft General Part of the Civil Code Act). Thirdly, in co-operation with different international organisations and family law jurists of other countries, the need has been revealed to pay more attention to internationally accepted and applied family law institutions and rights of action.*[6] The time seems ripe to go on a second round and thoroughly review the applicable family law.

Family law regulates the proprietary relations between persons mainly in two areas: the proprietary relations of spouses and the proprietary relations arising from the right of guardianship (including between parents and children). This paper focuses on the proprietary relations of spouses, and chiefly on the statutory marital property relationship. As marital relations characterise a remarkable part of subjects of private law, it can be said that marital property law affects the entire private law economic turnover to a certain extent. Also, the arrangement of proprietary relations of spouses has a most direct link to the law of obligations and the law of property, which in view of the current reforms in Estonia renders the subject of marital property law highly topical.

2. Role of marital property regimes in family law

The marital property regime or property relationship sets out the real right status of each spouse's entire property (including the matter of belonging of the items of property under the sole ownership of one spouse or in the joint ownership of spouses), the procedure for administration (use and disposal) of the property, and its possible restrictions in view of the other spouse's interests, liability to creditors who are third persons, as well as rules for division of property upon termination of the proprietary relationship.*[7] The objective of the marital property regime is — pursuant to the accentuation selected by the legislator — to balance the various, often conflicting interests: the personal interests of spouses *versus* general interests, the interests of the husband *versus* those of the wife; the interests of spouses *versus* those of third persons (creditors, successors). The world practice

4 See A. Lüderitz. Familienrecht. München: C.H. Beck'sche Verlagsbuchhandlung, 1999, p. 11, paragraph No. 28.

5 See M. J. A. van Mourik. Huwelijksvermogensrecht (Marital Property Law). Zwolle: W. E. J. Tjeenk Willink, 1994, p. 14.

6 Such recommendations and principles mainly arise from international conventions (European Convention on Human Rights, other UN or European Council conventions and recommendations, agreements of the *Commission International d'Etat Civil*, as well as agreements concluded in the framework of the Hague Conference on Private International Law). International co-operation in family law largely takes place today on the level of international private law harmonisation (mutual recognition of national acts, such as marriages or divorces, and court judgements concerning maintenance and curatorship of children, *etc.*). Other co-operation projects mainly concern ensuring the rights of children or other areas belonging to the field of constitutional law (equality of spouses in choosing the family name, *etc.*). In the area of the main topic of this paper — marital property law — only one known agreement has been concluded under the Hague Conference on Private International Law: Convention of 14 March 1978 on the law applicable to matrimonial property regimes, which Estonia has not joined.

7 Further to the provisions on marital property relationships, regulation of the obligation to maintain the family and the mutual right of representation of spouses also plays an important role in the proprietary relations of spouses. These norms are to be distinguished from the marital property regime, insofar as their content is not to define the real right status of property, but rather obligations under the law of obligations, concerning which property relations are irrelevant. These obligations are also of such importance from the viewpoint of the family as a whole that they should apply as preceptive norms to any arrangement of the proprietary relations of spouses, so that the possibility to deviate from these under a marital property contract would be quite limited.

knows a large number of marital property regimes, which can be broadly generalised into two basic models: separate property and joint property regimes. However, these do not occur in the pure form, because the interests of the society and of an individual require a combination of the elements of both models.*[8]

Within a legal order, marital property regimes divide into statutory property systems and those based on a marital property contract.*[9]

A statutory marital property relationship regulates the proprietary relations of spouses only pursuant to law, unless they have entered into a marital property contract in the required form or until the statutory marital property regime is not terminated on other grounds (*e.g.* by court judgement).

The statutory marital property relationship is the most important property regime, the role and spread of which in both Estonia and in foreign countries by far exceeds the role of all alternative marital property relationships or those created by a marital property contract.*[10] Although the relevant statistics are not available in Estonia*[11], it can be said that the vast majority of married couples do not enter into a marital property contract, which is why the statutory marital property relationship directly applies to the proprietary relations of the greatest number of married people. This requires that the statutory property system should be particularly elaborated and balanced, because it governs the relationships of people of most different proprietary positions.

3. Mutual proprietary rights created by statutory marital property law

In the post-World War II Estonian family law regulation*[12] the system of joint property of spouses has become so commonplace that its amendment or replacement by another regime regulating the proprietary relations of spouses has not even been discussed on a larger scale.The following part of the paper focuses on the problems related to the marital property regime established by the applicable law and provides an opinion on the ability of the regime to function.

3.1. Statutory marital property relationship *de lege lata*: joint property system

3.1.1. General

Pursuant to the applicable Family Law Act, the property acquired by spouses during marriage becomes the joint property of spouses, while property owned by a spouse prior to marriage remains his or her separate property.*[13] According to family law terminology, this is the limited community property or joint acquisition regime*[14], which as characteristic to community property relationships

8 See C. Hegnauer, P. Breitschmid. Grundriss des Eherechts. Bern: Stämpfli Verlag AG, 1993, p. 209, paragraph No. 22.03 *ff*.; G. Hohloch. Die Entwicklung des deutschen Familienrechts im europäischen und internationalen Zusammenhang. – Brennpunkte des Familienrechts. Berlin: Rechtspraxis, 1998, pp. 108, 143 (a review of statutory marital property regimes in European countries).

9 See also Family Law Act subsection 8 (2).

10 For instance, in the Netherlands marital property contracts are concluded in *ca* 25–30% of marriages. This is considered to be one of the highest rates in Europe. See M. J. A. van Mourik (Note 6), p. 75.

11 Information on concluded marital property contracts is available from the marital property register, but it should be kept in mind that registration of marital property contracts in the register is not mandatory with respect to validity of the contracts — the contract is entered in the register only at the request of a spouse. An entry in the marital property register is relevant for third parties (Family Law Act subsection 10 (6); Marital Property Register Act subsection 7 (2)). Summarised statistical data on the contracts entered in the marital property register are also not available, as the registrars are the land registries acting in county and city courts (Marital Property Register Act subsection 2 (1)) and there is no common database.

12 From 1 January 1941 the Russian SFSR Code of Marriage, Family and Guardianship Laws applied in the territory of Estonia, section 10 of which provided similarly to the later ESSR Marriage and Family Code of 1 January 1970 that property acquired by spouses during marriage is regarded as their joint property, while the property owned by the spouses prior to marriage remained their separate property.

13 Family Law Act subsection 14 (1), subsection 15 (1).

14 Limited community property in German: *beschränkte Gütergemeinschaft*; *Errungenschaftsgemeinschaft* or *Errungenschaftsbeteiligung*; in Dutch: *beperkte gemeenschap van goederen*.

entails a fairly strong proprietary bond between the spouses. Any community property relationship remarkably limits the spouses' economic freedom to act and thus greatly interferes with the personal sphere of spouses. Therefore, the question that needs to be answered first is whether the joining of proprietary rights enables to protect the rights of all parties concerned better than other possible legal structures do, and whether it thereby justifies the limitations characteristic to this property system.

Marital property systems creating joint property rights have been regarded as characteristic of the social nature of marriage — they correspond to the understanding of marital cohabitation as a social unit, which joins together both the personal and proprietary spheres of the spouses.*[15] The concept of community property directly relates to the notion that marriage is for life: having permanently linked their fates, spouses agree to incur each other's proprietary losses. This shows that community property as a marital property regime does not intend to create flexible and differentiated solutions for divorce or other cases of division of joint property, but is chiefly targeted at fixing the joint liability of spouses during marriage. The great divorce rate, however, forces one to consider the need to arrange the division of joint proprietary rights in an adequately efficient manner while having regard to the reasoned interests of both parties.

3.1.2. Scope and definition of the sphere of joint proprietary interests

Pursuant to the statutory marital property regime set out in the Family Law Act of 1995, almost all valuable property acquired during marriage becomes joint property.*[16] This also includes property acquired by a spouse on account of his or her separate property. Court practice too has largely relied on the grammatical interpretation method in this respect.*[17] According to court practice, the proceeds of an item acquired prior to marriage, which is separate property, is regarded as joint property; only when joint property is divided the court may declare a part of the joint property to be the separate property of a spouse, or to deviate from the equality of the shares of the spouses if joint property was acquired on account of the separate property of one spouse.*[18]

Against such a definition of joint property speaks the argument that simple replacement of an item belonging with separate property (such as a car) for another item of value (a sum of money corresponding to the market value of the car) means acquisition purely within the real right meaning, not in the economic meaning, and the property does not increase due to the transaction. This is why the items of value acquired on account of the separate property of spouses cannot be formalistically included in the sphere of joint proprietary rights of the spouses, and neither does it correspond to the society's perception of law. Such a property system significantly complicates the exercise of the collector's rights, because he cannot predict which items the court would assign to which spouse when joint property is divided. Pursuant to the Family Law Act of 1995, the entire property of a spouse related to economic activities (*e.g.* as a sole proprietor) is also regarded as belonging with joint property, insofar as it has been acquired during marriage. For example, a spouse running a car dealership should acquire the written permission of the other spouse for the sale of each car*[19], which may become an inhibiting factor to business, although the other spouse has essentially no interest in the business activities of the first spouse. On the contrary, the inclusion of one spouse's business-related property in joint property means a significant risk for the spouse who is not involved in the business, because if the economic situation impairs and property decreases, his or her share in the joint property also decreases. The possibility to regard property related to economic activities as the separate property of the spouse who runs a business exists in the form of the marital property contract, but as mentioned above, this possibility is not widely used. The marital property contract option cannot therefore be regarded as a sufficient means of hedging economic and other risks.

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15 Also see the preamble of the ESSR Marriage and Family Code (adopted on 31.07.1969): "The Soviet marriage and family legislation shall actively contribute to **the final clearance of family relations of economic considerations** /…/" (author's accentuation — K.K.).

16 Exceptions are provided in section 15 of the Family Law Act. These are property acquired during marriage as gift or by succession, as well as property acquired after the factual termination of conjugal relations, and personal effects.

17 See as a typical example the judgement of the Tartu Circuit Court of 5 May 1999 No. II-2-128/99 (a spouse exchanged the apartment owned by the spouse prior to marriage for contribution in a dwelling association — as the exchange took place after marriage, the circuit court regarded the contribution as the joint property of spouses). It is worth mentioning that the prevalent interpretation of the Marriage and Family Code applicable prior to entry into force of the Family Law Act was different despite the similar texts of section 20 of the earlier law and section 14 of the present Act. Money received from sale of separate property also remained the personal, *i.e.* separate property of one spouse. Also items acquired for money belonging as separate property to one of the spouses were regarded as the separate property of that spouse. See J. Ananjeva, E. Salumaa. Eesti NSV abielu- ja perekonnakoodeks: kommenteeritud väljaanne (Estonian SSR Marriage and Family Code: commented issue). Tallinn: Eesti Raamat, 1974, p. 39 (in Estonian).

18 Family Law Act subsection 19 (2) 3).

19 As cars are movables subject to registration — Family Law Act subsection 17 (4).

The court may, at its own discretion, deviate from the principle that property acquired prior to marriage is the separate property of spouses and property acquired during marriage is their joint property.*[20] Therefore, the division of property rights upon division of joint property is largely unpredictable until actual division. It is apparent that the existing statutory marital property law has no common and clear methodology to predict which part of property is to be divided as the joint property of spouses and which part is assigned to the sole ownership of one spouse upon division.

3.2. Mutual proprietary rights arising from the statutory marital property regime *de lege ferenda*

3.2.1. Overview of statutory marital property relationship provided in the draft law

The proprietary relationship set out in the draft law does not provide for the community property or joint property of spouses neither with regard to property acquired prior to marriage nor with regard to that acquired during marriage. Instead, the entire property of each spouse is regarded as separate throughout marriage (and the statutory proprietary relationship, respectively), which each spouse may freely use and dispose of at his or her own discretion. This so-called acquired property offset system would enable to avoid several disadvantages of the joint property relationship, which mainly relate to the extension of joint ownership to all property acquired during marriage, the restrictions arising from this to economic activities, and the complicated issues of liability.

The effects of the described property relationship mainly arise upon its termination (and not during it), which in turn relates to termination of marriage or entry into a marital property contract, which establishes another arrangement of the proprietary relationship of spouses. Essentially, the statutory proprietary relationship of spouses as provided by the draft law yields a similar result as the community property of spouses under the present Family Law Act: each spouse will have the right to an equal part of what the spouses jointly acquired during marriage, insofar as both spouses have contributed to the acquisition and increase of property with their work or this was enabled by the division of duties within the family. Instead of joint ownership, however, each spouse will be entitled to a right of claim under the law of obligations, pursuant to which he or she is guaranteed a fair part of what was acquired during marriage. The right of claim arises as from the moment the proprietary relationship terminates. On this basis, the increase in property acquired in the meantime is divided on the basis of whether and to what extent the property of spouses increased during the statutory regime. The spouse whose property increased to a lesser extent when compared to the other spouse is entitled to claim from the spouse whose property increased to a greater extent half of the amount by which the increase in the other spouse's property exceeds his or her own (offset claim). During marriage, the provisions regulating marital cohabitation and maintenance of family ensure that both spouses, in a due and adequate manner, participate in obtaining the means necessary to cover the needs of the family and through this enjoy the property and income of the other spouse.

Although the described marital property system does not render the property of spouses joint, it does not exclude the creation of joint proprietary rights of spouses. For example, property may be acquired into the common ownership of spouses, or into their joint ownership under a joint activity agreement (association agreement). Insofar as common ownership is concerned, the legal shares of each spouse are regarded as their separate property, which shall be disposed of having regard to the interests of the other spouse as a common owner and the family.

The so-called acquisition property system was already provided in Part I of the second book of the draft Civil Code of 1940 as prepared under the guidance of J. Uluots.*[21] The present draft also uses the terminology of the 1940 draft as a basis.

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20 Family Law Act subsection 14 (2), subsections 19 (2) and (3).

21 The statutory marital property relationship described in this paper and set out in the new draft Family Law Act is largely based on the provisions of the Civil Code of 1940. The family law legislation of a number of countries (including the Netherlands, Germany, Austria, Switzerland, Ontario and Alberta provinces of Canada, Latvia, *etc.*) have also been used as an example.

3.2.2. Accounting methods

Concerning the statutory marital property regime, the draft law follows the example of the draft Civil Code of 1940 and introduces the following concepts of property: (1) basic property, (2) acquired property, and (3) aggregate property.

The practical effects of the proprietary relationship under discussion definitely depend on which part of the property of a spouse is regarded as his or her basic property and which part is treated as acquired property. These two categories of property are in an inverse relation and form the aggregate property of a spouse. According to the legislator's choice, basic and acquired property can be defined either toward the separateness of proprietary rights (if the bulk of a spouse's property is included in his or her basic property) or as creating greater mutual rights and obligations (the larger the acquired property, the greater the offset claim of the other spouse). The main criterion in this respect should be to balance the proprietary interests of spouses: the marital property regime should enable to have as adequate as possible regard to the extent to which the spouse entitled to offset of acquisitions has contributed to the increasing of the other spouse's property, *i.e*. creation of acquired property, during marriage.

(1) Basic property means, according to the draft law, the core set of the proprietary rights of a spouse and covers the following rights:

(i) the property belonging to the spouse at the moment of entry into force of the statutory proprietary relationship;

(ii) property acquired by the spouse during the statutory proprietary relationship by succession, grant or other disposal free of charge;

(iii) property acquired by the spouse on the basis of the proprietary rights belonging with his or her basic property, as well as property acquired as compensation for transfer, destruction, damaging or deprivation of an item of basic property.

The latter clause sets out the principle that the basic property of a spouse does not merely include the property existing at a particular moment of time, but also the proprietary benefits directly related to such items of property (property acquired on account of basic property). The provision particularly covers various acts that a spouse is entitled to from third parties on the basis of ownership, as well as other real right relations and also relations under the law of obligations. These include, for example, the selling price or other consideration received upon transfer of an item, property acquired for money that belongs with basic property, as a rule, the benefit resulting from items of basic property[*22], insurance indemnity, compensation for expropriation, compensation received due to unlawful damage if an item of the property of the spouse was damaged, *etc*. Increase in the value of basic property (*e.g.* stocks) also belongs with basic property. Thus, the basic property of a spouse forms a certain core that remains basically in the same scope throughout the proprietary relationship and enables the spouse to dispose of such property at his or her own discretion without the legal status of this category of property changing from the aspect of the proprietary relationship of spouses. However, the draft law provides for an exception to the above general rule — namely, the basic property of spouses does not include the value of expenses made by each spouse during the statutory proprietary relationship on gaining benefit from the property through work or proprietary acts. The value of such expenses must be included in the acquired property of the spouse in connection with whose property such expenses were incurred. The exception attempts to adhere to the original principle of the selected statutory proprietary regime, the goal of which is to ensure each spouse an equivalent part of that which was acquired during marriage and to have regard to the efforts made by the spouses in the interests of each other and the family.

Rules are also established on which liabilities are deducted from basic property (liabilities arising from unlawful damage caused by the spouse, and also the sum by which the spouse has deliberately reduced the value of his or her property).

(2) Aggregate property is the whole property of a spouse after termination of the statutory proprietary relationship, less the spouse's total liabilities as of that time.

(3) Acquired property is an entirely figurative amount and does not constitute actual property in the proprietary relationship of spouses. The acquisition amount is the sum received by deducting the value of the spouse's basic property from the value of his or her aggregate property. As the

[22] The benefit of a thing (the fruit) is defined in section 23 of the Law of Property Act (see also section 61 of the new draft General Part of the Civil Code Act). This covers both the natural and civil fruits of a thing — fee from granting use of a thing to a third person (rent, licence fees, *etc.*), dividends, interests, late interests, *etc.* There are, however, exceptions to the inclusion of benefits in basic property (see below).

composition of the basic property of a spouse is exhaustively set out by law, acquired property can also be defined negatively — it is the property which is not the basic property of the spouse.

Besides the above basic principles, the regime to be applied to items of property and the division methods of acquired and basic property are also allowed to be defined otherwise under a marital property contract. Spouses may provide in a marital property contract that certain types of things (*e.g.* securities), which are acquired during the property acquisition regime, belong with the basic property of the spouses.*[23]

It is important to say that the purpose of the above categories of property is mainly for calculations. The calculations are based on the value of property that determine the size of the potential mutual rights of claim; the question here is not in the rights of ownership to any specific items of property. As opposed to the statutory regime of the presently applicable law, the given property system allows to focus on the dynamics of proprietary relations in the economic sense, *i.e.* it takes account of the actual changes that have taken place in the proprietary status of a spouse during the marital property regime.

3.2.3. Offset claim

If the acquired property of one spouse exceeds that of the other spouse, the spouse whose acquisition is smaller is entitled to one-half of the sum by which the other spouse's acquired property exceeded his or her own. The goal of the offset claim is to create a situation in which each spouse's property will have increased during marriage (and the statutory proprietary relationship, respectively) in equal parts. The prerequisite for applying the proprietary compensation mechanism is that one spouse's property increased during the statutory proprietary relationship, while that of the other spouse did not or only increased to a small extent. If each spouse's property increased equally, the offset result is zero and neither will have the right of claim against the other.

The offset claim is a financial liability under the law of obligations, which in itself does not give the right of claim to the ownership of specific items of property. Disputes over which spouse owns a particular thing or whether a thing belongs with the joint property of spouses should therefore significantly diminish. Instead, the calculated value of increase in property will have to be proved.

An offset claim arises when the proprietary relationship ends (upon divorce, conclusion of marital property contract or upon premature offsetting) and can also be bequeathed and assigned as from that moment.

3.3. Protection of rights arising from statutory marital property relationship

3.3.1. Restrictions on disposal of property

The present Family Law Act imposes restrictions on the disposal of joint property based on a mechanical division of things into movables, registered movables and immovables; no restrictions apply to transactions with separate property.*[24] According to the regulation of the present Family Law Act, nothing prevents a spouse from transferring or encumbering, for instance, a residential building in which the family jointly resides, if the building belonged to the spouse already prior to marriage and is thus a part of his or her separate property.

On the other hand, according to the new draft law, restrictions particularly apply to the disposal of property that belongs with the sphere of both spouses' (the family') joint and primary interests, regardless of their belonging with one spouse's independent set of property. Specific cases are provided in which a spouse may dispose of his or her property only with the consent of the other spouse:

(a) if the object of the disposal or the assumed obligation is the whole property of a spouse or the majority of it, and

[23] By explanation, it should be mentioned that this concerns items of property that are not acquired on account of a spouse's basic property (*e.g.* securities are purchased for wages).

[24] Family Law Act subsection 17 (3)–(5).

(b) if the disposal or the assumed obligation concerns the dwelling in which the family jointly resides, as well as the substantial property belonging with the dwelling (ordinary furnishings).

Other disposals do not presumably concern the welfare of the other spouse (who is not the owner of the property) and the rest of the family to such an extent as to justify the imposition of restrictions on disposal in the form of the obligation to obtain the consent of the other spouse. The lack of consent is also elaborated (voidness of transaction), but a possibility is provided to replace a missing consent with a later approval. At the same time, the restrictions on disposal of the entire property of a spouse or the bulk of it, as well as restrictions on the disposal of the object used as a dwelling, are planned to be absolute: acquisition in good faith by third parties is excluded in such transactions.

3.3.2. Joint ownership *versus* offset claim

The question may be raised whether the right of claim arising upon termination of the above-described marital property regime protects the spouse who is at a weaker position equally with the joint ownership provided in the present Family Law Act, which is created as of the moment of acquisition of property and can be henceforth protected under the relevant rights of claim. The question lies in the efficiency and potential effects of the measures established in the interests of the protected party. In case of joint property of spouses, with which one of the spouses concluded transactions adverse to the other party, the damaged party can apply for the protection of his or her interests only in court.*[25] Acquisition of items of joint property in good faith by a third person as a result of disposal performed by one spouse is also not excluded. Moreover, the present Family Law Act does not enable a spouse to demand termination of the community property relationship similarly to termination of a marital property contract under subsection 11 (2) of the Family Law Act, if the other spouse is bankrupt or handles the joint property in a dissipatory or damaging manner.*[26]

Thus, the compensation claim system under the law of obligations as offered in the new draft law enables to protect the interests of the economically less well-off spouse at least to the same extent as the joint property relationship under the Family Law Act of 1995. The draft law also provides for the right of claim for premature offset of acquired property if one of the spouses violates the proprietary (economic) obligations arising from the conjugal relationship, concludes transactions for which the consent of the other spouse is required without such consent, or otherwise intentionally damages the potential future offset claim of the other spouse. As a result, adverse effects on the spouse entitled to an offset claim can also be avoided if the marriage is not divorced. When acquired property is offset prematurely, then a separate proprietary relationship will take effect, thus preventing further damage to each other's potential proprietary rights and also creating a clearer situation for third parties.

3.4. Transactions between spouses

3.4.1. Applicable Family Law Act

Pursuant to section 16 of the Family Law Act, spouses may enter into transactions with each other concerning separate property, whereas no specific form is provided for such transactions. The joint effect of section 16 and section 14 raises questions due to their general formalistic approach that only takes account of the law of property meaning of acquisition: if one of the spouses desires to transfer to the other an item of separate property, the item becomes a part of the joint property of spouses under subsection 14 (1) of the Act. It is difficult to find a derogation to section 14 from section 16, which would enable to deviate, in relations between spouses, from the general rule, according to which everything acquired during marriage become the joint property of spouses. Therefore, the

25 Family Law Act subsection 17 (2), Law of Property Act subsection 70 (6), section 71 *ff.*

26 In case of a statutory joint property relationship, a spouse can, in such case, only apply for division of joint property in a court under subsection 18 (5), but this does not constitute termination of the proprietary relationship: property acquired after division of joint property will still be the joint property of spouses (subsection 18 (6)); the court cannot impose any other marital property regime for the spouses or oblige the spouses to enter into a marital property contract.

actual effect of transactions between the spouses is different from that probably desired by the spouses in their proprietary relations.*[27]

Problems have also arisen from the applicable Family Law Act in determining the legal proprietary regime in the case when an item that belonged with the joint property of spouses is desired to be given to one spouse so that it would thereafter form a part of the separate property of that spouse. In such case, the law provides for the possibility to enter into a marital property contract*[28], while the applicability of section 16, pursuant to which the spouses could, during their marriage, fully or partly divide the joint property in any form, which can be done only in respect of specific items of property, remains unclear. In the first case (marital property contract) the result would be that in case of a mutual transaction between the spouses, the result would be the applicability of significantly stricter formal requirements than those generally provided for the same transaction (*e.g.* sale of a car) (notarised contract, entry in the marital property register in view of third parties). On the other hand, if joint property were permitted to be partly or fully divided under an agreement between the spouses in any form at any time during marriage, this may cause a situation in which the spouses are formally in a joint property relationship (*i.e.* they have not entered into a marital property contract within the meaning of section 9 of the Family Law Act), but have already divided all property pursuant to section 16. In such case, the provisions of neither the statutory marital property relationship nor the marital property contract fulfil their function, while third parties, including creditors, have no idea of the arrangement of proprietary relations between the spouses. A danger arises that the proprietary interests of the spouses themselves as well as those of creditors are damaged. However, such agreements must be regarded as permissible under the wording of section 16 of the presently applicable Family Law Act, insofar as the generally used interpretation methods do not yield a different result.

Due to the above problem, difficulties have arisen in practice concerning taxation of the mutual transactions of spouses.*[29] Under tax law, the actual economic nature of a transaction serves as the basis and economic categories are applied (income and expense, accompanied by an actual change in the status of the property). As mentioned above, the bases of the Family Law Act of 1995 are the opposite when it comes to determination of joint property.

3.4.2. Solution provided in the draft law

In case of the "offset of acquisition" property relationship set out in the draft law, spouses are treated during the property regime like essentially unmarried persons as concerns their mutual proprietary relations (taking into account the above-described restrictions on disposal and other proprietary obligations to the family). This means that they can enter into transactions with each other similarly to all other subjects of law, regardless of any further demands besides those generally arising from the law of obligations. Therefore, a transaction between spouses by which one spouse transfers to the other a part of his or her property is not a marital property contract but an ordinary sale, grant or other disposal transaction.

Because during marriage the spouses do not have joint rights regarding property acquired by the other spouse, property actually transfers from one category to another under the statutory proprietary relationship provided in the draft act. Through this, transactions between the spouses acquire a clear meaning also for third parties, including from the tax law aspect.

3.5. Liability for obligations of spouses

3.5.1. Determination of liability in case of community property

A community property relationship frequently complicates the issues of liability in relations with third parties. Particularly, the issues of liability under the law of obligations may, with regard to the proprietary equality of spouses (equal rights of disposal) lead to conflicting results: if joint property were liable for all obligations of each spouse, this would mean giving an unreasonable advantage to

[27] However, the spouses still have the possibility to enter into a marital property contract, which can set out that property acquired from the other spouse will belong to the separate property of the first spouse (see Family Law Act subsection 9 (1) 2)).

[28] See the previous notes with reference to subsection 9 (1) 2) of the Family Law Act.

[29] See *e.g.* judgement No. 3-3-1-57-00 of the Administrative Chamber of the Supreme Court of 15 January 2001 (Riigi Teataja (The State Gazette) III 2001, 3, 22) (in Estonian).

creditors and damaging the spouse who has no debt obligations. If joint property were liable for joint debts only, this would damage the interests of creditors. But if a creditor has to file a claim against a spouse's part of joint property to satisfy a claim, the marital joint property would be divided on the grounds of circumstances completely unrelated to marriage. Such a "prerequisite" also makes it more difficult for a creditor to satisfy claims.*[30]

Pursuant to the applicable Family Law Act, a spouse is liable for his or her proprietary obligations with his or her separate property and the part of joint property that would belong to him or her if joint property were divided. This implies that if the separate property of the spouse is not sufficient to cover the liability, joint property has to be divided, including at the creditor's request (through a bailiff). Such a solution cannot be regarded as fair to the other spouse (who is not the debtor), because the joint proprietary rights of that spouse and the spouse who is a debtor would be interfered with on grounds not related to the conjugal relationship. During execution proceedings, the right of the other spouse to possess, use and dispose of joint property is not guaranteed.*[31]

To determine for which obligations a spouse is primarily liable with his or her separate property and for which obligations primarily with joint property, the Family Law Act sets out the assumption of obligations in the family's interests as the sole criterion (subsection 20 (2)). This is a provision that can be extremely broadly interpreted and its application is apparently not limited to transactions necessary to satisfy certain everyday needs, but also extend to greater investments (*e.g.* borrowing to buy immovable property), which depending to factual circumstances may benefit the family (and hence be in the interests of the family) or *vice versa* — damage the family (be against the interests of the family). It appears that completely different bases play a role in the creation of joint proprietary rights and obligations under the presently applicable statutory property regime. Whilst any property acquired during marriage (including property acquired on account of separate property) becomes joint property, obligations become joint only insofar as they have been assumed "in the family's interests". This can be seen as an imbalance, because the statutory marital property regime does not practically enable to increase the separate property of either spouse by natural methods during marriage.*[32]

3.5.2. Regulation of liability in the draft law

According to the solution provided in the draft law, not only the property itself, but also the obligations of each spouse remain separated, which gives the spouse who handles his or her property rationally remarkably better protection against the other spouse's risky financial and economic transactions. Since there is no joint property, there are, as a rule, no joint proprietary obligations and no danger that one spouse's creditor could interfere with joint rights. Such a solution stresses the independent liability of the spouses as subjects of private law.

As exception to the divided proprietary liability principle are obligations arising from certain transactions made in the family's interests, which bind both spouses as solidary debtors. This particularly concerns the ordinary everyday needs of family members*[33] and does not depend on the property regime applicable between the spouses.

4. Conclusions

One can assume from the above that community property, or otherwise said, joint ownership established by the statutory marital property law, is not necessary to protect conjugal cohabitation and the proprietary interests of family members from the legal aspect. Preservation of the property used to the family's benefit (such as the joint dwelling of the family, household property, *etc*.) can

30 *E.g.* A. Lüderitz (note 5), p. 111, paragraph No. 296.

31 Illustrative court practice is available on the bankruptcy of one spouse. In its judgement No. 3-2-1-104-96 of 3 October 1996 the Supreme Court found that items belonging to the joint property of spouses cannot be excluded from the bankruptcy estate and they can be attached until joint property is divided – Riigi Teataja (The State Gazette) III 1996, 26, 350 (in Estonian).

32 This is only possible by entering into a marital property contract or by disposals from third persons free of charge (Family Law Act section 15).

33 *E.g.* acquisition of food, thermal energy, lighting and clothing, health expenses, maintenance and education costs of children, as well as other needs such as recreation. Such obligations may not exceed a reasonable degree corresponding to the ordinary living conditions of the spouses. The scope of this definition is to be shaped by court practice, but it can certainly not cover major expenses targeted to the future, such as purchase of a dwelling, *etc.*

also be ensured by other means (such as restrictions on disposal).*[34] This also covers events when the property that serves as the basis for such family life belongs under the sole ownership of one spouse and such events that the joint property regime established by the Family Law Act of 1995 does not take into account.

The main shortcoming of the community property relationship in view of today's economic and social relations is the excessive overlapping of the proprietary spheres of spouses, which in turn gives rise to complicated liability relations. It seems the most expedient to introduce such an arrangement of marital property that leaves the proprietary spheres of spouses more separate than they are presently, *i.e.* independent from the other spouse's acts that affect the status of the property. At the same time, events where the contributory acts of both spouses are required for a transaction would be limited to situations of decisive importance to both spouses and the family. The scope of the mutual proprietary rights and obligations of spouses should reflect both of their contribution to the increase in the family's property. As regards the proprietary relations of spouses, it is also important to proceed from certain economic criteria — as opposed to the ideological foundations of the ESSR Marriage and Family Code that served as the main example for the presently applicable Family Law Act.

A suitable opportunity to take account of the above aspects in an integral and balanced manner is offered by the draft Civil Code of 1940 in its acquired property offset relationship provided as the statutory marital property regime. The task in itself is not to change labels, but to try to avoid the shortcomings of the present marital property law.

The intended statutory marital property relationship described in this paper may, in its accounting details, seem more complicated and stolid than the joint property system provided in the Family Law Act of 1995. However, the fact that the law does not expressly provide for several decision criteria of joint property law and gives courts a high degree of discretion, does not mean that it is easy for courts to divide joint property in practice. Rather, clear rules help to avoid disputes.

Considering the multitude of marital property regimes and their richness in variations, one has to admit that it is not possible to create an ideal marital property system that would fully take account of the interests of all married couples and third persons concerned. Therefore, marital property law has to leave space for freedom of contract, which deserves discussion in a separate paper.

[34] The same concerns the provisions of subsection 19 (2) of the Family Law Act of 1995, according to which the division of proprietary rights of spouses can be made dependent on the children's interests also. Such a solution cannot be regarded as relevant insofar as this favours a vagueness in the proprietary relations of spouses. Maintenance of children and all-round protection of their interests must be ensured separately from the proprietary rights of spouses, taking into account the systems of family law.