# THEORETICAL AND PRACTICAL ISSUES REGARDING THE MATRIMONIAL REGIMES

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**Abstract**

*Following the entry into force of Law No. 287/2009 on the Civil Code, as republished, and of Law No. 71/2011 for the implementation of Law No. 287/2009 on the Civil Code, as further amended, that repealed the Family Code (Law No. 4/1953, as republished and further amended), the spouses may choose another matrimonial regime than the legal community regime, respectively the separation of assets regime and the conventional community regime through a matrimonial agreement. The study examines theoretical issues of the matrimonial regimes that raise some debates in the doctrine. The research also consists in the analysis of some new institutions such as clauses of a matrimonial agreement and the provisions of the primary obligatory regime both from theoretical and practical perspectives. Considering the 5 year period after the entry into force of the legal provisions that regulate the matrimonial regimes, the authors intend to carry out an analysis of the relevant case law of the courts of law in the matter of the pecuniary relationships between spouses.*

**Keywords:** *matrimonial regimes, legal community matrimonial regime, conventional community matrimonial regime, separation of spouses' assets regime, matrimonial agreement*

## 1. Introduction

This paper intends to clarify a few issues related to the matrimonial regimes that raise some debates in the doctrine.

Given that Law No. 287/2009 on the Civil Code, as republished and further amended (hereinafter referred to as the "Civil Code")[1], regulates the conventional matrimonial regimes, the matrimonial agreement and the primary obligatory regime as a novelty after the repealed Family Code - Law No. 4/1953, as republished and further amended (hereinafter referred to as the "Family Code"), a thorough analysis of some debatable provisions is important not only for the authors of family law, but also for the legal practitioners.

In this respect, our intention is to examine some main theoretical issues of the matrimonial regimes, of the matrimonial agreement and of the primary obligatory regime and the main authors' opinions of family law already expressed in doctrine.

This paper will provide an analysis of the relevant doctrine, of the main legal provisions and of the jurisprudence in order to outline some options to be considered both by the authors of family law and by the legal practitioners.

## 2. Content

### 2.1. General considerations on the matrimonial regimes

Article 312 paragraph (1) of Civil Code provides that "the future spouses may choose as the matrimonial regime: the legal community regime, the separation of assets regime or the conventional community regime." Therefore, the Civil Code regulates the principle of freedom of choosing the matrimonial regime. Should the future spouses intend to choose another matrimonial regime than the legal community one, they must conclude a matrimonial agreement in this respect.

Notwithstanding the matrimonial regime chosen by the spouses, in accordance with article 312 paragraph (2) of Civil Code, they must comply with all the regulations that are common to all the matrimonial regimes.

These basic rules represent the so called "the primary obligatory regime"[2]. This primary obligatory regime is regulated by articles 312-338 of Civil Code and refers to the effects of the matrimonial regime, its opposability, the conventional or the judicial mandate by and between spouses, the disposition acts that endanger seriously the family's interests, the spouses' pecuniary independence, the spouses' right to

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[1] Published in Official Gazette of Romania No. 505 of July 15, 2011.

[2] See D. Lupașcu, C.M. Crăciunescu, *Family Law*, 2nd edition, Universul Juridic Publishing House, Bucharest, 2012, page 126; C. Mareș, *Family Law*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2015, page 73; M. Avram, *Civil law. Family*, Hamangiu Publishing House, Bucharest, 2013, page 201; G.C. Frențiu, *Comment (to article 312)*, in *New Civil Code. Comments, doctrine and jurisprudence, The 1st volume. Articles 1-952. About civil law. Individuals and legal entities. Family. Assets*, Hamangiu Publishing House, Bucharest, 2012, page 420; C.M. Nicolescu, *Comment (to article 312)*, in *New Civil Code. Comment by articles*, C.H. Beck Publishing House, Bucharest, 2012, page 321; P. Vasilescu, *Matrimonial regimes*, 2nd edition, Universul Juridic Publishing House, Bucharest, 2009, page 37.

information, the termination, the exchange and the liquidation of matrimonial regime, the family's dwelling and the marriage expenses.

This primary obligatory regime is considered primary for two main arguments[3]:

1. it applies prior to any other legal or conventional provision and
2. it is common for all the matrimonial regimes, given that it is their base.

This primary regime is obligatory given that applies compulsorily to all spouses as simple effect of the marriage and that no one may derogate from its provisions through a matrimonial agreement[4].

Although the primary obligatory regime is common to all the matrimonial regimes, it represents their base, as other authors of family law[5], we do not consider that it is a matrimonial regime[6]. In accordance with article 312 paragraphs (1) and (2) of Civil Code above cited, the spouses may choose only between the three matrimonial regimes, respectively the legal community regime, the separation of assets regime or the conventional community regime. The basic rules that are called the primary obligatory regime by the authors' of family law only apply besides the provisions of the chosen matrimonial regime. We consider that if the legislator had regulated a fourth matrimonial regime, it would have been expressly provided as it is the case of the three matrimonial regimes.

It is important to underline that according to article 27 of Law No. 71/2011 for the implementation of Law No. 287/2009 on the Civil Code, as further amended, irrespective of the conclusion date of marriage, the provisions of the Civil Code apply to the spouses, from its entry into force, in connection with their personal and pecuniary relations.

There has also been expressed that a regime of participating to acquisitions by the spouses may be chosen based on the separation of assets regime, considering the provisions of paragraph (2) of article 360 regulated by Law No. 71/2011[7] for the implementation of Law No. 287/2009 on the Civil Code, as further amended[8].

Although the spouses may include in their matrimonial agreement a clause in relation with the receivable of participation to the acquisitions of assets, we[9] do not consider that such clause may be a separate new matrimonial regime regulated by the Civil Code, but it is a variety of the separation of assets regime.

This matrimonial regime was regulated in the first draft of the project of the Civil Code, in 2000, but after this moment the authors of the Civil Code renounced this matrimonial regime, given that it was considered highly complicated.

Therefore, we consider that article 360 paragraph (2) of Civil Code does not provide a fourth matrimonial regime, but only a clause for its liquidation that may be or not included in the matrimonial agreement based on which the spouses choose the separation of assets regime.

Moreover, we consider that there is an inexact provision regulated by paragraph (2) of article 360 of Civil Code which provides that "by matrimonial agreement, the parties may stipulate clauses related to the liquidation of this regime (separation of assets regime) depending on the assets acquired by each of the spouses during the marriage (…)". From our point of view this inexactness refers to the regulated period, respectively during marriage. Instead of this time limit, the above mentioned legal provision should have been drafted in order to refer to the assets acquired during the separation of assets regime and not during the marriage, because the spouses may change the matrimonial regime during their marriage whenever they may want, according to the applicable legal provisions.

In case of the legal community regime, on the contrary to article 360 paragraph (2) of Civil Code, article 339 of Civil Code provides that the assets acquired during the legal community regime by any spouse are common assets acquired jointly by them, not as co-owners, from their acquisition date. Tehrefore, in this case the Romanian legislator regulated the correct period with exactitude, specifically during the application period of the legal community regime.

According to the final thesis of paragraph (2) of article 360 of Civil Code should the parties have not agreed on the contrary, the receivable of participation represents half of the difference net value between the two groups of assets acquired by each spouse and will be owed by the spouse whose net value of the acquired assets is bigger than the other spouse's net value of the acquired assets. Therefore, the receivable of participation is half of the difference net value between the two groups of assets acquired by each spouse only in case the spouses have not agreed a lower value of the receivable of participation.

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[3] C. Mareș, op. cit., page 73.

[4] C.M. Crăciunescu, *The spouses' disposition right over the assets that belong to them, in different matrimonial regimes*, Universul Juridic Publishing House, Bucharest, 2010, page 17-22; P. Vasilescu, op. cit., page 34.

[5] See G.C. Frențiu, *Comment (to article 312)*, in op. cit., page 420; E. Florian, *Matrimonial regimes*, C.H. Beck Publishing House, Bucharest, 2015, page 28; N.C. Aniței, *Matrimonial regimes in accordance with the new Civil Code*, Hamangiu Publishing House, Bucharest, 2012, page 43.

[6] See M. Avram, op. cit., page 202, for the point of view that the primary obligatory regime is a matrimonial regime, but incomplete, fragmentary, and the other matrimonial regimes are called secondary matrimonial regimes. According to this author the primary obligatory regime may be qualified as a matrimonial regime considering that it consists in the juridical norms applicable to the pecuniary relationships between spouses as well as to the relationships between the spouses and third parties, which is the essence of a matrimonial regime by definition.

[7] Published in Official Gazette of Romania No. 409 of June 10, 2011.

[8] M. Avram, op. cit., page 340; C.M. Crăciunescu, *Family in the new Civil Code. Amendments adopted by Law No. 71/2011 for the implementation of Law No. 287/2009 on the Civil Code*, in Pandectele săptămânale No. 17/2011, page 7; D. Lupașcu, C.M. Crăciunescu, op. cit., page 171.

[9] C. Mareș, op. cit., page 126; G.C. Frențiu, *Comment (to article 360)*, in op. cit., page 496.

### 2.2. Matrimonial agreement

The matrimonial agreement is a public authenticated juridical act based on which the future spouses, respectively the spouses, in accordance with the principle of choosing the matrimonial regime, by mutual consent, agree on the matrimonial regime that will apply, or change the matrimonial regime during their marriage.

Under the sanction of the absolute nullity, the matrimonial agreement must be concluded as an authenticated act, with both spouses' consent expressed either personally or by a proxy based on an authenticated special power of attorney and with predetermined content[10].

Therefore, unlike a marriage that can be concluded only personally by the spouses, the matrimonial agreement can be concluded by a proxy.

The power of attorney for the conclusion of a matrimonial agreement must be:

a) authenticated by a public notary
b) special
c) with a predetermined content, which means that it must provide in detail the clauses of the matrimonial agreement that will be signed by the proxy.

It is a contract with a specific juridical cause (*affectio conjugalis*). In this respect, the pecuniary relationships between the spouses are to support the marriage and cannot exceed the purpose of the marriage itself – the creation of a family.

Article 313 paragraph (1) of Civil Code provides that between spouses the matrimonial regime takes effect only from the conclusion date of the marriage. Paragraph (2) of the same article provides that the matrimonial regime can be opposed to third parties from the date when the legal publicity formalities are fulfilled, except the case when they knew about this matrimonial regime by other means. And paragraph (3) of this article provides that should the publicity formalities not be fulfilled, the spouses are considered married under the legal community regime, in relation with the good faith third parties.

These legal provisions protect only the good faith third parties, given that towards the bad faith third parties, respectively those who knew about the applicable matrimonial regime either from the spouses or from another source, the matrimonial agreement will apply, even if the legal publicity formalities had not been fulfilled.

In relation with the publicity formalities, article 334 of Civil Code provides that a matrimonial agreement is publicized as follows: (i) by the mention made by the public clerck on the marriage act, after its conclusion[11]; (ii) by registration within the National Notarial Registry of the Matrimonial Regimes; (iii) by registration within the land registry, the trade registry, or any other public registry provided by law, depending on the nature of the assets. In case there is an asset that based on its nature determines the obligation of registration of the matrimonial agreement with the special public registries above mentioned, failing to fulfil the obligation of registration within this special registry cannot be covered by the registration of the matrimonial agreement only within the National Notarial Registry of the Matrimonial Regimes.

In accordance with the provisions of article 330 paragraphs (2) and (3) of Civil Code the conclusion date of a matrimonial agreement may be before the conclusion of marriage or during the marriage, but it enters into force only during the marriage.

The future spouses may conclude a matrimonial agreement either before concluding the marriage, or at the moment when they conclude their marriage. Irrespective of the moment when the future spouses decide to conclude a matrimonial agreement, it will enter into force only if they conclude the marriage. In case the future spouses do not conclude the marriage, the concluded matrimonial agreement will not enter into force.

Notwithstanding the above, even if the marriage is not concluded and the matrimonial agreement does not enter into force, the juridical acts provided by such matrimonial agreement that are not linked with the matrimonial regime and that the future spouses haven't connected them with the conclusion of their marriage will take effect, such as a recognition of filiation either by the mother, or by the father.

During marriage, the spouses may conclude a matrimonial agreement in order to change the applicable matrimonial regime, only after a period of one year as of the conclusion date of the marriage[12]. The matrimonial agreement concluded by the spouses, therefore during the marriage, enters into force on the date provided therein by the spouses or, in case no date was provided, on its conclusion date[13].

Although the future spouses or the spouses have the right to conclude a matrimonial agreement, when they agree on this issue, they do not have the right to create their own matrimonial regime. They have only the right to choose between the matrimonial regimes expressly provided by the Civil Code.

According to article 332 paragraph (1) of Civil Code, a matrimonial agreement may not derogate from the legal provisions that regulate the matrimonial regime except otherwise provided by law, under the sanction of absolute nullity. Also, the matrimonial agreement may not derogate from the legal provisions that regulate the primary obligatory regime under the sanction of absolute nullity. Moreover, a matrimonial agreement may not affect the equality between spouses, the parental authority and the legal inheritance provisions. Given that we consider the matrimonial

[10] Article 330 paragraph (1) of Civil Code.
[11] Article 291 of Civil Code.
[12] Article 369 of Civil Code.
[13] Article 330 paragraph (3) of Civil Code.

agreement to be a contract, as any contract, it may not derogate from the legal obligatory provisions and from the good manners.

Article 312 paragraph (2) of Civil Code irrespective of the matrimonial regime chosen by the spouses or the future spouses, the matrimonial agreement may not derogate from the provisions of Section 1. Common provisions of Chapter VI. The spouses' pecuniary rights and obligations of Title II. The marriage of Book 2. About family.

Therefore, the spouses do not have the right to copy a matrimonial regime regulated by the legislation of another country, but not regulated by the Civil Code or the right to create a matrimonial regime combining the provisions of the matrimonial regimes regulated by the Civil Code.

Article 338 of Civil Code provides that in case the matrimonial agreement is null and void or is declared null, the legal community regime applies between the spouses, without affecting the rights of the good faith third parties.

The legal community regime will be also applicable, should the spouses not conclude a matrimonial agreement.

It is impossible to have a marriage without a matrimonial regime, or to have a matrimonial regime without a marriage.

Referring to the capacity for concluding a matrimonial agreement, although it is a contract, the rule *habilis ad nuptias, habilis ad pacta nuptialia* is applicable, which means that the capacity to conclude a marriage applies. Therefore, the individuals who are 18, as well as the children who are 16 with his parents' consent and with the authorization of the court may conclude a matrimonial agreement.

Article 337 paragraph (1) of Civil Code provides that the individual who is not 18, but he has the matrimonial age, may conclude a matrimonial agreement. The individual who is not 18 must have the matrimonial age when he concludes the matrimonial agreement, not when he concludes the marriage.

The individual who is 16 may conclude the matrimonial agreement only with his parents' consent and with the authorization of the court.

It is forbidden to a child who is 14 or 15 to conclude a matrimonial agreement, although according to civil law he has restricted capacity, given that he does not have the matrimonial age.

An individual who is 16 with anticipated capacity recognized by the competent court based on article 40 of Civil Code and an individual who is between 16 and 18 years old who marries and therefore gets full capacity based on his marriage can conclude a matrimonial agreement without their parents' consent and without any authorization of the competent court. They are considered as an individual who is 18 and who can conclude any act without any prior authorization.

Should these legal provisions related to the matrimonial age, to the parents' consent and to the authorization of the court be infringed, the matrimonial agreement may be null and void or may be declared null. Thus, on the one hand, under the sanction of absolute nullity the matrimonial agreement cannot be concluded by the individual who is not 16 years old. On the other hand, under the sanction of relative nullity the matrimonial agreement cannot be concluded by the individual who is 16 years old without his parents' consent or the authorization of the court. As we have already mentioned, should the matrimonial agreement be null and void or declared null, the legal community regime applies.

### 2.3. Family dwelling

A new institution regulated by the Civil Code within the primary obligatory regime is the family dwelling. Article 321 paragraph (1) of Civil Code provides that the family dwelling is the spouses' common dwelling or, in case such dwelling does not exist, the spouse's dwelling where the children live.

For opposability purposes, any spouse may request the registration of a house as the family dwelling within the land book, even if he is not the owner of that house[14].

The special legal regime of the family dwelling consists in the limits of one spouse's right of disposition of the family dwelling by his own, without the other spouse's express consent, through juridical acts.

According to article 322 paragraph (1) of Civil Code without the other spouse's written consent, none of the spouses, even if he is an exclusive owner, can dispose of his rights over the family dwelling and can conclude acts based on which he could affect its use.

In accordance with these legal provisions, given that they do not distinguish, it is not important the nature of the spouses' right over the family dwelling. Therefore, they may have a real right or any other kind of right over the family dwelling, even a right of use based on a lease/rent agreement or even a non-remunerated lease agreement.

Should the family dwelling be owned by a spouse, there is no relevance whether the spouse who intends to dispose of it is its exclusive owner or if the family dwelling is a common asset, depending on the applicable matrimonial regime[15].

Referring to the other spouse's consent, we must consider two situations: (i) when only one spouse is the family dwelling's owner (he has an exclusive ownership right) and (ii) when both spouses are the family dwelling's owners.

In the first case, should the spouse owner intend to conclude any act of disposition of the family dwelling, he will need the other spouse's written consent, but this consent will not be a consent to the conclusion of that act of disposition as a co-owner, but

[14] Article 321 paragraph (2) of Civil Code.

[15] See also B.D. Moloman, L.-C. Ureche, The new Civil Code. 2nd Book. About family. Articles 258-534. Commentaries, explanations and jurisprudence, Universul Juridic Publishing House, Bucharest, 2016, page 203.

a consent that he does not oppose the conclusion of such act of disposition. Thus, the other spouse's consent does not affect the owner spouse's exclusive ownership right over the family dwelling.

The spouse's consent who is not an owner of the family dwelling is an act of irrevocable authorization from its signature moment[16].

As a remedy, in case one spouse refuses to express his consent for the conclusion of an act of disposition of the family dwelling, without a legitimate reason, the other spouse may claim in court and request the authorization of the court in order to conclude such act[17].

The rule of the spouses' express consent applicable to all the acts of disposition of the family dwelling does not mean that the immovable asset becomes imperceptible, the family dwelling could be subject of the forced execution even for receivables contracted only by one spouse, without the other spouse's consent.

In the second case, should the spouse owner intend to conclude any act of disposition of the family dwelling, he will need the other spouse's written consent in his quality as co-owner. Therefore, in this situation both spouses will conclude the act of disposition either personally or by a proxy in their quality of owners.

In relation to the form of the spouses' consent article 322 paragraph (1) of Civil Code provides only that it must be written.

We should also consider the above mentioned two situations also referring to the form of the spouses' consent[18].

Thus, when only one spouse is the family dwelling's owner (he has an exclusive ownership right), given that the other spouse, who is not an owner of the family dwelling, does not become a party of the disposition act, we consider that his consent may be expressed through a private act that is not authenticated by a public notary[19]. Notwithstanding the above, for safety reasons, we consider that also in this situation the spouse who is not an owner of the family dwelling should express his consent in authenticated form. In this respect, we consider the verifications of the public notary in order to authenticate the act based on which this spouse express his consent, specifically his identification and ascertaining his consent. If the spouse owner presented to the notary who authenticates the act of disposition a private act signed by the other spouse, its authenticity couldn't be verified. Therefore, the spouse owner who intends to conclude an act of disposition of the family dwelling may present to the notary a private act providing the other spouse's consent that could be signed by anyone.

On the contrary, when both spouses are the family dwelling's owners, their consent must be expressed in authenticated form. This is applicable when one spouse cannot be present personally in front of the public notary in order to sign in his name and on his behalf the act of disposition. In this case, both spouses express their consent in their quality of co-owners. They become parties of the act of disposition. This rule derives from the provisions of article 1244 of Civil Code which provide that the agreements that transfer real rights that are to be registered within the relevant land book must be concluded in authenticated form, under the sanction of absolute nullity.

Failure to comply with the provisions of article 322 paragraph (1) of Civil Code will result either in the sanction of nullity[20] or in the damages[21]. For the applicable remedy, the law provides it depending on the fact whether the asset was duly registered as the family dwelling within the relevant land book.

According to article 322 paragraph (4) of Civil Code the spouse, who has not expressed his consent to the conclusion of the act of disposition or based on which the use of the family dwelling is affected, may claim its annulment in a period of one year from the moment when he acknowledges that it was concluded, but no later than one year from the moment when the matrimonial regime terminates.

In relation with the limit period of one year from the moment when the spouse, who does not consent to the conclusion of the act of disposition, may claim its annulment, we consider that it could be calculated from the registration date of the ownership right of the new owner within the relevant land book.

On the contrary, paragraph (5) of article 322 of Civil Code provides that if the asset was not registered as the family dwelling within the relevant land book, the spouse, who has not expressed his consent to the conclusion of the act of disposition or based on which the use of the family dwelling is affected, may not claim its annulment, but only he may claim damages from the other spouse, except the case when the third party knew that the asset is the family dwelling from another source.

Therefore, the exception regulated by the final thesis of paragraph (5) of article 322 of Civil Code applies in case of a bad faith third party who knew from any other source that the asset is the family dwelling. In such case, although the asset was not registered as family dwelling within the relevant land book, the spouse who has not expressed his consent to the conclusion of the act of disposition or based on which the use of the family dwelling is affected may claim the annulment of that act.

[16] See M. Avram, op. cit., page 206.
[17] Article 322 paragraph (3) Civil Code.
[18] C. Mareș, op. cit., page 78.
[19] See M. Avram, op. cit., page 207; C. Mareș, op. cit., page 78.
[20] Article 322 paragraph (4) of Civil Code.
[21] Article 322 paragraph (5) of Civil Code.

Referring to case law, a decision rendered by the Court of Appeal of Timișoara[22] in a second appeal registered against a resolution rendered in appeal by the Arad Tribunal[23] is relevant in relation with the registration of the family dwelling within the land book of an immovable asset. According to this decision the registration within the relevant land book of the immovable asset as the family dwelling, owned exclusively by one spouse, is allowed by the applicable legal provisions, irrespective that the immovable asset is a spouse's own or common asset, or that over this asset was priorly registered a conservatory seizure by the Directorate for Investigating Organized Crime and Terrorism (hereinafter referred to as "DIOCT"). The registration within the relevant land book of the immovable asset as the family dwelling has no effect over the conservatory seizure of DIOCT priorly registered over it. Moreover, such registration does not mean that the immovable asset becomes imperceptible. Therefore, should it be the case, even if an immovable asset is registered as the family dwelling within the relevant land book, it can be subject of forced execution as a consequence of the conservatory seizure of DIOCT.

Related to the movable assets that decorate the family dwelling, article 322 paragraph (6) of Civil Code provides that the same legal provisions applicable when the family dwelling was not registered with the relevant land book apply. Therefore, the spouse who did not consent to the conclusion of the act in writring may claim either to bring back the movable assets that were removed from the family dwelling, if these assets were not sold and the third party's patrimony is not affected, or damages[24].

It is important to underline that according to article 30 of Law No. 71/2011 for the implementation of Law No. 287/2009 on the Civil Code, as further amended, the provisions of article 322 of Civil Code are applicable also for the marriage into force on the entrance date into force of the Civil Code[25], if the acts of disposition of the family dweling or of the movable assets that decorate the family dwelling or their removal fom the dwelling were concluded after this date.

### 2.4. The preciput clause

The preciput clause may be provided by any matrimonial agreement concluded by and between the spouses or the future spouses[26]. Therefore, such clause is applicable either in the separation of assets regime or in the conventional community regime. Also during the separation of assets regime, the spouses may acquire common assets that will be owned by them in co-ownership.

Moreover, we consider that the preciput clause may be applicable even in case of a legal community regime, given that the spouses may conclude a matrimonial agreement that could provide only such clause.

Article 333 paragraph (1) of Civil Code provides that according to the matrimonial agreement the surviving spouse may take over one or more common assets acquired either jointly or as co-owners, without any payment and before the division of the inheritance. Such clause may be provided either on both spouses' benefit, or on one spouse's benefit.

Following these legal provisions, given that the preciput clause is a clause of the matrimonial agreement, it can not exist unless the spouses conclude such agreement. Moreover, a matrimonial agreement does not require necessarily a preciput clause, but it can be its single provision.

The beneficiaries of a preciput clause can only be the spouses in case they conclude a matrimonial agreement or they conclude a new matrimonial agreement after a period of one year from the conclusion date of the marriage and they agree that the matrimonial agreement provides such clause.

In case of future spouses who conclude a matrimonial agreement before the conclusion of the marriage, given that the matrimonial agreement enters into force only after the marriage is concluded, we may conclude that the beneficiaries of a preciput clause can not be the future spouses.

The object of this clause may be one or more common assets acquired either jointly or as co-owners, movable or immovable. Therefore, the spouses' own assets cannot be object of the preciput clause. Such assets will be included in the inheritance group of assets.

The preciput clause can not be object of the donations report, but only to reduction as provided by article 1096 paragraphs (1) and (2) of Civil Code[27].

Thus, the reduction will be done according to article 1096 of Civil Code, specifically before the donations, together and proportionally with the wills.

Although the Romanian legislator had the French Civil Code as inspiration source, respectively article 1516 that provides "Le préciput n'est point regardé comme une donation, soit quant au fond, soit quant à la forme, mais comme une convention de marriage et entre associés"[28], the juridical nature of the preciput clause has not been provided by article 333 of the Civil Code.

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[22] Court of Appeal of Timișoara, 1st Civil Section, decision no. 1538 of November 13, 2013, *Săptămâna Juridică* 21 (2014), page 6.

[23] Arad Tribunal, Civil Section, decision no. 256 of 2013.

[24] D. Lupașcu, C.M. Crăciunescu, op. cit., page 129.

[25] October 1, 2011.

[26] C.M. Nicolescu, *The preciput clause in the regulation of the new Civil Code. Comparative approach*, Romanina Revue of Private Law no. 6/2011, page 139-141; E. Florian, op. cit., page 79-80.

[27] Article 333 paragraph (2) of Civil Code.

[28] "The preciput is not seen as a donation neither in relation with the background conditions, nor in relation with the conditions of forme, but as a matrimonial agreement and between associates".

Considering these legal provisions, in the doctrine there are a lot of analyses in relation to the juridical nature of the preciput clause.

Together with other authors[29] we consider that the preciput clause is a matrimonial advantage, a special regulation in relation with the provisions regarding the reduction of the excessive non-remunerated acts.

We do not agree that the preciput clause may be considered a non-remunerated act[30], given that according to article 984 paragraph (2) of Civil Code the non-remunerated acts can be done only through a donation or a will.

According to a recent opinion[31] besides the legal inheritance and the testamentary inheritance, law regulates a forme of contractual inheritance under the name of preciput clause defined as the act based on which a person dispose of all or part of his assets, for the time when he will no longer be alive, in favour of another person who accepts it. The preciput clause is considered by this author as a donation of future assets.

The preciput clause does not affect the common creditors' right to execut the assets that are object of this clause, even before the community terminates[32].

Therefore, the assets that are object of the preciput clause do not become imperceptible, they could be executed by the spouses' common creditors before the community of assets terminates.

The preciput clause will no longer have any effect

a) when the community of assets terminates during the spouses' life,
b) when the beneficiary spouse dies before the spouse who gratified him,
c) when the spouses die at the same time or (iv) when the assets object of this clause had been sold by the common creditors' request[33].

Besides these situations expressly provided by the legal provisions of article 333 paragraph (4) of Civil Code, there are two additional situations when the preciput clause will no longer have any effect, specifically

a) if the matrimonial agreement that provides this clause is null and void or declared null and
b) if the matrimonial agreement will no longer have any effect given that the marriage was not concluded by the parties of the matrimonial agreement.

The execution of the preciput clause may be done in kind or, if it is not possible, by equivalent, in money[34].

Referring to the period of time for its execution, the law does not provide any special term in this respect. Therefore, the general prescription period of three years will apply from the spouses' death date, in case the preciput clause is mutual, on both spouses' benefit, or from the gratifying spouse's death date, when the preciput clause is unilateral, on one spouse's benefit.

Considering these legal provisions that regulate the preciput clause we consider that the surviving spouse has an important advantage regarding the use of some common assets before the division of the inheritance, specifically in case of a house taken over based on the preciput clause, the surviving spouse will no longer be interested in claiming the right of habitation that could be applicable, given that this right has specific conditions that could affect his right over that house if they are not fulfilled.

### 2.5. The expenses of the marriage

Article 325 paragraph (1) of Civil Code provides that the spouses must mutually support each other materially.

They must contribute to the expenses of their marriage depending on each other's means, should the matrimonial agreement not provide otherwise[35].

No agreement may provide that the expenses of the marriage are to be supported only by one spouse, any agreement contrary to this provision is to be considered unwritten[36]. Therefore, any agreement based on which the spouses would agree that the expenses of the marriage are to be supported by one of them has no legal effect.

Considering that the provisions related to the expenses of the marriage are regulated by the primary obligatory regime, we may conclude that they apply irrespective of the applicable matrimonial regime. Thus, notwithstanding the matrimonial regime chosen by the spouses, in accordance with article 312 paragraph (2) of Civil Code, they must comply with all the regulations of the primary obligatory regime that are common to all the matrimonial regimes.

Therefore, the spouses may agree within the matrimonial agreement the amount of each contribution, that may consists in money, in kind (e.g. by using the house as the family dwelling that is exclusively owned by one spouse) or in industry (e.g. one spouse's work in the house or for bringing up the children or one spouse's help for the other regarding his professional activity)[37]. As we have already mentioned above, it is forbidden for the spouses to agree that the expenses of the marriage

[29] D. Lupașcu, C.M. Crăciunescu, op. cit., page 150; D. Lupașcu, C.M. Crăciunescu, *The regulation of the preciput clause in the new Civil Code as it was amended by Law no. 71/2011*, in Pandectele române no. 8/2011, page 21; G.C. Frențiu, *Comment (to article 333)*, op. cit., page 457.

[30] D. Chirică, *Treaty of civil law. Inheritance and non-remunerated acts*, C.H. Beck Publishing House, Bucharest, 2014, page 363; B.D. Moloman, L.-C. Ureche, op. cit., page 228; I. Popa, *The preciput clause*, *Romanina Revue of Private Law* no. 6/2011, page 174.

[31] D. Chirică, op. cit., page 3-4.

[32] Article 333 paragraph (3) of Civil Code.

[33] Article 333 paragraph (4) of Civil Code.

[34] Article 333 paragraph (5) of Civil Code.

[35] Article 325 paragraph (2) of Civil Code.

[36] Article 325 paragraph (3) of Civil Code.

[37] C.M. Nicolescu, *Comment (to article 325)*, in *New Civil Code. Comment by articles*, C.H. Beck Publishing House, Bucharest, 2012, page 346.

will be supported by only one of them, but they are allowed to agree the amount of their contribution and how they contribute.

Moreover, it is important to underline that the legal provisions that regulate each of the three matrimonial regimes expressly provide that the usual expenses of the marriage and those for bringing up the children must be supported by both spouses.

Referring to the legal community regime, the spouses are jointly liable for the obligations undertaken by any of them for the usual expenses of the marriage[38]. It is important to underline that according to article 35 of Law No. 71/2011 for the implementation of Law No. 287/2009 on the Civil Code, as further amended, these provisions are applicable also for the marriage into force on the entrance date into force of the Civil Code, if the debt has been born after this date.

In case of the separation of assets regime, although the rule is that none of the spouses may be liable for the obligations undertaken by the other spouse[39], article 364 paragraph (2) of Civil Code provides that the spouses are jointly liable for the obligations undertaken by any of them for the usual expenses of the marriage and for those related to bringing up the children.

In the conventional community regime, although the spouses may limit their community to the assets and debts expressly mentioned in the matrimonial agreement, irrespective of the moment when they were acquired or they were born, either before or during the marriage, they can not exclude from their community the obligations undertaken by any of them for the usual expenses of the marriage[40].

According to article 326 of Civil Code any spouse's work in the house and for bringing up the children represents a contribution to the expenses of the marriage.

As the doctrine[41] and the jurisprudence[42] provided during the application period of the Family Code, that is also relevant in relation to the present regulation of the Civil Code, in case one spouse refuses to contribute to the marriage expenses, the other may claim against him in court and request to be forced to contribute to the marriage expenses. Also according to the current legal provisions above mentioned, a spouse may claim to force the other spouse to contribute to the marriage expenses.

In accordance with the case law[43] given that the woman's work in the house is considered a contribution to the family's income and considering that the defendant did not have any contribution to it in the last 7 years, the court decided that both spouses contributed equally to the acquisition of the common assets, even if there were some discrepancies between their incomes.

## 3. Conclusions

The common institutions of the matrimonial regimes are: (i) the primary obligatory regime and (ii) the matrimonial agreement.

The primary obligatory regime regulates special rules of protecting not only the family, but also each spouse's interest.

Although the Civil Code provides the principle of freedom of choosing the matrimonial regime, the spouses do not have full freedom to create a matrimonial regime combining the provisions of the matrimonial regimes regulated by the Civil Code or to copy a matrimonial regime regulated by the legislation of another country, but not regulated by the Civil Code, in order to apply it to their marriage.

Therefore, the spouses may only choose one of the three matrimonial regimes as they are provided by the Civil Code.

The family dwelling regulated for the first time by the Romanian legislation is a special case of protecting both the family and each spouse, given that without the other spouse's written consent, none of the spouses, even if he is an exclusive owner, can dispose of his rights over the family dwelling and can conclude acts based on which he could affect its use.

Referring to the preciput clause, we consider it helpful for the surviving spouse, in case it was provided by the matrimonial agreement, given that besides the common asset or assets that could be taken over by him before the division of the inheritance, he has an important advantage regarding the house taken over, specifically the surviving spouse will no longer be interested in the right of habitation, in order to avoid the specific conditions applicable in case of this right that could affect in some circumstances his right over that house, that does not happen in case of applying the preciput clause.

The Civil Code provides expressly that the expenses of the marriage are to be supported jointly by both spouses. It is forbidden for the spouses to agree that the expenses of the marriage will be supported by only one of them, but they are allowed to agree the amount of their contribution and how they contribute. The legal provisions that regulate each of the three matrimonial regimes expressly provide that the usual expenses of the marriage and those for bringing up the children must be supported by both spouses. Therefore, irrespective of the matrimonial regime and of the spouses' agreement in relation to the amount of their contribution and how they contribute, they could never avoid the joint contribution to the usual expenses of their marriage.

[38] Article 351 letter (c) of Civil Code.
[39] Article 364 paragraph (1) of Civil Code.
[40] Article 367 letter c) of Civil Code.
[41] I.P. Filipescu, A.I. Filipescu, *Treaty of family law*, Eighth Edition, Universul Juridic Publishing House, Bucharest, 2006, page 66.
[42] High Court, civil decision no. 34/1975, published in *Romanian Revue of Law* 9 (1975): 70.
[43] Călărași Local Court, civil resolution no. 3092/2014, published on www.portal.just.ro, in B.D. Moloman, L.-C. Ureche, op.cit., page 214.

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