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## SUMMARY

### **Matrimonial property in divorce**

Scope, dissolution and division by the Court

This thesis is a study on the consequences of divorce under the system, applicable in the Netherlands since 1838, of a general community property regime as the main system of matrimonial property law. In 2003 a bill was proposed to amend this system (bill 28 867). Originally this proposal contained considerable amendments to the main system by limiting statutory community of property to the property acquired during the marriage. However, the proposal was drastically amended in 2005 and this amendment has been abandoned for the time being. The debate on this bill has not yet been completed. Bill 28 867 also forms part of this study. After the *Introduction* therefore I have first provided an overview of the parliamentary debate on the bill and the state of affairs at the time the manuscript was finished.

*Chapter I* deals with matrimonial property in a general sense. The property law aspects are emphasised. The effects of joining of estates, legal succession under universal title and (the scope of) the participation in the goods belonging to the matrimonial property after the joining of estates are all discussed.

The most important general exception to the main system is described in *chapter II*. Under current law, the testator or donor may determine that anything a spouse acquires pursuant to inheritance law or gift shall not belong to the matrimonial property: the exclusion clause. The legal ground and the scope thereof have been dealt with. Based on literature and case law I have investigated the scope of the assets which do not become part of the matrimonial property if this exception is applied. I reached the conclusion that this should only be the share of the heir or donee in the goods that he acquires (jointly), irrespective of further acquisition. I do not consider the possibility of the matrimonial property obtaining a pro rata share of a property to be problematic.

I have extensively considered the consequences if by law, acquisitions pursuant to the law of succession and gift, do not become part of the matrimonial property in accordance with bill 28 867.

With regard to the other general exception, the connected goods, I have discussed the criteria developed in case law in *chapter III* in order to answer the question of whether a property does not become part of the matrimonial property due to its connexity. I reached the conclusion that there are barely any connected goods which do not become part of the matrimonial property. The economic and general damages and the case law as developed up until today have been dealt with separately. For the reimbursement of economic (income) damage I have concluded that the payment received for it before or during the marriage is not excluded from the matrimonial property. I also believe that Section 6:212 Netherlands Civil Code is applicable to the matrimonial property so that a right to reimbursement can arise pursuant to unjust enrichment, if the payment not only refers to damage suffered during the marital period.

This chapter also deals with the partnership, as it shall exist after Title 13 of Book 7 of the Netherlands Code has taken effect. Henceforth, solely the economic participation of a share in a partnership shall form part of the assets of the matrimonial property, without it being clear what this entails precisely.

Substitution of property has been discussed in *chapter IV*. Under current law a statutory regulation is lacking for matrimonial property. However, the literature accepts that Section 1:124 paragraph 2 Netherlands Civil Code, which refers to fruits and income and forms part of Title 8 Book 1 Netherlands Civil Code, applies *mutatis mutandis*. Bill 28 867 resolves this deficiency. The property law consequences of substitution of property are extensively scrutinised, in particular because the Dutch system does not allow for *pro rata* substitution of property. The acquired property either accrues fully to the matrimonial property or not at all. The effects of substitution of property on inheritance and gifts as well as connected goods have been described. The consequences of collecting a private claim by payment to a bank account have been given special attention.

*Chapter V* deals with the liability and recourse of debts, as well as the issue of when a debt can be seen as a connected debt, such that this debt cannot be considered to be a community debt. I have come to the conclusion that the latter is almost never the case, unless there is a case of debts concerning the goods excluded from the matrimonial property. Lack of connexity can mean that a community debt does accrue fully or partly to one of the spouses if it is not acceptable, according to standards of reasonableness and fairness, that it should also be borne by the other spouse.

Due to the exceptions to the main system and the rules which apply with regard to substitution of property, compensation rights can arise if property shifts took place between the private property and the matrimonial property during the

marriage. I have discussed this in *chapter VI*. The reimbursement right can lead to compensation by a spouse from his or her private assets to the matrimonial property on the one hand and to a compensation obligation for the matrimonial property to the private property of the spouse on the other hand. In relation to the investment doctrine included in Section 1:87 (new) of the bill 28 867, I have extensively considered the related consequences for reimbursement rights in the matrimonial property. I have defended that the investment doctrine does not belong in such reimbursement rights, so that in accordance with current case law, a nominal reimbursement of the asset shift which took place should be maintained. A fairness correction may suffice if a nominal payment under standards of reasonableness and fairness would be unacceptable. Since a statutory regulation to this end is currently lacking, I have argued that a (reduced) prescription period should be included in the law for reimbursement rights of 3 years after dissolution of the marriage.

In this chapter I have also discussed the insurance providing for payment of a capital sum, since bill 28 867 has devoted a separate provision to this in the scope of reimbursement rights (Section 1:96a new).

Due to the (objective) solidarity connected to our system, in principle it is irrelevant in how far such solidarity actually exists in view of divorce. This greatly affects the spouses' legal relationship. Therefore in *chapter VII* I have dealt with the consequences of the management of the matrimonial property and whether such management, in view of the divorce, can lead to mismanagement or management transgressions. Further in that respect, I have discussed the absence of a right to or obligation to report on the management and the limitations of the statutory regulation on providing information about the property of the matrimonial property. Our system only contains one section referring to prejudicial acts concerning the matrimonial property in view of the divorce: Section 1:164 Netherlands Civil Code. I have dealt with the issue of whether this is sufficient for the spouses to protect each other against prejudicial acts in view of the divorce. I have established that attempts have been made in the lower courts to find more room for this even though it is at odds with statutory regulations. Therefore I have argued for amendment to the statutory regulation which should make reporting on management acts in view of the divorce possible.

The dissolution of the matrimonial property means it ends as does application of Title 7 of Book 1 Netherlands Civil Code. Instead Title 7 of Book 3 Netherlands Civil Code takes effect. The consequences of the dissolution in a divorce under current law have been discussed in *chapter VIII* as well as the proposal to bring forward the time thereof in divorce as included in bill 28 867. The latter shall mean that the matrimonial property as a main system ends even before

the marriage has ended. Even though the majority of the writers applaud this amendment, I have argued that the matrimonial property as the main system of our matrimonial property law should continue as long as the marriage does. That is why I have proposed making it easier to reach dissolution of the matrimonial property as the matrimonial property regime applicable between spouses in view of the divorce.

In *chapter IX* I have dealt with the civil-law notary's role in the division of the dissolved matrimonial property. After referring to the law prior to 1992 in which the civil-law notary played an important role in the division of the dissolved matrimonial property, I have described current procedural law for division disputes and the civil-law notary's limited role therein. Considering his skill and expertise, I consider the involvement of the civil-law notary desirable in division disputes. Absence of an explicit lawful authority means the court's possibility to appoint the civil-law notary as an expert pursuant to Article 194 Code of Civil Procedure is limited. Therefore I have argued that the Court be given the authority *ex officio* to decide on referral to a civil-law notary in division disputes.

Although I see the estate inventory as part of the division I have dealt with it separately in *chapter X*. I have listed the various procedural provisions relating to it and requirements found in them and compared them with one another. These provisions do not stand out for their clarity and have little practical use for the dissolved matrimonial property. The estate inventory itself is an indispensable element for the court in its decision on division disputes. I have come to the conclusion that an estate inventory should be a requirement for the division by the court.

*Chapter XI* deals with the consequences of fraudulently withdrawing goods from the division by withholding them, causing them to be lost or concealing them. I have dealt with the application of Section 1:94 paragraph 2 Netherlands Civil Code in the event of a divorce.

*Chapter XII* deals with division by the court. I have emphasised the special position which the court presented with a division dispute has. The wide authorities which the court has pursuant to Section 3:185 Netherlands Civil Code have been extensively considered. On the other hand the restrictions put on the court have been examined, since pursuant to Section 1:100 paragraph 1 Netherlands Civil Code it is bound to equal division. Based on case law I have assessed the (limited) leeway which the court has to deviate from this. The valuation standards are discussed as part of this chapter. In derogation to what various writers argue, I have defended that the court has limited freedom in determining these standards and cannot derogate from the market value of the goods.

With regard to the value reference date I have dealt with the consequent main rule which can be derived from case law that this should be the day of division. Based on a number of categories of goods I have assessed whether the rule is always correct or whether a date other than the day of division should be considered as value reference date. Thereafter I have described the possibilities for determining the value on the value reference date since the day of the division applies as the day of division. I have argued that the main rule should be the day of the dissolution of the matrimonial property applies as value reference date. Even though a statutory regulation to this end is lacking, at the end of the chapter I have discussed the court making an arrangement for the division of debts and the possibilities which exist.

The subsequent *chapter XIII* deals with the property law consequences of the division established by the court. I consider the delivery requirement specified in Section 3:186 paragraph 1 Netherlands Civil Code as the (property law) rule of the division. I have defended that the prescribed delivery acts should be carried out if the court divides the dissolved matrimonial property. In the event that one of them does not cooperate in the performance of these delivery acts, it is conceivable that a property law completion, which I consider necessary to be carried out, I have described the related effects. I have ended the chapter with a brief explanation of my view of Section 3:186 paragraph 2 Netherlands Civil Code as the ground for the division.

Finally deals *chapter XIV* with a foreign matrimonial property system. In the case law and literature I have discussed the community property as model of matrimonial property law in California (USA) and the consequences of the substitution of property and reimbursement rights in divorce of that system. In contrast to the Dutch system, this system of community property means that premarital assets of the spouses also belong to the matrimonial property. The classification of goods as community property and separate property is an important element in the settlement. This can be found in our system of finalisation of settlements systems. Insofar in my opinion the study shows great similarities to the settlements system of our law.

I have finished the investigation with a Final Consideration in *chapter XV* where I expressed the wish that the court would fulfil its duty more effectively in matrimonial disputes. It is able to manage the process of division to a greater extent than it usually does now in order to reach fast and effective division of the matrimonial property. Further, I have questioned the need and the desirability of most of the amendments to the matrimonial property as currently stated.

Summary

28 867. I have argued for another amendment to the main system. As well as the currently existing (wide) matrimonial property, the system should provide in the possibility of choosing for limited matrimonial property, such that all premarital goods and debts are excluded from the matrimonial property.