

**The ISFL Family Letter**  
*Fall, 2007*

**Published by the International Society of Family Law by Prof. Margaret F. Brinig, Editor, the Family Letter: Newsletter of the ISFL, Notre Dame Law School, Notre Dame Indiana 46556 (574) 631-2303 FAX (574) 631-3595 E-mail mbrinig@nd.edu**

**MESSAGE OF THE PRESIDENT:**

Dear colleague, dear Family (Law) member, dear friend,

When you read this Family Letter, it will already be October. This autumn our nature is lovely again with the beautiful golden colours of the trees. For those living south from the equator spring will bring you the fresh green of the leaves, and the promise of a new summer.

This change of seasons reminds me of the changes in our society. We had some good conferences last year with interesting and inspiring lectures from young colleagues. Some older members of ISFL just faded away from the academic work.

The first successful conference this year was held from 18-20th June in Vancouver. The topic was: *Making Family Law: Facts, Values, and Practicalities* and Marsha Garrison, Susan Boyd, Leslie Harris, Marygold Melli and Lynn Wardle were the planning committee. Unfortunately I could not attend that conference, but I heard that the atmosphere was good, the papers stimulating and the dinner cruise of the harbor unforgettable. Even the weather was great, although it may rain 180 days a year in Vancouver.

The second conference I wish to mention was the one in Chester, that has been convened by Martha Sampson and Roger Kay. My wife Aletta and I could attend that conference and we combined this conference with a vacation afterwards. We went to the Lake District and Yorkshire and we loved it. The weather in Chester was not too bad, although in other parts of the UK, many people suffered from heavy rains and floods. The conference was held from July 17<sup>th</sup> to 21<sup>st</sup>. The theme of the conference in Chester was: *Family Justice: for Whom and How?* And the conference was very interesting too. About 65 participants, also from other continents (Japan, Australia, South Africa, USA)

attended the meetings in the law building of the University from Chester. One day we even had to move to another university because of a royal visit to the University. Prince Charles got a special award that very day and the security staff did not wish us in his neighbourhood. Were they afraid that family lawyers would confront him with his family life with Lady Di? Interesting news for royal watchers: in the town hall, where we had a reception, I heard that lady Di is still very popular there and that people can hardly forget her. Camilla's portrait was not in the town hall, while Diana's photograph was in the official meeting room. For family lawyers the story can only be interesting.

We are now looking forward to the international ISFL-conference in Vienna, which will be held in the 3<sup>rd</sup> week of September 2008. Bea Verschraegen is the convenor of this world-conference and I hope that we will attract a lot of ISFL-members and other interested persons to Austria. Vienna in September is lovely and you will certainly enjoy this beautiful romantic city. I trust Bea that the quality of the conference will be as good and interesting as is the city. Please, mark this week in your new agenda for 2008!

Besides this, I wish to thank Bill Atkin for all his work for the new International Survey 2007. He succeeded Andrew Bainham, who did the editing work for many years. We owe Andrew Bainham a lot, since he has been an excellent editor all these years. For Bill it must have been a hard job to succeed such a good editor, but the first Survey was excellent again. Thanks, Bill.

Finally, I wish to mention that we have sent observers to the international meetings of the Hague Conference on Private International Law. You will find their reports in this Family Letter. I am very grateful that The Hague Conference gives us the opportunity to send observers.

In the Spring Family Letter I asked your help to enlarge the number of members. Indeed, the two conferences in

June and July brought us several new enthusiastic members.

I think we can do more and I repeat my request:

If you speak to your colleagues in your country (in a personal meeting, at a conference or elsewhere) ask them if they know ISFL and if so, whether they wish to become a member. We offer so much for the amount of the subscription (annually the International Survey of Family Law will be sent, twice in a year they receive the Family Letter and besides that they receive a great discount for ISFL-conferences), that it is a waste that so many colleagues do not take advantage of all these advantages, I think.

Thanks to the activities from Prof. Miquel Martin-Casals and Dr. Jordi Ribot we could welcome many new members in Spain and in South and Central America. An example to be followed by all of us!

Be proud of ISFL and try to promote it as much as possible!! You can refer them to our renewed website: <http://www.law2.byu.edu/ISFL>. Our treasurer, Dr. Adriaan van der Linden (A.vanderLinden@law.uu.nl), will be happy to welcome them and to send them the Survey and other information.

I hope to meet you or at our international conference next year in Vienna (or sooner)!

I wish you a lot of success and pleasure in your work and much happiness in your family.

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**REPORT OF THE SECRETARY-GENERAL:**

The 2007 North American Regional Conference took place in Vancouver, B.C. on June 18-20, 2007. More than 50 presenters discussed a wide variety of topics related to the conference theme “Making Family Law: Facts, Values, and Practicalities.”

The keynote speaker was Professor Zheng Wu, Chairperson of the University of Victoria Sociology Department and Vice President of the Canadian Population Society. Professor Wu’s presentation explored “Changing Canadian Families: Patterns,

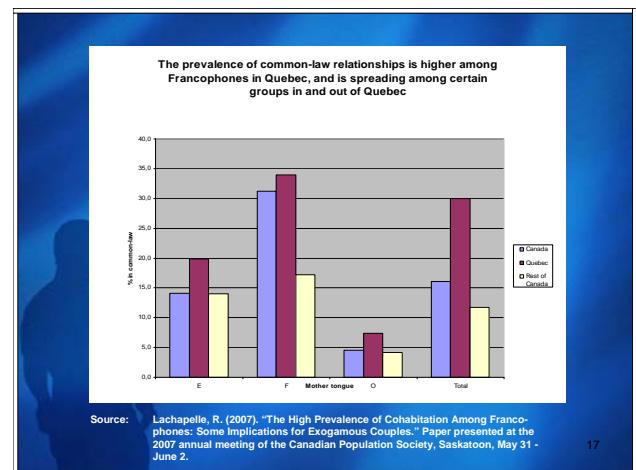
Trends, and Explanations.” Some of the Canadian patterns that Professor Wu described are familiar: in recent decades, Canada – like the United States and most of Europe – has seen a decline in married-couple households and an increase in both single-person and unmarried-couple households:

**Census Family Structure: Canada, 1981 - 2001**

| Family type                | 1981  | 1986  | 1991  | 1996  | 2001  |
|----------------------------|-------|-------|-------|-------|-------|
| Total couple families      | 88.7% | 87.3% | 87.0% | 85.5% | 84.3% |
| Married couples            | 93.7% | 91.8% | 88.8% | 86.3% | 83.6% |
| Common-law couples         | 6.3%  | 8.2%  | 11.2% | 13.7% | 16.4% |
| Total lone parent families | 11.3% | 12.7% | 13.0% | 14.5% | 15.7% |
| Female parent              | 82.6% | 82.2% | 82.7% | 83.1% | 81.3% |
| Male parent                | 17.4% | 17.8% | 17.3% | 16.9% | 18.7% |
| Total                      | 100%  | 100%  | 100%  | 100%  | 100%  |

Source: Canadian Censuses, 1981 - 2001.

What is unusual about Canada is its strong regional variation. The province of Quebec once had the highest marriage rate in Canada. It now has the lowest rate. Indeed, the Quebec marriage rate is now about half that of the other Canadian provinces; conversely, the cohabitation rate is about double that in the rest of Canada. Of course, Quebec is largely Francophone and Catholic. The rest of Canada is largely Anglophone and Protestant, and even outside Quebec, Francophones have a higher cohabitation rate than Anglophones. But intriguingly, Anglophones residing *in* Quebec have a higher cohabitation rate than Francophones residing *outside* Quebec:



What is the explanation for this interesting phenomenon? Dr. Wu reported that some demographers theorize that the explanation lies in religious attitudes. For example, Dr. Benoit Laplante argues that:

[T]he rise of cohabitation [and decline of marriage] in Quebec can be explained by the fact that almost all of its French speaking population was Catholic, and . . . the Church's refusal to change its doctrine on marriage and sexuality . . . provided Quebec Catholics with the motive to abandon the traditional Christian norms in these matters; the local Catholic authorities' withdrawal from the institutions that framed people's lives "from cradle to grave" [during the ] made it possible to actually abandon these norms. . . . In other words, the Catholic Church in Quebec gave up its power over these institutions, its most obvious and effective means of controlling its members, at the same time as the Holy See was tightening its control over the definition of right and wrong, and using it to ensure that the doctrine would not change. With Quebec's Catholic Church . . . no longer able to enforce this dogma this created a situation inviting Quebecers to act as though it was no longer relevant. Given the circumstances, Quebecers chose to accept the invitation, and treated it as irrelevant.

But Francophones' attitudes toward the Catholic Church cannot explain why Anglophone Quebecois have fallen in line with their Francophone neighbors. Economic factors may be relevant. Quebec has historically had a high unemployment rate and duration compared to most of the other Canadian provinces; the Quebec unemployment rate also rose more than 120% between 1966 and 1981, the period in which the marriage rate began to decline sharply. Researchers have also found that Quebec's high unemployment rate is significantly linked to its comparatively high suicide rate. However, Quebec's current occupational distribution, family income, and dependency ratios are comparable or better than those of neighboring provinces New Brunswick and Nova Scotia, while the marriage rate of these provinces is 1.8 times higher than that of Quebec.

So, what's your explanation for the interesting case of Quebec? And do you know of any other comparable example of regional variation in family-formation behavior? I'd love to hear from you on either point and will be happy to report what I learn in an upcoming issue of this newsletter.

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#### **REPORT OF THE TREASURER:**

Dear colleagues,

Please will you check the status of your payment of dues to be sure that you are still a member of the Society. If you don't have a survey please ask me by mail (a.vanderlinden@uu.nl). In case you still have to pay for this year (and some members still need to pay for last year as well), wire or otherwise send along the money as soon as possible.

If you wish to be deleted as a member, which I hope you don't, send me a letter before the end of November 2007, otherwise you have to pay your membership dues for the year 2008.

Unfortunately again there are members who have moved without sending their new address. This takes me a lot of unnecessary time and results in extra costs for the ISFL. Please send me your full new address and preferably also your fax number and e-mail address. We try to keep the membership list updated and with your help we can succeed in that. If you change your address or if you want to be deleted as member, please send me a message as soon as possible, but before the end of November 2007. In the case you know interested persons who want to become a member, I can send you or the interested persons (after you inform them) the application/subscription form, both in the English or in the French Language.

We do have the possibility to pay dues for up to five years. Many members choose for this opportunity, which will save you and the ISFL costs. After I paid the Annual Survey of Family Law 2007 Edition our minimum amount for 'dark' years has been diminished from € 35000,- till € 27.000,-. I hope the Society will be able to regain the amount of € 35000,-. You can help me in this respect by paying your subscription as soon as possible.

Whenever you write me, please do it by using your computer or typewriter. In many cases I can't read your

handwriting and especially to your Banks this gives me a lot of troubles.

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#### **REPORT OF THE NEWSLETTER EDITOR:**

This month, we are pleased to include a paper submitted by one of our members on Portuguese family law. Mr. Wolf has responded to the Council's invitation to all members to send me pieces for inclusion in the Newsletter describing developments in their countries. I hope you enjoy his piece and find it thought provoking, and encourage you to send me your short papers. Short pieces describing interesting developments in various countries will enhance the knowledge of all the membership, will supplement the excellent Annual Survey in a timely way, and in addition may serve as a publication for more junior members. I am accordingly pleased to again solicit short articles (less than 1000 words) on developments in various countries, and will endeavor to publish at least one each issue, depending upon the number of submissions and their lengths. The Council would be particularly pleased to receive submissions from outside Europe and North America.

Margaret F. Brinig, Editor, *The Family Letter*

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#### ***Website Updates:***

Due to changes made on the host computer system, the ISFL website homepage address (URL) has been revised. It is now all lower-case. The old URL may not open. The revised website address is:

<http://www.law2.byu.edu/isfl/index.php>

Please save this as the computer bookmark or link to the ISFL homepage, replacing the former URL.

An alternative way to find the ISFL website is to go to the BYU Law School homepage, click on "Organizations," then click on "Law School Sponsored Programs" then click on "International Society of Family Law."

First, the computer experts at BYU Law School have added the link for the "2008 ISFL 13th World Conference in Vienna" at <http://www.law2.byu.edu/ISFL/conferences.php>.

Second, we now have a "secure" section of the ISFL website. To access it the username is "ISFL" (in capitals), and the password is "ISFL2006" (again, in capitals, as the lock is case-sensitive). We have put on that secure section the "International Survey of Family Law -2006 Edition" pdf file that you sent a few weeks ago. It is now linked on the secure page link at <https://www.law2.byu.edu/isfl/members.php>. I invite you all to try it.

Regional Conference Links are available there as well.

The American Association of Law School, Family Law Section Website is now available at <http://www.uiowa.edu/~mfblaw/aals.html>. Section members have provided material, but more suggestions would be welcome, including links, class materials, exams you don't mind being generally available, or anything else you'd like to supply. You may write her at [mbrinig@nd.edu](mailto:mbrinig@nd.edu), and may attach electronic versions of any submissions.

#### **REPORTS ON CONFERENCES:**

##### **New Hague Convention on the International Recovery of Child Support and other Forms of Family Maintenance Nears Completion**

Experts and observers gathered in The Hague in May 2007 for the fifth meeting of the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance. A final series of commission meetings, followed by a diplomatic session of the Hague Conference on Private International Law to approve the text of the new convention, will take place in The Hague in November 2007. I attended the Special Commission meetings in May as an observer on behalf of the ISFL, and plan to return in that role, joined by Linda Elrod of Washburn University, for the diplomatic session in November.

The primary focus of the fifth Special Commission meeting was the preparation of an optional protocol on applicable law issues for the proposed Convention on the International Recovery of Child Support and other forms of Family Maintenance. In addition, several days were devoted to discussion of the provisions on application for recognition and enforcement of orders and on effective access to procedures.

Members of the ISFL who are interested in the new convention will find the most recent draft Convention, Protocol and Explanatory Reports on the web site of the Hague Conference at [www.hcch.net](http://www.hcch.net) under “Work in Progress” and “Maintenance Obligations.” If you have questions or comments to share, please feel free to contact me at [ann-estin@uiowa.edu](mailto:ann-estin@uiowa.edu).

--- Ann Laquer Estin, University of Iowa College of Law

#### UPCOMING CONFERENCES AND CALLS FOR PAPERS

**\*Symposium on Contemporary Conflict of Laws Issues in Family Law\*** sponsored by the BYU Law Review at the J. Reuben Clark Law School at Brigham Young University on Friday, February 1, 2008. Papers will be presented by Patrick J. Borchers, Jr. (Creighton), Joseph Dellapenna (Villanova), L. Lynn Hogue (Georgia State), J. Thomas Oldham (Univ. of Houston), Melanie Reed (Texas Tech), Jeffrey Rensberger (South Texas), Mark Strasser (Capital), Lynn D. Wardle (BYU), and others.

Registration cost is \$35 (includes materials, lunch and Utah CLE credit). To RSVP or for travel/hotel information contact Genevieve Beck at 801-422-2079 or at [beckg@law.byu.edu](mailto:beckg@law.byu.edu). Conference website:

[http://www.law2.byu.edu/organizations/marriage\\_family/index.php](http://www.law2.byu.edu/organizations/marriage_family/index.php) .

#### **Call for Papers: Gender, Family Responsibility and Legal Change**

An international, interdisciplinary conference  
*10 – 12 July 2008*  
*Brighton, East Sussex, UK*

Because societies are changing a number of issues in family law are currently on the political and legal reform agenda in many countries – unmarried cohabitation, divorce, income and property on divorce, contact with children, residence of children, father’s rights, assisted reproduction, the criminalisation of family antisocial behaviour (with a particular focus on children), the welfare test in the aftermath of the advent of legally enforceable individual rights, and many others.

Even outside the bounds of traditional family law there are numerous issues that have implications for families and family responsibilities – balancing the roles of mothers and fathers in the labour market and in family life, support for the elderly and responsibility for

pension provision, the protective role of family members in the face of dramatic environmental changes, and others – which see family membership as the source of political engagement.

In each of these reform movements gender looms large as the issue that makes resolution either particularly difficult or especially interesting (and certainly politically contentious).

In this conference – which will draw together people working in a variety of spheres of both political and academic life – we wish to consider the role that gender plays in determining family responsibility and in debating and achieving legal change. We hope to see it examine questions that range across social life in every part of the world. Questions which we hope to see addressed and explored include:

- What is family responsibility?
- How is family responsibility gendered?
- When is the law implicated in questions of family responsibility?
- Is the involvement or absence of law in the family gendered?
- What responsibility does law have for the family?
- What is the role of the state in relation to family responsibility?
- How does (and should) law and lawyers interact with other disciplines in resolving questions of family responsibility?

We hope to establish conference panels discussing:

- Fathers’ rights and fathers’ responsibilities
- Responsibilities of grandparents
- International law and family life
- Allocating family responsibilities after assisted conception
- Public life and family responsibility
- Education and the family
- Theoretical perspectives on the nature of responsibility
- Legal regulation of family/intimate/personal relationships
- Family responsibility in relation to criminal responsibility
- Violence, harm and responsibility
- Responsibility, rights and the welfare of children
- Responsibility for the elderly
- Intra-state law (for example, European law) and the responsibilities of the family

- Post-separation care of children
- Environmental degradation and family responsibility
- Society, responsibility and disability
- The nature of responsibility and its gendering
- Gender in work, welfare and family life
- Family responsibility in healthcare
- Corporate responsibility and the family

The Conference will be held on the beautiful campus of the University of Sussex, close to the seaside city of Brighton and Hove and the South Downs, between 10 and 12 July 2008.

Plenary speakers for the event include:

- Martha Fineman
- Brenda Hale
- Eva Kittay
- Jo Miles
- Ratna Kapur
- Albie Sachs (to be confirmed)
- Barbara Hobson (to be confirmed)

The conference is being organised by Craig Lind (c.lind@sussex.ac.uk), Jo Bridgeman (j.c.bridgeman@sussex.ac.uk), Heather Keating (h.m.keating@sussex.ac.uk), Sue Millns ([s.millns@sussex.ac.uk](mailto:s.millns@sussex.ac.uk)) and Alex Newbury (ahn21@sussex.ac.uk) in the Sussex Law School at the University of Sussex.

**Please send proposals for papers (on the proposal form below) to Craig Lind (c.lind@sussex.ac.uk).**

**For proposals received by 30 September 2007 decisions will be communicated to their authors by 31 October 2007. For proposals received by 31 December 2007 decisions will be communicated to their authors by 31 January 2008. The final deadline for proposals is 30 April 2008 (and decisions on those proposals will be communicated to authors by 31 May 2008).**

**If you would like further information please contact any of the conference organisers (detailed above).**

**There is a (developing) conference website accessible through the Sussex Law School web site at <http://www.sussex.ac.uk/law/1-4-9-1.html>.**

## **DEVELOPMENTS IN FAMILY LAW: A COUNTRY REPORT:**

### **PRE-MARITAL AGREEMENTS IN PORTUGAL**

#### I. Introduction

Some time ago, an American colleague asked me about marital regimes in Portugal and if it was possible to have a Portuguese pre-marital agreement subject to the laws of another jurisdiction, even if the marriage took place in Portugal. The practical objective was to avoid the obligatory heirship rights of the surviving spouse recognized under Portuguese law.

The question, as posed, simple in formulation, raises many complex areas of international private law. Nevertheless, in this area of transnational marriages, where citizens of different countries marry, and the situs of the marriage may be a country of which neither is a citizen, the importance of the query is obvious.

It is the bold practitioner who attempts to publish answers, but I shall at least touch on the many problems, all with reference to Portugal.

Any understanding of a pre-marital agreement executed in Portugal obligates an understanding of the various regimes of marriage statutorily recognized in Portugal. The relevant legal material affecting marital regimes is contained within the Portuguese Civil Code and all references to appropriate articles are simply cited as “PCC”.

#### II. Portuguese Regimes of Marriage

Under Portuguese law, there are three general regimes of marriage, all statutorily regulated by the PCC, although there exists another, rare regime, utilized under special circumstances, and whose description would detract from the contents of this article. The three most commonly used regimes are:

(1) general community property (“bens comuns”) where all assets of any nature owned by either betrothed prior to the marriage becomes jointly owned as well as property acquired during the term of the marriage

(2) jointly owned property (“bens adquiridos”) applicable to assets acquired after marriage (hereinafter referred to as “marital-acquired property” and

(3) separate property (“separação dos bens”) whereby neither spouse ever acquires an interest in any of the assets of the other spouse, other than by succession

upon death of a spouse

It is not possible to marry in Portugal without adopting one of the above regimes. It is possible, by a pre-marital agreement, to combine the regimes (Art. 1698 PCC) so that one regime is applicable to a particular asset or class of assets and another regime is applicable to a different asset or class of assets. The variations and combinations are not subject to any statutory limitation.

However, a regime may not be chosen by a generic reference to a foreign law (Art. 1718 PCC). As there is a presumption under Portuguese law (by virtue of Article 1736 PCC) of joint ownership of moveable property unless proved otherwise, a pre-marital agreement may be used to establish ownership of moveable property (for example valuable paintings or antiques brought to a marital home).

Moreover, it is possible to have a pre-marital agreement subject to a condition or term (Art. 1713 PCC). Normally this article is used in situations such as “Presently our property is deemed separate. However, should we have a child, the farm I now own shall be deemed general community property.”

Moreover, the common law concepts of tenants in common, or even tenants by the entirety, is not analogous to marital-acquired property. Where marital-acquired property exists, neither spouse may exercise rights over the property without the consent of the other.

Considering now the three various regimes:

(1) Under the general community property regime, all property, real or personal, (hereinafter referred to as “property”) owned by either spouse prior to the marriage forms part of the “marital property”, as does all property acquired after the marriage by either spouse. There are no exceptions. All property is considered as constituting the marital *corpus* and thus belongs equally to both husband and wife.

(2) Regarding the marital-acquired property regime, all property owned by either spouse prior to the marriage as well as property received during the term of the marriage, whether by gift or inheritance, is excluded from marital-acquired property and is considered “separate property”, to which the other spouse has no title. On the other hand, all property acquired during the term of the marriage is jointly owned by the spouses. However, there are exceptions to these general rules which transform the apparent division-separate/marital-acquired-into a more complex set of rules.

One exception is that “income” from separate property is considered as being marital-acquired property. This doctrine is a result of Art. 1733 PCC which states that the consequences resulting from marital-acquired property regime (the existence of separate and marital-acquired property) does not extend to the “income” produced by assets. The rationale of this article is the importance Portuguese law gives to the maintenance of the family and its characterization as a moral and economic unit. Income is seen as a contribution to the common marital benefit.

The interpretation of “income” is found in Art. 1733 which states that the “frutos” (fruit) of separate assets is communicable, i.e. although the underlying asset may be separate property, the income is communicable to another regime, in this case the marital-acquired property regime. The word “frutos” is clearly similar to our English word “fruit”. The use of the word “frutos” is intended to convey the meaning of “income” from the underlying asset and most certainly would include, e.g. rents from real estate owned, an example cited by *Pereira Coelho, Curso de Direito da Família, 3<sup>rd</sup> Edition, 2003*. By a simple analogy, Art. 1733 would then extend to dividends from stock.

Also, that dividends are “income” is supported by the Lisbon Appeals Court (one step below the Supreme Court) decision in “Acórdão do Tribunal da Relação de Lisboa, Processo:0016362, 09-10-97, holding that profits distributed from a commercial society become communicable and are marital property as distinct from company reserves, which not being distributed can not be considered income.

A suggested method for avoiding the consequences of Art. 1733 would be to create a life estate prior to a marriage on the right to dividends so that the future dividends are already subject to a legal estate. Portuguese law, by virtue of Chapter II of the PCC Arts. 1446 et seq. recognizes the concept of a life estate and various articles deal with its applications.

A further consequence of the marital-acquired property regime dealt with by the PCC is the concept of subrogation, similar in theory to the common law concept. By virtue of Art 1723, the legal status of separate property is conserved as to property substituted in place of the original gift or inheritance. Such a substitution is denominated “sub-rogação”, or subrogation. However, Art 1723 mentions only three categories, which are classified in legal theory as direct subrogation and indirect subrogation:

(1) “direct exchange”, e.g. one building for another, or

(2) “the price of the separate property alienated,” e.g. a building sold for cash, both the above being classified as direct subrogation.

Then there is indirect subrogation, or

(3) “goods acquired” with separate property, e.g. sale of a building and purchase of another, but here there is a substantial limitation as to the application of indirect subrogation.

Indirect subrogation is valid only if the origin of the money or other value is duly mentioned in the document of acquisition which must be signed by both spouses. This doctrine of indirect subrogation within a marital context has raised a number of legal questions debated in scholarly texts and case law, e.g. shares are inherited and subsequently (with no statutory time limitations) the shares are sold for an apartment. This is a classic example of indirect subrogation. For the second purchase to remain separate property, the other spouse would have to acknowledge the purchase as separate property, in writing, in the purchase order. The debate has centered on whether or not other proof may be presented showing the origin of the purchase. Current judicial opinion is against varying the literal terms of the PCC so as not to admit other evidence of proof as to the origin of the asset in question.

An additional, third consequence of the marital-acquired property regime is that income from work is considered as belonging to the marital corpus (Art. 1724 PCC).

(3) The marital consequences under the regime of separate property are simple. All property owned by each spouse remains the asset of the title owner with no exceptions, including income, (Art. 1735 PCC) or income from work.

### III. Pre-marital agreements in Portugal

With this brief survey of the statutory regimes of marriage in Portugal, we can now examine their interplay with a pre-marital agreement.

Portuguese law recognizes the validity of a pre-marital agreement. It can be conditional and subject to terms (Art. 1713 PCC). The regime of marriage chosen must be one recognized by Portuguese law but they can be combined and different regimes can apply to varying assets. The agreement must be in writing (Art. 1710 PCC) and must be registered (Art. 1710 PCC). It cannot regulate succession (Art. 1699 PCC). A pre-marital agreement cannot be modified after the marriage is

consummated. Unless the parties, or one of them, is a Portuguese citizen, there is no simple way of publicly registering a pre-marital agreement. The lack of registration means the pre-marital agreement has no effect as to third parties except as to legitimate heirs.

A commonly asked question by colleagues is to what extent a pre-marital agreement made subject to the laws of an American state will be considered valid under Portuguese law if the agreement cannot be registered in Portugal.

Portugal recognizes the customary rules of private international law as concerns obligations, where for example parties can designate a forum if the jurisdiction has substantial contact with the underlying obligations. Portugal is a party to the European Convention on Obligations (1980) which is a restatement of these rules. But a pre-marital agreement is substantially different in objectives from the traditional contract and the possible application of this Convention to a pre-marital agreement is not convincing.

Moreover, Art. 53 PCC states that pre-marital agreements are regulated by the law of the habitual conjugal residence where the parties are of different nationalities. The issue of the domicile (the Portuguese article does state “residence” but domicile is intended) presents one opportunity for designating another forum provided the pre-marital agreements recites the multiple conjugal residences. Nevertheless, it is by no means a certain conclusion that a pre-marital agreement executed under the laws of a foreign forum will be recognized by a Portuguese court.

This question is different from whether the jurisdiction where the agreement is intended to be operative will recognize and enforce the validity of the agreement. This falls under the analysis of a “foreign forum”.

### IV. Foreign Forum

Assuming a pre-marital agreement drafted subject to the laws of an American state, where perhaps the surviving spouse waives any right to heirship, but the parties intend to reside in Portugal. We have two possible scenarios.

Arts. 52 and 53 of the PCC establish that the law of the habitual conjugal residence at the time of marriage regulates a pre-marital agreement when the parties are a foreigner and a Portuguese. Moreover, Portuguese law requires a pre-marital agreement to be registered to



have effect as to third parties. Consequently, a pre-marital agreement under the law of an American state, not registered in Portugal, but where the parties are living in Portugal, may be declared invalid.

Thus, there is a strong argument for adopting a regime of separate property in Portugal but which at the same time selectively incorporates a category of marital-acquired property by a private agreement. If the agreement is declared invalid, the regime of separate property as to all assets will prevail. There is no pre-marital agreement and the only declared regime of marriage is separate property. Such a conclusion assumes litigation in Portugal where the pre-marital agreement may be the subject of a lawsuit contesting its validity.

#### V. Application of Law of Foreign Forum

However, if litigation takes place in an American state, or another jurisdiction other than Portugal, reasons must be inserted into the pre-marital agreement so as to have it held valid under the laws of the forum in question..

Under the rules of international private law, the choice of law clause should be substantiated by, e.g. anticipated changing of domicile of the spouses, the diverse location of the assets, the need for one jurisdiction to interpret any questions of law, the diversity of the assets, and the relevancy of legal concepts not normally utilized in civil law systems, e.g. the law of trusts.

In the absence of compelling reasons for the incorporation of foreign law into a pre-marital agreement executed in accordance with Portuguese law, the foreign forum may well look to the law of Portugal as to its validity.

#### VII. Conclusion

Pre-marital agreements in Portugal are regulated by statute. Counsel seeking to avoid the inheritance laws of Portugal through a pre-marital agreement, utilizing the device of reference to a foreign law for regulation of the rights of the parties can not be assured of a successful conclusion.

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Set forth below is a summary of the material concerning the Portuguese regimes of marriage based upon the 3

standard family law text books *Pereira Coelho, Curso de Direito da Familia, 3<sup>rd</sup> Edition,*( 2003); *Ferreira Pinto, Direito da Familia e de Direito das Sucessões* (2004); and *Proença, Direito da Familia, 3<sup>rd</sup> Ed.,* (2004); online research at the web site of the Portuguese Ministry of Justice (which has made available electronically thousands of cases decided by the various tribunals in Portugal); and multiple legal essay collections and monographs which I reviewed at the law library of the Portuguese Bar Association.

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*FAMILY LAW - BALANCING INTERESTS AND PURSUING PRIORITIES* Selected Papers from the 12th World Conference of the International Society of

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This anthology contains eighty-seven chapters written by family law scholars from dozens of nations who were among the 164 presenters who delivered papers at Twelfth World Conference of the International Society of Family Law in 2005. The theme of the conference and title of the book, \*Family Law - Balancing Interests and Pursuing

Priorities,\* reflects two basic principles that underlie family laws in all nations. First, multiple valid and important (and often sensitive) interests are implicated in the regulation of family relations, and those interests must be identified, recognized, understood and respectfully considered in framing family policies in order to strike an appropriate balance in family law. Second, the policy and value priorities of the people and their government also must be identified, protected and vindicated in setting family policies and in resolving family disputes. The chapters in this book are divided into eight Parts, covering the \*before-during-after\* phases of (legal and quasi-) spousal and parent-child relations, as well as general, historical, theoretical, and reflective chapters. Chapters reflect perspectives from many legal systems, civil as well and common law, traditional as well as modern, on the relational, economic, social, and other aspects of family law. The book is cloth-bound, and available for purchase from the respected Buffalo, New York law book publisher, William S. Hein & Co. at their website at

<http://www.wshein.com/Catalog/Product.aspx?sku=6736> or by or by e-mailing [order@wshein.com](mailto:order@wshein.com). The cost per book is US\$78.00 (with a 10% discount or US\$70.20 for current members of the ISFL), plus mailing.

**NOTE:** The Newsletter will publish notices of recent publications dealing with family law topics if the following information—Name of author, title of article chapter, title of book or journal in which it is published, the volume and pages, the year of publication (and if the title of the article, chapter and/or book or journal is not in English a translation of the same into English - so that the entry can be placed in the appropriate category)—is sent to Prof. Laurence C. Nolan, Howard University School of Law, 2900 Van Ness Street, N.W., Washington, DC 20008; 202-806-8428 (fax); [lnolan@law.howard.edu](mailto:lnolan@law.howard.edu) (e-mail).

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### Personal Notices:

Professor Olga Cvejic-Jancic of the University of Novi Sad, Serbia, has been appointed a member of the National Commission for the drafting of the Serbian Civil Code. The Code dates from 1844 until Second World War, after which it was abolished. Professor Cvejic-Jancic, a long-time member of the ISFL and the former Dean of the Faculty of Laws at the University of Novi Sad, is the only member of the Commission who is not from Belgrade.

Not exactly a member, but Sheila Simon, who delighted the 12<sup>th</sup> World Congress with her interacting songs about gender and violence, is running for Mayor of Carbondale, Illinois. The Chicago Tribune reported on its front page on November 24, 2006, that Sheila Simon (who teaches legal writing and family law at Southern Illinois University) is running for mayor of Carbondale.

Carbondale is a long train ride from Chicago, and a story about a non-partisan race for mayor of a town of only 25,000 people would not normally make the front page of a Chicago paper.

This is the webpage of the story:

[http://www.chicagotribune.com/news/politics/chi-0611250201nov25\\_1\\_3306552.story?coll=chi-news-hed](http://www.chicagotribune.com/news/politics/chi-0611250201nov25_1_3306552.story?coll=chi-news-hed)