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### **UNEQUAL CONTRIBUTIONS: PROBLEMS WITHIN THE DIVISION OF SHARES IN JOINT COMMUNITY PROPERTY**

#### **Jurgita Grigienė**

**Associate Professor; Dr.  
Vytautas Magnus University, Faculty of Law (Lithuania)**

##### **Contact information**

Address: Jonavos str. 66, LT-44191 Kaunas, Lithuania

Phone: +370 37 333 031

E-mail address: jurgita.grigiene@vdu.lt

#### **Paulius Čerka**

**Associate Professor; Dr.  
Vytautas Magnus University, Faculty of Law (Lithuania)**

##### **Contact information**

Address: Jonavos str. 66, LT-44191 Kaunas, Lithuania

Phone: +370 37 333 031

E-mail address: paulius.cerka@vdu.lt

#### **Milda Štuikytė-Skužinskienė**

**Master of Law; Lawyer  
Vytautas Magnus University, Faculty of Law (Lithuania)**

##### **Contact information**

Address: Jonavos str. 66, LT-44191 Kaunas, Lithuania

E-mail address: mstuikyte@gmail.com

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### **ABSTRACT**

Marriage influences the economic rights of spouses when joint community property is created. When a marriage is dissolved, joint community property has to be divided. Each country sets different rules about how joint community property should be divided between spouses. Lithuania has chosen the presumption of equal shares in joint community property. Courts may depart from equal shares of spouses because of such important circumstances as interests of children, health state of a spouse, and personal income used to increase joint community property. However, courts have never departed from the equal shares principle due to differing contributions by spouses to matrimonial property. Meanwhile, other countries take into account contribution of spouses in order to divide property fairly and to protect the interests of the spouse who has contributed significantly to joint property, if the marriage was brief and the marriage produced no children. The impossibility to depart from equal shares to different contribution of spouses could increase the misuse of the institution of marriage and the unjust division of joint community property when the spouse who has not contributed to joint community property receives an equal share of it.

### **KEYWORDS**

Joint community property, division of joint community property, equal shares in joint community property, matrimonial property

## INTRODUCTION

Marriage is a central social institution – an integral part of society. Marriage existed even before the State. Marriage has influence over the status of spouses, their rights and obligations. The property rights of spouses are influenced by marriage. For example, spouses have to support each other and contribute to joint property. In the course of history, property rights of spouses evolve. For example, in ancient times, all property acquired after the marriage belonged to the husband, but later, in order to protect the weaker party (woman), some restrictions were imposed so that the husband would not be able to dispose of the property without consent of the wife. However, in general the wife's property rights were related only to her dowry: "Until the 19th century a woman's property became her husband's property on marriage in most European legal regimes".<sup>1</sup> After that different regimes of institutions of matrimonial property were established: "The common goal of these regimes was to ensure the economical protection of the weaker spouse, i.e., women, in cases of divorce or the termination of marriage. The intention was to equalize the position of women and men in the traditional sense of marriage with a male breadwinner and a female housewife, which was common at that time".<sup>2</sup>

Even though marriage is a covenant, it does not always last until death and can be dissolved. When a marriage is dissolved, property rights, joint community property and obligations must be divided. Different methods to divide joint community property of the spouses have been applied in different countries in various ways depending upon the model of matrimonial property. Some countries apply the principle of equal shares in the community property, but other countries consider that division of property into equal shares does not ensure justice; thus, in order to divide joint community property of spouses justly and honestly, the principle of proportionality was used. When applying the principle of proportionality, the aim is to divide the property of spouses with respect to their contribution to the marriage. When dividing joint community property of spouses during the divorce process in Lithuania, the presumption of equal shares is applied. This regulation is one of the means to ensure equality between spouses. Even though courts have the discretion to depart from the principle of equal shares, they usually do not use it, seeking instead to retain the principle of equality. As a number of countries applying the principle of proportionality when dividing joint community property of

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<sup>1</sup> Andrea Woelke, "Response to Green Paper on Conflict of Laws in Matters Concerning Matrimonial Property Regimes, Including the Question of Jurisdiction and Mutual Recognition" // [http://www.resolution.org.uk/site\\_content\\_files/files/resolution\\_response\\_to\\_green\\_paper\\_on\\_mat\\_pty\\_regimes\\_2.pdf](http://www.resolution.org.uk/site_content_files/files/resolution_response_to_green_paper_on_mat_pty_regimes_2.pdf).

<sup>2</sup> Rešetar Branka, "Matrimonial Property in Europe: A Link between Sociology and Family Law," *Electronic Journal of Comparative Law* Vol. 12.3 (2008): 1.

spouses has been increasing, this issue should be important for Lithuanian case law as well, as it allows departing from the principle of equal shares. It is important to find out whether it is possible to reach justice in Lithuania when applying the presumption of equal shares and whether it is possible to depart from the principle of equal shares taking into consideration the proportionality of contribution of the spouses.

The property issues of spouses in Lithuania have been investigated by Pranciskus Stanislavas Vitkevičius, Inga Kudinavičiūtė-Michailovienė and Valentinas Mikelėnas, but departure from equal shares in joint community property due to the principle of proportionally and different contribution has not been analysed yet.

The purpose of this article is to analyse whether courts in Lithuania could take into account different contributions of the spouses and depart from equal share according to the different proportions of input. The analysis could be useful for judges who wish to solve practical cases, and who want to divide property fairly, and for the situations when there is a need to depart from equal share of spouses.

## **1. MODELS OF MATRIMONIAL PROPERTY REGIMES**

Marriage is a union between a man and a woman, who commit to long-term exclusive relations. By entering into such relations, spouses put all their efforts into creating mutual financial and emotional well-being. Even after several months of marriage, spouses have common gifts, furniture, and in this way create not only non-material but also material relations.<sup>3</sup> When these relations are to be terminated, the main problem arises as to how to divide the jointly created welfare justly; it covers not only financial issues but also the non-material contributions of each spouse. Each country has its own rules about how to distribute property acquired during the marriage. In some countries only property acquired after the marriage is treated as joint property of spouses and in some countries even property acquired prior to the marriage belongs to matrimonial property. In addition, in common law countries the matrimonial property is formed by marriage but upon divorce the property is divided by the court pursuant to different criteria.

All these models suggest that property relations between spouses require particular, special regulations which are usually chosen by the State in accordance with its traditions, customs, national government and interests of the people. According to Herring, there are three factors that play an important role when choosing legal regime of property: 1. The model should be as concrete as possible; 2. Expectations of the spouse(s) should be taken into consideration; 3. Rules of the

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<sup>3</sup> John M. Haynes and Stephanie Charlesworth, *The Fundamentals of Family Mediation* (Leichhardt: Federation Press, 1996), 97.

model should be practically applicable and easily followed.<sup>4</sup> However, practically speaking, each of the above mentioned regime models has its own advantages and disadvantages. The model that would reflect all of the expectations of spouses in marriage has not been created yet. The established particular legal regime allows for the decrease of the number of disputes during the process of divorce and to defend legitimate interests of the spouses.

### **1.1. THE SYSTEM OF SEPARATE PROPERTY REGIME IN WHICH MATRIMONIAL PROPERTY IS NOT CREATED**

According to English law, marriage has no influence on property rights of spouses. "The concept that a woman's property was automatically transferred to the husband on marriage was immediately replaced in 1883 by nothing happening to property on marriage at all".<sup>5</sup> Upon divorce the court takes decision and allocates property according to the needs of the applicant pursuant Matrimonial Causes Act 1973<sup>6</sup>. Even though it is called a separate property regime, this does not mean that all property acquired during the marriage will belong to the spouse who has acquired it. The courts have the right to distribute property. The regime is called a separate property regime because matrimonial regime is unknown in England. According to the English law, the court should pay attention to:

the income, earning capacity, property and other financial resources of each spouse, 'the financial needs, obligations and responsibilities' of each spouse at the time of divorce and in the future, 'the standard of living enjoyed by the family before the breakdown of the marriage', the age of the parties and duration of the marriage, contributions to the welfare of the family etc.<sup>7</sup>

Even though England applies the model of separate shares of spouses, in order to make the right decision courts have changed the former practice and started dividing property according to the principle of equal shares. The first change in England took place in 2000 after the case *White vs. White*, since from that time on the property of spouses has been divided in equal shares protecting a weaker spouse.<sup>8</sup> After such practice was formulated, the boom of "huge cases" started. For this reason, after some years the court supplemented the issue of the division of property with a new rule: the property of spouses is divided in equal shares unless

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<sup>4</sup> Jonathan Herring, *Family law* (London: Pearson Education, 2001), 118.

<sup>5</sup> Andrea Woelke, *supra* note 1: 1.

<sup>6</sup> *Matrimonial Causes Act* (United Kingdom 1973).

<sup>7</sup> Chris Clarkson, Leicester Jonathan a d Mark Thompson, "Study On Matrimonial Property Regimes And The Property Of Unmarried Couples In Private International Law And Internal Law," *Commission Européenne* (2001): 13.

<sup>8</sup> Rachael Stretch, *Family Law* (New York: Routledge, 2013), 72.

there are proper reasons for the departure from such proportions.<sup>9</sup> This new practice is reflected in the case between wife Beverley Charman and husband Jon Charman, who had a big business in Dragon Trust and sought to leave a particular part of the property in that business and not to give it to his wife. The husband disagreed assertively with the division of the property in equal shares since he regarded such a division as absolutely disproportionate. According to the final decision of the court, 37% (i.e. 100 million pounds) of the possessed property shall belong to the wife. In this case, the main task for the court was to solve the case fairly. This could be reached only when the parties are equal, the principle of proportionality is applied, the protection from high costs is assured and the case is solved quickly and fairly and the divided property conforms to the financial situation.<sup>10</sup> The court more than once emphasized in the case that "marriage is equal partnership and after the partnership ends, each of spouses has the right to the equal share of property. However, the criterion of honesty requires the contrary in case of an important reason. The criterion of equality should be applied as an additional measure but not as a rule."<sup>11</sup> So, in England even though each property is separate during the marriage, upon divorce the property is divided between spouses according to the principle of equal shares by the decision of the court, unless significant circumstances not to behave so are present.

Different contributions of spouses are evaluated at the time of marriage dissolution in England and other common law countries.

## 1.2. COMMUNITY PROPERTY REGIME CREATED AFTER MARRIAGE

Another system was created in continental Europe. In order to protect a wife's rights after marriage the institution of matrimonial property was created. "The idea of community means that whatever property falls into the pot it will be divided 50:50 between the spouses on the dissolution of the marriage."<sup>12</sup> The scope of community property differs and it could include all of the spouse's assets acquired even before marriage (universal community property) or only property acquired after the marriage (limited community property). The matrimonial property regime could be universal, deferred and limited.

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<sup>9</sup> Joanna Miles and Rebecca Probert, *Sharing Lives, Dividing Assets: An Inter-Disciplinary Study* (USA: Bloomsbury Publishing, 2009), 7.

<sup>10</sup> *Charman v Charman*, The High Court of Justice London, (2006, EWHC 1879 (Fam)).

<sup>11</sup> *Ibid.*

<sup>12</sup> Elizabeth Cooke, Anne Barlow, and Thérèse Callus, "Community of property A regime for England and Wales?" *Great Britain The Nuffield Foundation* (2006): 4.

### 1.2.1. UNIVERSAL COMMUNITY PROPERTY REGIME

Universal community was the legal regime of, *inter alia*, Roman-Dutch law, and was taken over from there by South African law, where it has remained the legal regime to this day.<sup>13</sup> Property owned before the marriage and during the marriage forms universal community property in the Netherlands. However, the Netherlands is almost unique insofar as universal community is the default regime.<sup>14</sup> Upon divorce the property and the obligations are divided between spouses in equal shares. It is possible to have deviations upon agreement of parties: "If the divorce is contested in court, a court will virtually always hold fast to the equal division of property".<sup>15</sup> The Netherlands is one of the obvious supporters of the principle of equality. All contributions of the spouses are equally evaluated, and this reduces weaker spouse's discrimination in marriage because usually one spouse must give up the career and do housework and raise children, that is why material deposits often are very different. According to the Dutch Civil Code, Article 94 paragraph 6, even if it is unclear who owns the property and none of the spouses is unable to prove that it is his property, there is a rule that the property will be considered common joint property, of course, without prejudice to the interests of creditors.<sup>16</sup> This article reveals that the Netherlands, in particular, aims to protect the joint ownership rather than separate, which also shows the desire to protect equal rights of spouses. We can presume that such countries as the Netherlands seek to ensure equal rights of the spouses. However, recently some changes have been made in the Netherlands and the universal principal was changed. "For all marriages concluded after the 1st of January 2018 a new marital property regime applies. In short, property acquired before marriage is no longer a part of the marital property".<sup>17</sup> Therefore, only for marriages concluded before the 1<sup>st</sup> of January 2018 universal community property regime will be applied.

### 1.2.2. DEFERRED COMMUNITY PROPERTY

The deferred community property regime appeared in Scandinavia and is applied in other countries with different deviations, as well. "When marriage is entered into, each spouse's property shall, under the main rule, become so-called

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<sup>13</sup> H. R. Hahlo, "Matrimonial Property Regimes: Yesterday, Today and Tomorrow," *Osgoode Hall Law Journal* 11.3 (1973): 460.

<sup>14</sup> See Elizabeth Cooke, Anne Barlow, and Thérèse Callus, *supra* note 12: 5.

<sup>15</sup> Jeremy D. Morley, "Some Notes on Marriage and Divorce Law in the Netherlands" // <http://www.veldlaw.nl/en/services/family-law/dividing-marital-property-in-the-netherlands/>.

<sup>16</sup> H. C. S. Warendorf, R. L. Thomas (M.A.), and Ian Sumner, *The Civil Code of the Netherlands*, (Alphen: Kluwer Law International, 2009), 52.

<sup>17</sup> "Dividing Marital Property in The Netherlands - update" // <https://veldlaw.nl/en/services/family-law/dividing-marital-property-in-the-netherlands>.

marital property (in Swedish: giftorättsgods) forming a part of the deferred community property regime, Ch. 7 § 1<sup>18</sup>.“ “Although the equal division also applies in Sweden, there is rather more scope for deviation from this, dependent upon a number of factors and notably the duration of the marriage ... on a sliding scale for the first five years of the marriage.”<sup>19</sup>

In Germany, the property is divided in their own way. Here, the whole property is not divided in equal shares but only the difference between the increases of individual property of both spouses.<sup>20</sup> In case the difference is very big after the division of the property, the court is allowed to depart from the principle of equal shares.<sup>21</sup> The most common situation when the difference of the property is not divided in equal shares is manifested in case of different contributions of the spouses to the marriage: if the differences of property value are extremely big, the court can divide the property according to principle of fairness.<sup>22</sup> Germany is one of the countries that uses an exclusive model of the division of property: one share of the property of spouses is regarded as his/her personal property, and each situation is assessed individually in case of divorce in order to protect the rights of spouses. Thus, if it is likely that the property will be divided inequitably in respect of one spouse, the property is divided proportionally according to the contribution of spouses and this division is called community of gains because only increase of property is divided.

Austria is among the most active countries in supporting a different contribution model, and analyzing each case of divorce individually. There is no established strict division of the property of spouses in equal shares<sup>23</sup> as there is quite much freedom left for divorce and the spouses can agree on everything. The Austrian family laws emphasize that, when dividing the property of spouses, it is necessary to take into consideration the contribution of each spouse as well as all savings added to the total family budget. It should be noted that contribution is understood not only as material expression but also as the management of the economy of the family, supervision of children, etc.<sup>24</sup> Consequently, by applying the principle of proportionality, it is possible to secure interests of a weaker spouse since household chores and raising of children can also be considered as

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<sup>18</sup> Maarit Jänterä-Jareborg, Margareta Brattström, and Kajsa Walleng, “National Report: Sweden,” *Uppsala University* (2008): 2.

<sup>19</sup> Johanna Schiratzkis, “Swedish report in the European Commission’s”; in: *Study on Matrimonial Property Regimes and the Property of Unmarried Couples in Private International Law and Internal Law*, General Direction Justice and Home Affairs, JAI/A3/2001/03 (Brussels: European Commission, 2001).

<sup>20</sup> *The Bürgerliches Gesetzbuch* (BGB) (1881), veröffentlicht 1991 01 01, § 1416 Gesamtgut (1).

<sup>21</sup> Thomas Rauscher, *Familienrecht* (Berlin: Hüthig Jehle Rehm, 2008), 337.

<sup>22</sup> *The Bürgerliches Gesetzbuch* (BGB) (1881), veröffentlicht 1991 01 01, § 1381 Leistungsverweigerung wegen grober Unbilligkeit (2).

<sup>23</sup> Jens M Scherpe, *Marital Agreements and Private Autonomy in Comparative Perspective* (New York: Bloomsbury Publishing, 2012), 67.

<sup>24</sup> “Divorce – Austria” (August 2, 2007) // [http://ec.europa.eu/civiljustice/divorce/divorce\\_aus\\_en.htm](http://ec.europa.eu/civiljustice/divorce/divorce_aus_en.htm).



contribution. Additionally, issues of the division of property solved in this way leave fewer conflicts and disputes after divorce.

In most of the above-mentioned states, different property regimes are established and different models are applied for division of property. However, each country seeks to divide the property of spouses equitably; it is an integral part of the principle of fairness. As relations between spouses are specific and matrimonial ties usually cannot be judged according to the relations between other spouses, it is essential for the court to evaluate individually the material and non-material contribution to the creation of family welfare in every single case.

### **1.3. LIMITED COMMUNITY PROPERTY REGIME**

The example of limited community property could be France, where only property acquired after the marriage forms community property.

European Family Law provides different approach to this regime in different states. The profit generated by personal property turns into the community property in countries such as Belgium, Spain and Portugal and of course the France, while in Slovenia, Serbia or Croatia it did not. Notwithstanding all contrariness it is most common default system in Europe. <...> Limited community property regime is characterized by the fact that it creates three groups of assets: 1) joint property; 2) personal property of one spouse; 3) personal property of another spouse.<sup>25</sup>

In a divorce case, the main principle is that each spouse keeps his or her personal property and the community property is divided equally. At first glance it looks easy but in practice it is difficult to delimit those three groups of properties. Also, this mode is distinctive because inheritance and gifts that were received during marriage remain separate property of each spouse.<sup>26</sup>

Worldwide there are several main methods applied for the division of the property of spouses. The application of each method is aimed at an easier, more effective and equitable division of the joint community property of spouses. These days, more and more countries apply the method of equitable division of property for the division of property in case of divorce. This method assures equitable but not necessarily equal division of property among spouses.<sup>27</sup> Other countries that are still applying the principle of joint community in the division of the property of spouses tend to form a new case law and complement traditional provisions regarding cases, where it is allowed to depart from the principle of equal shares

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<sup>25</sup> Jens M. Scherpe, "The Financial Consequences of Divorce in a European Perspective," *European Family Law* Vol. 3 (2016): 26.

<sup>26</sup> *Ibid.*

<sup>27</sup> William Statsky, *Family Law: The Essentials* (USA: Cengage Learning, 2014), 199.

when seeking for justice. This method of the division of the property of spouses has received great popularity because it reflects better the interests of modern spouses and, according to the article by Tom Orecchio, the unequal division of the property of spouses is becoming a more equitable way to end property relations of spouses in divorce.<sup>28</sup> For this reason, countries seeking for a more equitable division of joint community property and for a better method for such division, which would allow measuring each situation of the division of the property of spouses individually, started using the method of equitable division of property more often. According to this method, the property is divided proportionally taking into consideration the contribution of spouses to marriage.

## 2. THE MATRIMONIAL PROPERTY MODEL IN LITHUANIA

There are several regimes that determine the status of property of spouses: the property may be joint, separate or it may be a limited joint property of spouses. Lithuania has chosen a model of limited property of spouses, where the property acquired after the marriage is joint. The Lithuanian Civil Code (CC) does not provide a finite description of joint community property since it includes almost any income received by spouses and any property acquired after the marriage conclusion. The property received as a gift or inherited even after the marriage is treated as a separate property of spouses. However, the spouses may choose between separate or joint property by signing a marriage contract.

The Lithuanian CC stipulates a legal regime of limited community property, according to which the property acquired during the marriage is regarded as joint community property of spouses.<sup>29</sup> The choice of this model in Lithuania was based on its longevity as the legal regime of limited community property was introduced in 1940, so few generations have already lived according to this regime.<sup>30</sup> The legal regime of limited community property is applied in Lithuania; therefore, some property is distinguished as individual, i.e. intellectual and industrial property rights except income, funds received by these rights, funds received by one of the spouse as the compensation for damages or any other compensation for damages made due to the health injury, individual property for personal needs of the spouse, etc.<sup>31</sup> Property acquired before the marriage is also regarded as individual property. The sole fact that the property was acquired after the marriage does not mean

<sup>28</sup> Tom Orecchio, "What is a "Fair" Division of Property in Divorce?" // <http://www.hcplive.com/physicians-money-digest/columns/physicians-wealth-manager/06-2012/Division-of-Property-During-Divorce>.

<sup>29</sup> Stanislovas Pranciškus Vitkevičius, *Šeimos narių turtiniai teisiniai santykiai* (Vilnius: Justitia, 2006), 90.

<sup>30</sup> Valentinas Mikelėnas, *Šeimos teisė* (Vilnius: Justitia, 2009), 266.

<sup>31</sup> *Sutuoktinių turtines prievoles reglamentuojančių teisės normų taikymas*, The Review of the Supreme Court of the Republic of Lithuania (Nr. AC-40-1), 16-18.

automatically that it is joint community property: "property devolved to a spouse by succession or gift during the marriage unless the will or donation agreement indicates that the property is devolved as joint community property, shall be considered as individual property."<sup>32</sup> The main distinguishing feature between the joint community property and the partial community property is that shares of owners are determined in case of partial property and no shares are determined in case of joint community property.

Joint community property is regarded as total property acquired after marriage in the name of one spouse or both spouses.<sup>33</sup> Income received from individual property is also regarded as joint community property: "income and fruit received from the individual property of the spouse. No matter in whose name the property is registered in the Centre of Registers. If the property has been acquired for joint funds it shall be regarded as joint community property of spouses in the case of the division of the property."<sup>34</sup> Pursuant to sub-paragraph 5 of paragraph 1 of Article 3.88 of the CC, even "income from the work or intellectual activities, dividends, pensions, benefits or other"<sup>35</sup> property is regarded as joint community property. As the law does not provide a finite description of what joint community property is, in some cases court has to decide whether a particular item could be treated as joint or separate. For example, the dispute may arise whether property that has to be registered but is not registered yet may be recognized as joint community property. In general, the presumption is established in paragraph 1 of the Lithuanian CC Art. 3.87 that total property acquired after the marriage is joint community property of spouses. Nevertheless, spouses may conclude a marriage contract and determine their property rights by the contract, choosing to consider the whole property acquired even before the marriage as joint community property of spouses or choosing to consider the whole property acquired after the marriage as the separate property of spouses.

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<sup>32</sup> Stanislovas Pranciškus Vitkevičius, *supra* note 29, 97.

<sup>33</sup> See *Civil Code of Republic of Lithuania* (Official Gazette, 2000-07-18, no. VIII-1864), art. 3.88.

<sup>34</sup> Viktorija Čivilytė – Gylienė, *Trumpas šeimos teisės vadovas* (Vilnius: Eugrimas, 2006), 82.

<sup>35</sup> *Civil Code of Republic of Lithuania*, *supra* note 33, art. 3.88(1(5)).

## 2.1. DIVISION OF JOINT COMMUNITY PROPERTY

### 2.1.1. DIVISION OF PROPERTY ACCORDING TO THE PRINCIPLE OF EQUAL SHARES IN LITHUANIA

Article 3.117 of the Lithuanian CC presumes that spouses have equal shares in joint community property in Lithuania.<sup>36</sup> After establishing the presumption of equal shares, it was expected, first of all, "to assure property equality of spouses irrespective of the nature of the activity of each spouse and individual contribution creating corporate property as well as legal certainty in respect of property rights."<sup>37</sup> One more task of the institution of equal shares is protection of property interests of minors since their interests are often infringed upon in divorce cases. These tasks reveal that one of the main aims of the presumption of equal shares is to protect the economically and socially weaker party.

The presumption of equal shares is always applied when spouses have not entered into a marriage contract and have not chosen a different way to divide their property. In such a case, the measure stipulated in the law for division of property is applied to spouses. Since marriage contracts are not very popular in Lithuania, most spouses are divorced by means stipulated by the law.

In Lithuania, the main focus is on the principle of equality in marriage. In Lithuania, the presumption of equal shares is applied in order to protect equal rights of spouses. This presumption contributes to implementation of the principle of equality because, as mentioned above, special relations are created between spouses, where both spouses have a single aim – to create welfare in marriage. However, the Lithuanian laws apply the presumption of equal shares as a main rule to end all property relations of spouses in case of divorce.

### 2.1.2. THE BASIS TO DEPART FROM THE PRINCIPLE OF EQUAL SHARES IN LITHUANIA

The possibility to depart from the presumption of equal shares is stipulated in paragraph 1 of Article 3.123 of CC, stating that important circumstances have to be proved to make that departure possible. The following circumstances are regarded as important:

- interests of minor children,
- the health state of one spouse,
- or his/her financial position,

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<sup>36</sup> *Ibid.*, art. 3.117.

<sup>37</sup> *R. M. v N. M.*, Supreme Court of the Republic of Lithuania (2008, no. 3K-3-623).

- or other important circumstances.<sup>38</sup>

The Lithuanian CC allows for departing from the presumption of equal shares in four cases. Three of the listed cases are clear, while the last case leaves discretion to the court for departure because of other circumstances. There is a stipulated restriction for important circumstances: "it is insufficient just to state the existence of important circumstances in accordance with which the departure from equal shares can be made; it is necessary to measure to what extent such departure is necessary seeking to protect interest of the spouse or the child."<sup>39</sup> According to the case law, the following circumstances are usually regarded as important: use of personal income received after the sale of the immovable property owned as a personal property, acquiring other immovable property in marriage,<sup>40</sup> as well as contribution of one of the spouse's relatives to acquisition of matrimonial property.<sup>41</sup> Thus the court has the right to decide which circumstances are important; however, the departure from the presumption of equal shares due to significant reasons is often applied because of other circumstances than those enlisted in the Civil Code. The departure is usually made under the essential and necessary circumstances enlisted in the Civil Code; however, a different contribution of spouses does not fall under the category of such circumstances.

The Supreme Court has formulated what other important circumstances may be treated as sufficient to depart from the principle of equal shares. The decision of the Supreme Court in *V. J. v. O. A. J.*<sup>42</sup> case may serve as an illustration. The Court found that "the fact that the spouse had taken care of the house for a long time, that her economic contribution was bigger, that she took care about the management of the property and that the other spouse did not contribute to the maintenance of the dwelling is a sufficient basis for deviating from the principle of equal parts."<sup>43</sup> In another case, the court considered that the circumstance that the mother of one spouse had donated a dwelling house with farm buildings and that the applicant had contributed to the renovation of the house was sufficient evidence to depart from the principle of equal shares. In the context of other important circumstances, a meaningful rule was formulated in the *V. Z. v. D. Z.*<sup>44</sup> case. In the court's opinion, it is possible to depart from the principle of equal shares in common property of spouses because of other important circumstances only if they are of a property nature.

<sup>38</sup> Civil Code of Republic of Lithuania, *supra* note 33, art. 3.123 sec. 1.

<sup>39</sup> *R. A. v A.A.*, Supreme Court of the Republic of Lithuania (2010, no. 3K-P-186).

<sup>40</sup> *N. M. v S. M.*, Supreme Court of the Republic of Lithuania (2014, no. 3K-3-342).

<sup>41</sup> *A. L. v R. L.*, Supreme Court of the Republic of Lithuania (2006, no. 3K-3-251).

<sup>42</sup> *V. J. v O. A. J.*, Supreme Court of the Republic of Lithuania (2009, no. 3K-3-577)

<sup>43</sup> *Ibid.*

<sup>44</sup> *V. Z. v D. Z.*, Supreme Court of the Republic of Lithuania (2007, no. 3K-3-463).

One of the reasons to depart from the principle of equal shares would be serious health condition of one of the spouses, as mentioned in the Supreme Court's decisions in *R. D. v. M. D.*<sup>45</sup> and *A. T. v. Z. T.*<sup>46</sup> cases. In the first case (*R. D. v. M. D.*), the plaintiff asked to divide the apartment into equal parts and the defendant wanted to depart from the principle of equal shares and to get  $\frac{3}{4}$  parts of the dwelling on the ground that it was the place of residence of the minor and that she had cancer and had only 15 percent of her capacity to work. The defendant provided evidence of her disease. The court stated that it was clear that the defendant was in a serious state of health resulting in loss of her capacity to work, and thus she was only partially capable to earn income. In addition, the defendant asked to apply the principle of equal treatment because of her health. Therefore, in order to protect the defendant's interests, the apartment was divided according to the principle of equal shares: the defendant received  $\frac{3}{4}$  parts of the apartment and the plaintiff received  $\frac{1}{4}$  part. A different situation is described in another case (*A. T. v. Z. T.*) where the spouse used basically the same circumstances, i.e. a serious health condition and the fact that the minor child lived with her; however, she had not provided any objective evidence to justify seriousness of her condition. Therefore, the court found that there were no grounds for departing from the principle of equal shares because the spouse was not unfit to work, and thus capable to support herself.

The interests of the minor children are probably the most important basis in the case-law for departing from the principle of equal shares in common property of the spouses. In most cases, in absence of other grounds, the greater part of the joint ownership of the property will be awarded to the spouse with whom the minor child will remain, but again, only the existence of such circumstance does not guarantee departure from the principle of equal shares. For example, in *R. K. v. A. K.*<sup>47</sup> case, the court ruled that:

It was in the interests of the minor daughter, to award more valuable in-kind property to the applicant, with whom the minor daughter remained, leaving the defendant with the property awarded. In such a way, the interests of the minor and the right to a decent living were taken into account when dividing the property and the principle of equal shares in the property of the spouses was respected.<sup>48</sup>

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<sup>45</sup> *R. D. v. M. D.*, District Court of Šiauliai (2017, no. 2-11-776).

<sup>46</sup> *A. T. v. Z. T.*, Supreme Court of the Republic of Lithuania (2017, no. 3K-3-243-969).

<sup>47</sup> *R. K. v. A. K.*, Supreme Court of the Republic of Lithuania (2004, no. 3K-3-435).

<sup>48</sup> *Ibid.*

Another example in which the interests of a minor child were invoked is in the *R. Š. v. A. Š.*<sup>49</sup> case. The applicant asked the court to depart from the principle of equal shares under certain circumstances, namely that the defendant failed to fulfil his obligation to maintain the minor son. The Court noted that:

Failure to comply with the obligation to pay the maintenance to a minor child, or inadequate enforcement of the question of the division of property of the spouses, is not significant, but important in determining the amount of maintenance or debt owed to it, so it must be concluded that departure from the principle of equal shares is not justified.<sup>50</sup>

According to paragraph 1 of Article 3.117 of the CC of the Republic of Lithuania, "the shares of the spouses in joint community property shall be presumed to be equal".<sup>51</sup> Thus, there is an established static and restrictive rule, according to which property is divided automatically without giving enough time for analysis of contribution of each spouse because only in case of disagreement between the spouses, the court would consider whether it is worth departing from the principle of equal shares. It is obvious that the method established for division of property in Lithuania is not based on proportionality and does not take different contribution of spouses to marriage into consideration.

Even though in Lithuania there is the possibility to depart from the presumption of equal shares and to divide property more proportionally to the contribution of spouses, there is very little practice of this in the courts and usually this practice is based on the CC of the Republic of Lithuania that does not provide different contributions of spouses. The following grounds are provided in paragraph 1 of Article 3.123 of CC of the Republic of Lithuania: interests of the minor children, the health state or the financial position of one of the spouses.<sup>52</sup> As the list is not complete, there are two additional grounds formed in the practice of courts: contribution of relatives of one of the spouses to acquire matrimonial property or use of personal income of one of the spouses acquired before marriage to create joint community property.<sup>53</sup> All these exceptions presuppose that the departure from the equality of shares is usually made in order to protect a weaker spouse and interests of children without evaluating the contribution of spouses to marriage. Also, in the review of the practice of the Supreme Court, the Court highlights that, when dividing the property, no attention is paid to the contribution of a spouse: "the aim of the institution of joint community property is to assure the equality of property of spouses irrespective of the type of activity of each spouse and his/her

<sup>49</sup> *R. Š. v. A. Š.*, Supreme Court of the Republic of Lithuania (2015, no. 3K-3-27-686).

<sup>50</sup> *Ibid.*

<sup>51</sup> Civil Code of Republic of Lithuania, *supra* note 33, art. 3.117 sec. 1.

<sup>52</sup> *Ibid.*, art. 3.123.

<sup>53</sup> *H. B. v. J. B.*, Supreme Court of the Republic of Lithuania (2011, no. 3K-3-517).

personal contribution to creating joint community property, as well as legal certainty with regard to property rights.”<sup>54</sup> The conclusion can be made that different contributions of spouses do not have any influence on the departure from the presumption of equal shares in Lithuania. The only case when the contribution of a spouse can be defended is when “the share of one spouse from joint community property can be reduced by the sum of income not received by the family due to negligence of one spouse or that was concealed by a spouse and used for his/her personal needs.”<sup>55</sup>

Joint community property is divided according to the presumption of equal shares of spouses. The Lithuanian CC allows for departing from the principle of equal shares for the interests of minor children, because of the health state of one spouse or his/her financial position or other important circumstances. The courts have discretionary right to name other circumstances as important circumstances and the case law suggests that the share of one spouse could be reduced by the sum of income not received by the family. Thus, in summing up the case law of the Lithuanian courts, it must be concluded that the court can depart from the principle of equal shares only after a detailed assessment of the facts of the particular case. The state of health of the spouse does not mean that the court will deviate from the principle of equal shares on that basis. This may be done only after having assessed how much the health condition affects the spouse's ability to sustain himself. The same is with the interests of minor child. If there is a way to protect those interests without departure from the principle of equal shares in property, the court will go that way. Different contributions to marriage do not serve as a suitable basis to depart from the principle of equal shares in Lithuania.

### **3. EVALUATION OF DIFFERENT CONTRIBUTIONS OF SPOUSES IN FOREIGN COUNTRIES AND DIVISION OF PROPERTY UNEQUALLY**

The principle of equal shares was suitable under conditions of traditional family in 1990s, but, since then, social and material conditions have changed completely and inflexible system of equal shares has apparently allowed making unfair decisions in some cases.<sup>56</sup> Sovereignty of all states assigns to courts the main task of ensuring justice in the country by solving cases justly and honestly. Therefore, when dividing joint community property of spouses in divorce, the preference, first of all, should be given not to the observance of the law but to the attainment of justice and honesty. Nowadays, the division of property is considered

<sup>54</sup> *Sutuoktinių turtines prievoles reglamentuojančių teisės normų taikymas Lietuvoje*, supra note 31, 13.

<sup>55</sup> *Civil Code of Republic of Lithuania*, supra note 33, art. 3.123 sec. 4.

<sup>56</sup> See Jens M. Scherpe, supra note 23, 474.



to be equitable and honest if it is divided taking into account not only the principle of the community but also proportionality. Nowadays, marriage is regarded as economic partnership;<sup>57</sup> therefore, property issues are of great importance. It is becoming more difficult for countries to divide property equitably on the basis of the established method of the division of property since relations are becoming more modern. Consequently, countries started more often to consider a proportional division of property, even countries upholding joint community property which, usually, divide property in equal shares, now, in some cases, prefer the method of equitable division of property.<sup>58</sup> Thus countries seeking to divide property of spouses in divorce fairly and honestly usually try to calculate contribution of each spouse and, taking the calculations into account, to divide joint community property proportionally.

The state of New York could serve as an example: the division of joint community property of spouses honestly does not necessarily mean equally.<sup>59</sup> Such attitude suggests that the most important thing is not to follow static rules; therefore, in order to solve the case justly, property is divided in proportion to contribution of spouses. Consequently, property can be divided proportionally, and it does not matter if the institute of equal shares is applied in the country, because the main task of the court is to execute justice. Such practice of courts is being formed more and more frequently not only in the United States but all around the world, which presupposes that the principle of equal shares does not ensure the observation of the principles of justice and honesty. The discretion to depart from the principle of equal shares often used by courts reveals that such model of division is ineffective and does not perform the main functions.

The method of equitable division, first of all, outspread in the United States of America as more and more spouses were dissatisfied with the division of property. The first reason why a new model of the division of property began was different contributions of spouses to marriage. The application of the presumption of equal shares caused more and more dissatisfaction of spouses with the unfair division of property; therefore, courts having the right of discretion to depart from the principle of equal shares formulated a new practice of courts, which was later introduced in the management of states. Thus, in most of states there are factors provided which are taken into consideration when the shares of property are

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<sup>57</sup> Jay E. Fishman, *Standards of Value: Theory and Applications* (New Jersey: John Wiley & Sons, 2013), 241.

<sup>58</sup> *Ibid.*

<sup>59</sup> Sara Schechter, *New York Family Law* (New York: Delmar, 2012), 288.

measured.<sup>60</sup> Several factors which condition unequal contribution between spouses should be distinguished:

- potential career;
- future economic circumstances;
- maintenance of children;
- housekeepers, etc.<sup>61</sup>

Only after having considered and evaluated all factors important to spouses, the allocation of a particular share can be made. This share is usually expressed by percentage. There had been many problems when deciding on how to evaluate house chores or raising of children, so the evaluation was started to be made how much everything would cost if the other person was hired.<sup>62</sup> Having evaluated all factors, the division of the property of spouses based on proportionality is possible,<sup>63</sup> in this way not only protecting a weaker spouse such as a housekeeper but also a spouse who by his/her devotion to work and family rightly deserves a larger share of property.

Different contribution as one of the reasons to divide property of spouses in divorce more proportionally has been included not only in the regulation of the United States but also in laws of Australia. Family Law stipulates that, when establishing the share of property, courts must take into account the following:

- the financial contribution made directly or indirectly by or on behalf of a party to the marriage;
- any children support that a spouse has provided;
- the contribution made by a spouse to the marriage to the welfare of the family and children, including any contribution made in the capacity of homemaker or parent;
- needs of the future.<sup>64</sup>

In Australia, the practice to distinguish between joint community and personal property does not exist as the whole property is divided taking into account direct or indirect contribution of spouses stipulated in Family Law Act.<sup>65</sup> In Australia, even more attention is paid to different contributions of spouses to marriage than in America because in Australia unequal contribution of spouses is regarded as the main reason to divide property not in equal shares but proportionally. In Australia,

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<sup>60</sup> Marvin B. Sussman, et al., *Handbook of Marriage and the Family* (New York: Plenum Press, 1999), 560.

<sup>61</sup> *Ibid.*

<sup>62</sup> Michael D. Bayles and W.L. Robison, *The Legal Essays of Michael Bayles* (Dordrecht: Kluwer Law International, 2002), 248.

<sup>63</sup> *Ibid.*

<sup>64</sup> *The Family Law Act (1975 06 12, Australia)*, published No. 53, (Cth) ("FLA") (1976).

<sup>65</sup> John M. Haynes, Stephanie Charlesworth, *supra* note 3, 97-98.

spouses themselves have the right to determine their shares of property.<sup>66</sup> However, if spouses do not agree on the size of the respective shares, the court has a wide discretion right when evaluating contribution of each spouse, assuring proportionality and fair division of property. As relations of spouses are becoming more modern, spouses in Australia are given the discretionary right to divide property themselves and, in case of failure to do this, the objective is to divide the shares in property equitably taking into account both material and non-material contributions of each spouse.

Differing contributions of the spouses are taken into consideration when dividing property of spouses in divorce not only in countries of common law but also in countries upholding traditions of continental law, though in the latter countries this is less significant. In Europe more attention to such division is paid in Scandinavian countries and in the Central Europe because the idea of calculating the balance of the contribution of a spouse has spread in these parts.<sup>67</sup> Despite great interest in the calculation of contribution and its proportional division, the largest part of Europe is still using the principle of equal shares and does not apply the proportional division of property according to different contribution of spouses to marriage.

In America and Australia, a new or supplemented method of the division of property of spouses in divorce has been established. However, in Europe most states apply older methods of the division of property, not taking into consideration the fact that relations of spouses have changed. Nowadays it is supposed that the protection of justice operates on the bases of contributions of the spouse.<sup>68</sup> Thus, it is important that parties would not only consider the abidance of the provided law but would seek justice, which is becoming impossible when disassociating from different contribution of spouses when dividing their property. As the lifestyle and relations of spouses have changed not only in America but in Europe as well, the main indicator in the division of property should become contribution of each spouse. Proportional distribution of shares of property according to contribution of each spouse in divorce is one of the main models which would further allow dividing property equitably and would satisfy interests of spouses even if relations of spouses kept changing.

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<sup>66</sup> *Ibid.*

<sup>67</sup> Katharina Boele-Woelki, *Common Core and Better Law in European Family Law* (Oxford: Intersentia, 2005), 127.

<sup>68</sup> John Dewar and Stephen Parker, *Family Law: Processes, Practices, Pressures* (Oxford: Hart Publishing, 2003), 566.

#### 4. DIFFERENT CRITERIA USED FOR UNEQUAL DISTRIBUTION OF PROPERTY

One of the models for proportional division of property of spouses in divorce is applied in New York. Here, in many cases the following provision has been defined: "it is not required that each division of property of spouses would be equal, on the basis of 50-50."<sup>69</sup> There is also another provision established which stipulates that "in order to divide joint community property between spouses honestly, the court must take into account many factors,<sup>70</sup> which usually conditions unequal division of property. The following factors are the main ones determining unequal division of property:

- the duration of marriage;
- the age and health of each spouse;
- contribution of a spouse: by finances, by efforts as of a spouse or a parent, by salary income, by housekeeper's work;
- inappropriate behaviour of a spouse in respect of property, lost-making expenses;
- future financial factors of each spouse;
- when matrimonial property includes business components, interests of business are protected to avoid troubles;
- outcomes of taxes to each spouse, etc.<sup>71</sup>

Thus, in New York, courts strive for a fair result of a case, which usually means a division of property of spouses in unequal shares. It might be concluded that only dividing property proportionally according to contribution of each spouse and taking into account all factors important to spouses in divorce, fair and honest result can be reached. Courts of New York associate a fair and honest division of property of spouses not with the principle of the community of property but with principle of proportionality.

The same principles are also applied in the state of Georgia. In this state, the same as in New York, courts refer to the same rule according to which property of spouses have to be divided equitably, which does not necessarily mean that in equal shares.<sup>72</sup> In this state, the separation of personal property is also very important since the court separates the share of a spouse by which he or she contributed to buying joint community property, which causes many problems when

<sup>69</sup> *Sykes v Sykes*, Supreme Court (NY Slip Op 50731(U) (2014)).

<sup>70</sup> Jeffrey A. Jenkins, *The American Courts: A Procedural Approach* (Canada: Jones & Bartlett Publishers, 2011), 156.

<sup>71</sup> *NY Code Domestic Relations Law (2010 10 12, New York)*, Dom. Rel. Law § 109-117), § 236, part B, subd 1, par b, subd 5.

<sup>72</sup> Susan Bishop, "Georgia Divorce: Dividing Property" //

<http://www.divorcenet.com/resources/divorce/marital-property-division/georgia-divorce-dividing-prope>.

evaluating joint community property. Similarly to the aforementioned state, in order to divide property equitably in Georgia the most important thing is to divide property of spouses proportionally. Besides, in this state, alongside all circumstances due to which the departure is made from equal shares the following are also taken into consideration: behaviour of spouses during the divorce, professional skills and contribution to joint community property. When dividing property in Georgia, the same as in many other states, the greatest attention is paid to the proportional contribution of spouses to marriage. In such a case, the principle of justice is secured. At the same time, a solid system of the division of property is created in the United States because most statutes indicate that, when dividing property, courts must take into account the share of contribution of each spouse evaluating works accomplished by a spouse at home.<sup>73</sup> In attempt to reach justice, in Georgia and in all the States, a solid system of the division of property based on proportional division of property is under creation.

The application of the principle of proportionality when dividing the property of spouses in divorce first of all spread in the United States of America. Here, the method of the equitable division of property was established to assure a more equitable division of property,<sup>74</sup> the attention being paid not only to the regulation stipulated by the law but also to its application to individual situation of spouses in divorce. It was noticed that the principle of proportionality needs to be applied in consideration of contribution of each spouse. Most of the states have indicated in articles what contribution is taken into consideration when dividing shares of property. The following are the main reasons why the property is divided in proportions: the contribution of each spouse to the matrimonial property, efforts to create home comfort, the length of marriage, the age and health of a spouse, the maintenance of children, etc.<sup>75</sup> The regulation of family legal relations in Illinois is an obvious example which presupposes that joint community property of spouses should be divided according to proportions.

Similarly to other countries, in Lithuania only some circumstances are established according to which the departure from the presumption of equal shares is allowed. As a matter of fact, the list is not finite; therefore, the court may regard other circumstances as important but then another problem arises since there is a complicated procedure of substantiation established. Most spouses fail to prove the necessity to depart from this presumption, and the court, applying the discretion right to depart from the presumption, usually refers to the well-established practice

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<sup>73</sup> Joseph M. Hawes, *The Family in America: An Encyclopedia*, Volume 2 (California: ABC-CLIO, 2001), 342.

<sup>74</sup> Jay E. Fishman, *supra* note 57, 241.

<sup>75</sup> Steven Peskind, *Divorce in Illinois: Understandable Answers to Your Legal Questions* (USA: Addicus Books, 2013), 147.

of the courts without getting into the real situation. Courts are not even obliged to depart from the presumption provided by the law even if there was a basis for this: "Having analysed Parts 2-4 of Article 3.123 of the CC, it might be concluded that the court 'can' after taking into account particular circumstances of the case but not 'must' in all mentioned cases establish unequal shares of property for spouses."<sup>76</sup> It is also questionable whether the settlement of the case can be regarded as fair if even after the establishment of an essential circumstance to depart from the presumption of equal shares, property is divided not proportionally but referring to the shares formulated by the practice of courts: the "court of cassation has found out that in case there is a basis for the departure from the principle of equal shares of property of spouses, usually, the shares of respectively 2/3 and 1/3 are established of the property rights to joint community property."<sup>77</sup> Such practice of the courts in Lithuania can not only prevent fair settlement of a case but also result in a division of property absolutely unproportionally since different spouses have different, individual situations. So, in Lithuania, in the situation of application of the presumption of equal shares and even in the case of departure from the principle of equal shares, the division of property is made in particular established shares, which not only reveals the absolute disregard of the principle of proportionality but also increases the possibility of the settlement of a case unfairly and dishonestly.

Contemporary spouses typically do not follow the image of a standard family of the past, in which the husband maintains the family and the wife raises the children and takes care of housekeeping. Therefore, nowadays a contribution of spouses to the welfare of marriage often differs greatly because the woman, as well as the man, sometimes not only takes care of the maintenance of the family but also takes care of children and housekeeping. So, the joint community property of spouses could be divided taking into account facts that one of spouses has not made efforts to contribute to the welfare of marriage.

## CONCLUSIONS

The analysis of legal acts and case law of Lithuania and other countries presents various models of the division of property of spouses and the content of the principle of proportionality when dividing joint community property of spouses during divorce. Having defined the concept and advantages of the division of property based on the presumption of equal shares and the principle of proportionality, the conclusion is reached that the presumption of equal shares is

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<sup>76</sup> Egidija Tamošiūnienė and Inga Kudinavičiūtė-Michailovienė, *Šeimos bylą nagrinėjimo ir teismo sprendimų vykdymo ypatumai* (Vilnius: MRU, 2013), 91.

<sup>77</sup> Ž. V. v J. V., Supreme Court of the Republic of Lithuania (2007, no. 3K-3-220).

non-absolute in Lithuania and the Civil Code of the Republic of Lithuania provides the theoretical possibility to depart from the presumption of equal shares for important reasons, one of which theoretically could be the different contribution of the spouses to the marriage. However, the case law shows that courts rarely use the discretionary right to depart from the presumption of equal shares. Thus, it may be concluded that the provided opportunity to depart from the principle of equal shares does not ensure justice.

In Lithuania, the legal regime of limited joint community property has been chosen; therefore, property of spouses acquired after marriage is considered to be a joint community property, although there is an opportunity to consider particular property as personal: compensation for damages made due to personal injury, and property intended for personal needs of a spouse.

In the USA, the most popular measures of the division of property which help to divide property more effectively include the division of property in equal shares, which is regarded as a starting point, equitable division and the presumption of equal shares. In Lithuania, the choice of the presumption of equal shares was conditioned by economic status, interests of the society, and the objective to assure equality between spouses.

Application of the presumption of equal shares, as well as the proportional division of property, are aimed to divide joint community property of spouses equitably; however, advantages of each method of division differ. Division of property proportionally is evaluated individually in each case of divorce; different contribution of spouses is evaluated; not only the material contributions of the spouses are taken into account but also non-material contributions (the length of marriage, efforts to raise children, take care of household, etc.). The presumption of equal shares is a measure applicable for implementation of the principle of equality, thus it protects the interests of the weaker spouse, and it prevents discrimination in marriage, and, practically speaking, it accelerates the process.

Following the comparison made between different countries and Lithuania, the conclusion drawn is that when dividing property of spouses proportionally to their contribution, a weaker spouse is protected because non-material contribution is also evaluated. Moreover, an individual evaluation of the situation also prevents from discrimination when evaluating property of spouses. Therefore, many advantages of the presumption of equal shares can be achieved in this way.

However, when evaluating the presumption of equal shares, attention is not paid to different contributions of spouses unless this presumption is not absolute in the country; in such a case, it is allowed to depart from the principle of equal shares. However, very often differing contributions of the spouses are not provided

in legal acts as the basis for departure from the principle of equal shares. According to the comparison made, there is a greater possibility to divide property more equally and honestly when dividing property proportionally.

In order to divide joint community property more equitably and honestly in Lithuania, it is recommended to depart from the presumption of equal shares, taking into consideration the different contributions of the spouses to the marriage.

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