DETERMINATION OF PERSONAL AND COMMON PROPERTY DURING DISSOLUTION OF MARRIAGE UNDER ETHIOPIAN LAW: AN OVERVIEW OF THE LAW AND PRACTICE*

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INTRODUCTION

Marriage as one of the most important social institutions is a bedrock for a society in general and for a family in particular. It is a voluntary legal union founded on the free and full consent of the spouses. Once such a legal union is created, the union gives rise to the various legal effects, which are generally the derivatives of personal and pecuniary relations established between the spouses. The latter category in turn is mainly constituted of personal and common property of the spouses.

However, following the dissolution of the marriage on various grounds, those established legal effects of marriage would be terminated. The dissolution would consequently entail other various legal effects. One of such legal effects of dissolution of marriage is the liquidation of pecuniary effects. This inevitably imports the crucial issue of the determination of personal and common property at the end of the marriage. Therefore, this lies at the heart of the basic legal issues in this article.

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Such a very indispensable issue of determination, frequently arising in the course of liquidation of pecuniary relations, may primarily be settled on the basis of marriage contract or an agreement validly concluded between the spouses prior to termination of the marriage. Failing such agreements, eventually there comes into picture the operation of the law to dispose of the issues pertaining to the question of determination. This ultimately mandates the application of the cardinal legal presumption of common property with its unfettered rules. The legal presumption may be rebutted only by the required proof of personal property.

The law squarely provides that all property shall be deemed common property of the spouses unless proved to the contrary by the spouse claiming for personal property. As a result, the fundamental legal presumption would operate to determine common property while proof is a necessary condition for a claim of personal property. These basic principles of the law are of an immense importance for the determination of personal and common property, the application of which shall strictly be adhered to by the family arbitrators or the court, as the case may be.

The article, therefore, thoroughly dwells on the determination of personal and common property during dissolution of marriage where an attempt is made to draw a clear line of distinction between personal and common property. To this end, the article, in the first two sections, deals with issues pertaining to *how* and *by whom* the determination is made during dissolution of a marriage. The last section wraps up the article with some recommendations. However, this article does not address the various issues relating to some grey areas of pecuniary effects that are not clearly characterized as such. In particular, the article does not delve into the characterization of some exceptional proprietary assets or interests acquired

during or before the marriage. Despite their dubious character, it is worth noting that those assets or pecuniary interests would necessarily be subject to the dichotomy of pecuniary effects.

1. Determination How Made

Following dissolution of a marriage, the very indispensable issue which often crops up is the determination of personal and common property in the liquidation of pecuniary relations. Of course, the determination of personal and common property may primarily be made on the basis of the marriage contract or an agreement concluded between the spouses during dissolution of marriage. This latter agreement, the applicability of which is, however, hinged up on approval by the court, is concluded basically for the purpose of facilitating the smooth liquidation of pecuniary effects. Hence, in the presence of any of these agreements, the family arbitrators or the courts may fortunately be relieved of the controversies that may often emerge with regard to the question of determination. The priority is usually given to the agreement of the spouses to determine as to which items constitute personal or common property on the basis of which the liquidation of pecuniary relations will be made. It is only when there is no such an agreement, or where the agreement is invalid that a resort to the law would be made to determine the character of the properties.[1]

Nonetheless, in the absence of any agreement or if any, as a result of its inadequacy, the law steps into the matter to dispose of all the issues or those ungoverned issues pertaining to the determination of personal and common property of the spouses. Yet, though the law comes forth to take up the matters, the task of determination is not as automatic and mechanical as it

[1] *See* Meharu Redai, **የተሻሻለውን የቤተሰብ ህግ ለመገንዘብ የሚረዱ አንዳንድ ነጥቦች፣ ቅጽ አንድ ፣ሁለተኛ እትም፣ 2002 ዓ.ም፣ ገጽ** 56

appears at first. There may still remain some challenges that require the family arbitrators or the courts to make a careful and closer scrutiny of the provisions of the law to dispose of the issues of determination amicably.

In any case, the determination of personal and common property by the operation of the law involves the application of the legal presumption of common property and proof of personal property that rebuts the presumption.

1.1. Determination by Agreement

During dissolution of a marriage, it is an inevitable consequence that the pecuniary interests of the spouses would be liquidated. The spouses usually come up with their claim over their personal and common property which indispensably necessitates the determination of the character of the properties. It is not unusual that disputes over the marital property arise between the spouses regarding the character of the property either to retake as their respective personal property or to share between themselves as their common property.

Then, the first possible solution to such controversy is a resort to the agreement of the spouses serving as a basic frame of reference for the amicable resolution of the matrimonial dispute. Worthy of note at this point is that the agreement of the spouses may refer either to their contract of marriage or an agreement concluded during dissolution of marriage to regulate the liquidation of their pecuniary relations.[2] In either case, the personal property of the spouses would be distinguished from their common property in accordance with the terms stipulated in their agreement.

[2] *See* Revised Family Code, Art. 85 (1).

But, one has to note at this moment the difference in the purposes of both contract of marriage to be concluded prior to or on the date of marriage and other agreement concluded usually at the end of the marriage.[3] The difference is that unlike the former which generally regulates the overall pecuniary matters during marriage the purpose of the latter is confined only to regulating the manner of the liquidation of pecuniary effects of the marriage. Despite disparity in the purpose they are originally concluded for, they have the same importance for the purpose of distinguishing between personal and common properties since the subject matter of the agreements is often the same, i.e., pecuniary matters.

As regards the importance of contract of marriage to determine the character of a marital property at the end of the marriage, personal property could be distinguished from common property on the basis of the stipulations in the contract of marriage. The contract containing specification of property of the spouses facilitates the proof of the mutual rights of the spouses with regard to recovery and partition of their personal and common property respectively.[4] So, they might have agreed on or before the date of their marriage that all or only part of the property they acquired prior to marriage would remain their respective personal property. Yet, they can reiterate in the agreement that the property they acquire onerously during their marriage would fall within the realm of common property. The stipulations, if so

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[3] Basically, contract of marriage is not concluded in anticipation of the dissolution of the marriage and the consequences there of, but to regulate the overall pecuniary relations existing between the spouses during marriage. However, therein the character of the property may, inter alia, be specified the point which is of crucial importance for the purpose of the distinction under discussion. Whereas the agreement concluded later at the end of marriage is exclusively in contemplation of the dissolution and solely for the purpose of providing for certain guidelines regarding the liquidation.

[4] Marcel Planiol and George Ripert, Treatise on the Civil Law, Vol.3, Part1,11th ed,(1938), at 15.

made, are all the confirmation of what the law expressly provides for they cannot agree otherwise. All the property designated in marriage contract to remain personal must so remain as long as such a designation does not run contrary to the mandatory provisions of common property. The spouses could nevertheless enter it into common property by an approved subsequent agreement amending the original contract.[5] For instance, they may amend their marriage contract to convert the personal character of inheritance or personal gifts due to a spouse into a common property. Therefore, during dissolution of the marriage, the issue of determination would be resolved in accordance with the terms agreed up on in the contract of marriage.

The spouses might have also agreed further in their contract of marriage that all the property they acquired prior to and during marriage even gratuitously would wholly be part of their common property. Regarding the possibility to make such stipulation, our law is mute. One writer apparently agrees that there is no prohibition that such an agreement could freely be made by the spouses.[6] Further, as stated earlier, the practice of other legal systems clearly evidences such possibility. The practice is also evident from the decisions and reasoning of some of the decisions of courts in Ethiopia.[7]

It is thus worth noting that where there is such an agreement that entirely avoids the existence of personal property, there would be no such difficult task of determination to be carried out at the end of the marriage since a

[5] *Id.*
[6] *See* Mehari, *supra* note 1, at 65.
[7] In particular, the possibility to contractually convert personal property into common property by marriage contract can be noted from the decisions of the Federal Supreme Court in its cassation division. *See* Biruk H/Eyesus vs Fanaye Abebe, Cass.FileNo. 38544/2002, and Senait H/Mariyam vs Abebech Worku, Cass. File No. 42766/2002, Federal Supreme Court Cassation Decisions, Vol.10, 2003, at 2-3, &17-18. *Nota Bene*: Unless indicated otherwise, all the cases cited in this article are in Ethiopian Calender.

mere reference to the agreement readily shows only the existence of common property.

Nonetheless, is it not reasonable to imagine the existence of personal property irrespective of the agreement of the spouses that purports to convert the entire personal property into common property? For instance, can a property donated or bequeathed separately to the spouses on condition that it will not enter the common property be converted into common property by the agreement? What about interests which by their very nature are not assignable? Indeed, these instances must be considered exceptional cases. Such exceptions are unavoidably recognized even in those legal systems where universal community system is adopted.[8] The same partly holds true in our legal system. That is, even if the spouses are permitted to make a stipulation to convert all their property into common property, there are still some exceptional assets, like maintenance allowance (save the exception)[9], compensation[10] or family objects[11] due to a spouse as a result of bodily injury suffered by him/her, which are not subject to such stipulation and which should naturally remain personal. It should be noted that

[8] Planiol & Ripert, *supra* note 4,at 133.

[9] *See* Revised Family Code, Art.205. Indeed, maintenance allowance due to a spouse is not expressly indicated to be personal. Thus, it is possible that the maintenance allowance received by a spouse from the debtors can be commonly used during the marriage. Nonetheless, it cannot be fully considered as a common property notwithstanding an agreement to this effect. The main reason is that the maintenance allowance, unlike a common property, cannot be claimed as such for partition upon dissolution of a marriage.

[10] *See* Civil Code, Art.2144. It is clearly stated by the law that compensation due to material damage suffered by a deceased spouse may be claimed by the heirs of the victim. Likewise, the compensation due to the liability of the deceased would be satisfied by the succession. Thus, even if the nature of the compensation does not prohibit its conversion into common property as such, the law has characterized it as a personal property that forms part of the succession that devolves upon the heirs.

[11] See Civil Code, Art.1094. As can be noted from the provision, family objects which are jointly owned by co-heirs including a spouse cannot be transmuted into a common property despite the willingness of the co-heir spouse as long as the other co-heirs object to such a transmutation or alienation.

compensation due to bodily injury is regarded as personal for it is characterized as such by the relevant law.

The other agreement that is of a great importance to distinguish between personal and common property is the agreement concluded between the spouses during dissolution of marriage. The purpose of such agreement, as stated earlier, is to regulate the manner of the liquidation of their pecuniary relations. Thus, the spouses can usually agree on their personal and common property and the manner of the partitioning of their common property between themselves.

The agreement made accordingly in contemplation of the end of the marriage and to regulate the consequences thereof should necessarily be approved by the court for its validity. Previously, under the Civil Code regime, the agreement was used to be brought before the family arbitrators who had the power to decide on the pecuniary issues between the spouses. Presently, under the Revised Family Code, such power has been taken away from the family arbitrators and vested on the court.[12]

In approving the agreement, the court has to closely examine the terms of the agreement so that they are not contrary to law and morality. For example, the agreement that completely converts an entire common property into personal properties to be owned exclusively by a spouse may be deemed to be contrary to the law. Moreover, an agreement that suffers from undue influence in such a way that it arbitrarily violates the rule of equal partition

[12] Art 80 (2) of the Revised Family Code empowers the court to approve the conditions of the divorce agreed between the spouses along with the divorce agreement. *See also*, Art.103(2) of the Oromia Family Code.

in a common property or that goes against the welfare of their children can be subject to judicial scrutiny. Thus, where the court finds the agreement to be against the pecuniary interests of one of the spouses and the well-being of their children, it may give appropriate decisions to correct the defects therein.[13]

1.2. Determination by the Operation of the Law

It is possible that the spouses might have married each other without marriage contract or the contract might have been invalid, lost, or destroyed in its totality. Likewise, even during the dissolution of their marriage, the spouses may fail to conclude an agreement as regards the liquidation of the pecuniary consequence of their marriage or even if there is one, it may be rejected and rendered invalid by the court requested to approve it. In such instances, how could one distinguish between personal and common property without any agreement would be a painstaking question for the moment. Ultimately, the only way out to be opted for is a resort to the relevant provisions of the law provided in contemplation of such instances.

Hence, the second way of distinguishing personal property from common property is by the operation of the law. The operation of the law comes into application where the determination cannot be made by the agreement of the spouses for any reason mentioned herein above. The determination by virtue of the law eventually calls for the application of the relevant legal provisions.

[13] *Id*. Art 80(3). *See also*, Art.103(3) Oromia Family Code.

To this end, the law has somehow tried to determine personal and common property based on the cardinal legal presumption of common property and proof of personal property respectively.

1.2.1. The Legal Presumption of Common Property

As is frequently mentioned herein this article, the presumption of common property is a cardinal principle of vital importance in the determination of personal and common property during the dissolution of a marriage. The significance of the fundamental principle becomes more vivid in its fullest application in particular where determination by agreement of the spouses partly or wholly proves to be of no help for reasons mentioned elsewhere in this article.

The legal presumption of common property as embodied in Art. 63(1) of the Revised Family Code may be regarded as the legal linchpin of the property aspects of the institution of marriage.[14] This can be noted from the aforecited provision which provides that *"[a]ll property shall be deemed to be common property even if registered in the name of one of the spouses unless such spouse proves that he/she is the sole owner thereof*"(emphasis added). The generalization of *"all property"* to be presumed as common property without any further specification unquestionably draws the conclusion that the presumption exclusively operates in favor of common property (emphasis added). In effect, the purpose of the law basically seems to achieve unity in the material interests of the spouses and thereby attaining the development of common property (single patrimony) between them.

[14] It must be noted that the legal presumption has been reiterated in verbatim under Art.79(1) of the Oromia Family Code.

Under French law, for example, the major part of the property of the spouses presumably enters the common property and only by exception do certain items remain in their personal ownership.[15] *A fortiori*, the presumption of ownership is in favor of the common property.

The theory underlying the legal presumption of common property seems to have been originally conceived of the notion of sharing of effort and results whose very purpose in turn is to keep intact the matrimonial union.[16] In other words, analogous to that of a partnership the reason behind common property is based on the fact that each spouse contributes labor or capital for the benefit of the community, and shares equally in the profits and income earned there from. And it is this philosophical underpinning that gives birth to the presumption of common property. The presumption is almost universal in that it has been enshrined in many laws of community property systems.[17]

Coming back to the aforementioned provision of our law, the comprehensive nature of the presumption hardly calls for a detailed elucidation. As has been noted from the wording of the afore cited provision, the presumption in a nutshell, encompasses *"all property"* with no subsequent qualification restricting the generic charter of the phrase. In effect, the law seems to have closed up many determinant matrimonial issues in favor of the presumption of common property.

Thus, the careful inference that can possibly be drawn from a closer reading of the provision is that all movables and immovable, no matter how and when they are acquired, fall within the scope of the presumption unless

[15] *See* Planiol and Ripert, *supra* note 4, at 94.
[16] *Id*.
[17] Menell R.L. & Brykoff T.M., Community property in a Nutshell, 2nd ed., 1988, at 36.

proved to the contrary. The presumption is so significant, for instance, where both personal and common property are so intermixed that their separation is insurmountably impossible. In such a case, the resolution of the intricate issue rests on the application of the presumption that characterizes the intermixed property as a common property unless proved otherwise.[18]

The importance of this cardinal presumption for the determination of personal and common property during dissolution of marriage shall not be overlooked. The spouse claiming for a common property relies on the presumption that s/he bears no burden of proof. The proper application of the presumption itself totally makes it unnecessary that one need not look for evidence in support of his claim for common property. In other words, the spouse alleging that a certain matrimonial asset is a common property certainly benefits from the presumption as of right without any duty to adduce evidence to that effect. This legal significance is inherent nature of the legal presumption itself.

As a result, there is no onus of proof on the spouse maintaining that the property is common. Furthermore, the statement of the spouse who maintains that a given property is personal need not be used as a pretext to derogate from the presumption, unless such a statement amounts to a clear admission of the personal character of the property in question.[19]

Another point of noteworthy at this moment is with regard to the nature of the presumption. Accordingly, the legal presumption of common property is amenable to rebuttal by the spouse claiming the property to be personal. The

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[18] *Id*, at 139.
[19] Ato Bekele Haile Selassie ,"Settlement of Matrimonial Disputes in case of Divorce," *J.Eth.L* ,Vol. XVIII, No –, 1997 , at 87.

nature of the legal presumption, though not explicitly stated, should be understood as rebuttable as long as nothing is expressly provided to the contrary.[20] The standard of proof to rebut the presumption must not be less than the preponderance of evidence applicable in civil suits.[21] Only persuasive arguments as substantiated with evidence on the strength of proof would bar its enforcement and in all other cases,[22] the application of the presumption must remain unaffected. In the course of determining the character of a property in dispute, if at all a proper determination is to be made; there must be a full application of the presumption by complete observance of the rules implicit therein.

The glimpse of a look into the practice, however, shows that in spite of the unfettered rules embodied in the cardinal presumption of common property stringently mandated to be complied with in determining personal and common property, there is a gross deviation of the practice from the law. As it could be clearly noted from the discussion *infra,* some cases evidently indicate that sometimes the practice flatly goes astray from the law.

For instance, in one case[23] of manifold issues, both the High and the Supreme Courts rendered similar decisions that in effect eroded away the cardinal presumption of common property in determining the character of a certain house. The dispute was that the appellant-wife claimed the house as a common property which the respondent- husband considered exclusively his own.

[20] *See* Mehari Redae, Dissolution of Marriage by Disuse:A Legal Myth, *J.Eth.L,* Vol.XXII, No.2, 2008, at 43.
[21] *See* Bekele, *supra* note 19.
[22] *Id*.
[23] Bruktawit Gebru V. Alebachew Tiruneh, Supreme Court, Civ. App. No. 2133/78(unpublished).

The then Supreme Court, affirming the decision of High Court, deviated in its decision from the legal presumption of common property by rejecting the appellant's assertion that the house was an item of common property acquired during the continuance of the marriage. The court even went further in requiring the appellant to adduce evidence and corroborate her assertion which in fact is quite against the overall spirit and purpose of the presumption.

In its reasoning, the Court stated that the house was not built through the joint effort of the spouses. This kind of reasoning has obviously no legal basis. Nowhere in our law does there exist any distinction between property acquired by personal and joint effort of the spouses during marriage for the purpose of determining the character of a certain property. Also, the Court endeavored in futility to point out the fact that the house was constructed after the spouses had begun living apart, *albeit* prior to dissolution of the marriage. A quest for a specific time within the existing marriage was entirely of no legal significance to resolve the issue at hand. Because whatever the case may be, the separation of the spouses can never exclude any property acquired onerously during such period from its presumption as common property in so far as no formal dissolution of the marriage is made.[24]

Moreover, in an attempt to determine the character of the property, the Court engaged itself in making an inquiry into the source of the money used for the

[24] However, it must be borne in mind that the current stance of the Federal Supreme Court is also a further confirmation of the misconstruction in the case at hand. Apparently, the same position is also held by some writers. *See* Mehari, *supra* note 20, p 42(disagreeing with the court's ruling of defacto dissolution of the marriage, but in support of the exclusion of the operation of the legal presumption during the separation); Philipos Aynalem, in an article that appeared in Mizan Law Review, Vol.2, No.1, 2008, pp110-136(supporting the rulings of the Federal Supreme Court Cassation Bench, which introduced a *defacto* dissolution of a marriage despite the limited causes of dissolution as per art.75 of the Revised Family Code).

building of the house. Setting aside the fundamental presumption, it unreasonably indulged itself into the inquiry of whether the house and the donated money with which the house was built constituted common property. Indeed, such an inquiry serves no purpose to determine the character of the house as far as it was built during marriage for which the mere application of the presumption suffices. Such an inquiry would have been relevant only in connection with the required court declaration, which was not at issue in the case at hand.

As is apparent from the foregoing comprehensive analysis of the case, for all the inquiries unnecessarily made, the Supreme Court, like the High Court, erroneously required the appellant to adduce sufficient evidence and to corroborate her claim of common property. In the case under consideration, all the attempts were entirely unnecessary exercise which rather amounted to a complete derogation from the presumption of the law to determine the character of the property. The import of the fundamental presumption of common property was blatantly overlooked by the courts.

In other similar case,[25] the then Awradja Court of Addis Ababa had deviated in its judgment when it grossly did away with the application of the presumption. The judgment was later reversed by that of the High Court which was further affirmed by the Supreme Court.

The point of contention in the case was that the wife claimed a certain house built during the marriage to be the common property of the spouses and be partitioned accordingly. The husband in his part contended that, even though

[25] W/ro Tiruwork Aseffa V. the heirs of Ato W/Mariyam Wube, Civ. App. No 613/93, Federal Supreme Court Case Report, Vol. 1, Addis Ababa, 2002, at 8-23.

the house was built during the marriage, it was his own personal property for it was exclusively built with money personally borrowed from a bank.

The Court then held that the house at issue was the personal property of the husband. In rendering its decision, the court reasoned that since the house was built with money personally borrowed by the husband from the bank and the wife, in her part, failed to prove the construction of the house through their" *joint effort*", the house would be the personal property of the husband.

The Court obviously erred in requiring the wife to produce evidence to prove the fact that the house was jointly constructed to be considered common which was in fact not required by the law. Once she asserts that the house, having been built during the marriage, was their common property, whatever money used for the acquisition of the house, the presumption of the law operates in her favor. She has no burden to adduce evidence and prove the assertion. The court went astray and made a quest for the existence of joint effort to determine the character of the property. The absence of joint effort of the spouses has no bearing on the application of the presumption. Nowhere provided in our law is such a requirement of joint effort for the operation of the presumption.

In the same case under scrutiny, the court also overlooked the operation of the presumption as regards household furniture. Amazingly enough, the court unreasonably urged the wife to adduce evidence and show the community of some of the household furniture denied by the husband. In so doing, the court left no room for the application of the fundamental presumption of the law and shifted the onus of proof wrongly.

Likewise, in a certain case,[26] a similar fundamental error was committed by the High Court in determining the character of a certain car. The car was acquired by the spouses during their marriage but it was registered in the name of the husband. In the case, despite the persistent assertion of the wife that the car was commonly owned, the court gave a judgment that it would be the personal asset of the husband. The court simply based its decision on the fact that the registration of common property in the name of the spouse would suffice to prove the personal ownership of the car.

Such a decision of the Court is against the basic presumption of common property which stands operative notwithstanding the registration of the property in the name of the spouse claiming it to be personal.[27] Registration unlike in property law, it seems, has a relegated effect in family law with regard to proof of ownership of marital asset between the spouses. Registration alone is not decisive to exclude the operation of the presumption. In this case, too, for house hold furniture the court insisted on the production of evidence by the wife to prove her claim of common property.

It must be noted that all the preceding cases indicate the practice prior to the enactment of the Revised Federal Family Code and the Oromia Family Code. Even if they cannot evidence the current practice, which is pragmatically more relevant, their inclusion in this article is however important to indicate the trend and shade a light on the current *status quo* as there is no substantial difference in the legal principles *ante* and *post* the Revised Family Code. The

[26] *Id*, Supreme Court, Civ. App, No. 541/69, at 73-76.
[27] Art 63 (1) of the Revised Family Code expressly provides that unless the spouse proves the sole ownership of the property, it shall be deemed to be common property even if registered in his/her name.

following are more recent cases that highlight the current practice of some courts.

Accordingly, in one recent case,[28] the Oromia Regional High Court of Dandi affirmed a decision of Woreda Court that required the plaintiff-wife to adduce a sufficient evidence to substantiate her assertion of common property. To begin with a brief summary of the facts, involved in the case was a certain house allegedly built by the defendant-husband prior to the conclusion of the marriage with the plaintiff. The defendant argued that the house in issue was acquired before the marriage while he was in a marital bond with his former (now deceased) wife. In essence, he claimed that the house was his own personal property. On the other hand, the plaintiff argued that the house was repaired during their marriage and served as their common residential home. In other words, the plaintiff's argument was essentially based on the assertion that the subsequent improvement made to the property would change the house to a common property.

The Woreda Court decided that the property in issue was proved to be the personal property of the defendant. In its reasoning, the Court stated that the house so contested was a personal property as long as it was acquired before the marriage and no mention was made of its inclusion in the marriage contract for the second marriage. The ruling was affirmed upon appeal up until its remand as per Art.343 of the Civ.P.Code by the Oromia Regional Supreme Court in its cassation division.[29] It is quite clear that a property acquired prior to a marriage remains personal as long it is sufficiently proved to be so upon dissolution of the marriage. As such, there exists no error in the ultimate decision of the courts. Nevertheless, the important point here is

[28] *See* Oromia Regional High Court, Civ.App,File No.26556/2001
[29] *See* Oromia Regional Supreme Court, Cass. File No.42922/2002.

the procedure it followed to reach its final decision. Procedurally, the flaw in the decision lies in the lower court's initial order of the plaintiff to prove the character of the property she claimed as common.

As can be noted from the case, the rulings of the courts apparently allude to the argument that the courts unreasonably required the plaintiff to prove the character of the property. This reflects the courts' neglect of the legal presumption of property which in effect relieves a person invoking it of the burden of proof. There is no burden of proof at all for a person relying on the presumption the existence of which shall be taken note of by the courts. The mere assertion made by the plaintiff was sufficient to trigger the operation of the presumption.[30] In contrast, the mere assertion by the defendant in indicating the time of acquisition of the property does not suffice to automatically characterize the property as personal property especially when the existence of substantial improvement is indicated. Nor does the non-inclusion of the property in the marriage contract conclusively warrant the personal nature of the property so claimed. There is no automatic characterization of personal property merely due its acquisition prior to a marriage and its non-inclusion in the marriage contract. Such an inference as was drawn by the courts is a misconstruction of the fundamental principle underlying the community of marital property. In particular, the case at hand indicates the issues overlooked by the courts in disregard of the appropriate weight inherent in the legal presumption.[31] The personal character of the disputed property has to be proved primarily by the interested spouse even if

[30] As a rule of evidence, this is often the case with all legal presumptions the operation of which shall be permitted by courts without any further evidence. In other words, courts should take judicial notice of the existence and application of a legal presumption.

[31] Both Arts. 63(1) and 79(1) of the Revised and the Oromia Family Codes explicitly stipulates that any property shall be presumed to be common property. This is therefore applicable for all properties that may be claimed as personal properties on any grounds.

it was acquired before a marriage. The spouse who claims the property as common is required to adduce evidence in support of its assertion only after the legal presumption initially invoked is adequately rebutted.

In another case,[32] the Federal First Instance Court deviated from the unfettered rules of presumption of common property in ruling on the character of a house disputed between spouses during the dissolution of their marriage. The essence of the argument and the evidence submitted by the husband, in support of his allegation of personal property, were solely based on the assertion that the said property was acquired before the marriage. The court eventually determined the character of the contested property as personal irrespective of the wife's alleged acquisition of the property during marriage. Nevertheless, the decision by the court was subsequently reversed by the appellate court whose decision was ultimately upheld by the Federal Supreme Court in its Cassation division. The decision of the Federal High Court was based on the house register maintained by the relevant authority of the city administration. The evidence so examined was found to demonstrate the acquisition of the house after conclusion of the marriage.

Therefore, the point worth noting from the case at hand is the insufficiency of the evidence relied on by the lower court to overrule the application of the solid presumption of common property. This is clearly evident from the subsequent decision of the higher courts on the basis of the evidence disregarded by the lower court. It is also contrary to the rule of evidence for the court to reject the requested production and admissibility of the relevant evidence in possession of the appropriate administrative authority. The relevance of the immovable register (administrative documents) ought to

[32] *See* Argaw Abache v. Aster Abegaz's heirs, Cass. File No. 39408/2002, Federal Supreme Court Cassation Decisions, Vol.10, 2003, p.4.

have been taken note of by the court. That is within the mandate of the court to take judicial notice of the public document. Thus, the court's disregard of the evidential significance of the document and its reliance on the wrong evidence undermines the purpose and importance of the basic legal presumption of common property.

A similar disregard of the legal presumption is also evident from a case[33] originating from Amhara regional courts. The disputed property was a sum of money paid to the respondent-husband in the form of rehabilitative subsidy up on his return from Brundi after a military service for the time he spent as a member of the peace-keeping force. It was not disputed that the money was acquired during the continuance of the marriage between the petitioner and the respondent. However, up on dissolution of the marriage and the consequent partition of the existing common property, the said money was claimed by the respondent as his own personal property while the same was claimed by the applicant as their common property.

In their decisions, the Woreda and high courts had determined the character of the disputed property as the common property of the spouses while the Regional Supreme Court ruled otherwise characterizing it as the respondent's personal property. In its reasoning, the Supreme Court stated that the property in issue could not be characterized as a common property as long as it was not acquired through the joint contribution of the spouses.

In analyzing the case at hand, it is important to mention that the relevant provision of the Regional Family Code, i.e., Art.73, is a verbatim copy of Art.62(1) and 78(1) of the Revised Family Code and the Oromia Family

[33] *See* W/o Addis Alem v. Corp. Aklilu Abebe, Cass. File No.31430/2000, Federal Supreme Court Cassation Decisions, Vol.5, 2001, at 237-39.

Code respectively. It is clear from the reading of the aforementioned provisions that none of them is indicative of the Court's "*joint contribution* or *effort*" as a necessary requirement for the existence of a common property. It is rather explicitly articulated by the provisions that a property acquired through the *personal effort* of the respective spouses shall remain their common property. The only overriding requirement for the existence of the common property and the legal presumption is the continuance of a valid marriage during the acquisition of the property.[34] The general assumption that the spouses would contribute to their common pecuniary interests does not necessarily entail a legal requirement for joint contribution. There is no need to resort to an interpretation and import a non-existent requirement into a clear and unambiguous legal provision. Thus, the Court's quest for a joint contribution in effect displaced the legal presumption of common property and excluded its proper application. This was well noted by the Federal Supreme Court, which consequently reversed the decision and characterized the disputed property as a common property.

Moreover, in a very recent case, [35]the Federal Supreme Court has explicitly limited the scope of the legal presumption to only property acquired during the spouses' in a marriage. In highlighting the salient facts of the case, the facts can be summarized as follows. The case involved a claim over a certain house, the character of which was disputed between an ex-wife (the

[34] Admittedly, the conclusion of a marriage is not a license for a common property. Nonetheless, the existence of a common property necessarily depends on the existence of a valid marriage (save the case of irregular union). This implies that once a marriage comes into existence a property acquired by the *personal* or *joint efforts* of the spouses within the marriage shall remain a common property of the spouses. It should be noted that the law clearly provides for two possible alternatives for the acquisition of a common property. Despite the arguments of some writers in support of the court's stand, there is no legal ground for limiting the alternatives only to a "joint effort "or " contribution" requirement merely based on a general assumption.

[35] *See* W/o Seniya Sheh Temam v. W/o Belaynesh Matebo & Ato Sherif Ahmed, Cass. File No.43988/2003, Federal Supreme Court Cassation Decisions, Vol. 11, at 107-109.

respondent) and her ex-husband with his wife (the petitioner). The disputed house, which was claimed by both wives as their respective common property with the husband, was constructed in the period between 1990-1994. As can be learnt from the case, the marriage between the respondent with the husband was in existence between 1988-1994 while the marriage with the petitioner came into existence since 1980 and was still intact throughout the period of the suit. The co-habitation between the husband and the respondent lasted only for the first two years following their marriage.

The decision, which was initially rendered by the *Mesqa* Woreda Court of Gurage Zone, was successively affirmed by the appellate court and the Regional Supreme Court. The Woreda court ruled the disputed property as the common property of the husband and the respondent. The court rejected the claim of the petitioner (the third party intervener at the court) reasoning that she failed to prove the time and manner of the acquisition of holding right over the land used for construction. More importantly, the court also stated that the petitioner did not adduce a written evidence registered with the court, in which the property was indicated as a common property.

In contrast to the regional courts, the Federal Supreme Court reversed the decision of the lower courts. In support of its ruling, the Court stated that the application of the legal presumption in favor of the respondent contradicted the overall purpose of the legal regime for common property and the notion of private property under Art.40(1) of the FDRE Constitution. The Court's reasoning was solely based on the requirement of co-habitation and its presumed implication for common property. The Court emphasized that this would hold true as the disputed property was acquired during the time when the respondent deserted the co-habitation despite the legal existence of the marriage.

Despite the origin of the case from a regional sate other than Oromia, a brief analysis of the salient issues is worth considering as the practice in Oromia regional courts is not entirely devoid of some recurring flaws. A closer scrutiny of the decisions of the regional courts and the Federal Supreme Court in the case at hand reveals the flaws in the rulings and the underpinning reasoning therein. As can be noted from the rulings of the regional courts, the courts clearly deviated from the similar legal presumption enshrined in the relevant law[36] in shifting burden of proof to the petitioner. It is a fundamental rule of evidence and explicitly stated legal principle that the petitioner who asserted the existence of a common property would bear no burden of proof concerning the time and manner of its acquisition. Surprisingly enough, the courts tried in futility to inquire into the rights pertaining to the land for the construction, which is obviously under communal ownership over which individuals acquire only possessory right. It suffices that the petitioner simply asserts the existence of the property in the marital union and its presumed character as per the legal presumption of common property. It is up to the contending party to discharge the burden of rebutting the outstanding legal presumption set in operation. The courts' gross neglect of the legal presumption is at odds with the overall spirit and purpose of common property.

Moreover, it is not necessary for the spouses to obtain any judicial declaration or make any agreement to confirm the character of a common property acquired during marriage. By providing for a mandatory legal presumption, the law itself makes further juridical acts unnecessary for the determination of the character of the property embraced by the presumption.

[36] *See* Art.72(1) of the SNNP Family Code of the Southern Nations, Nationalities and Peoples Regional Sate, Family Code Proclamation No.75/2004, Debub Negarit Gazeta Extraordinary Issue No. 1/2004 [hereinafter, Family Code of SNNP].

Even if there do exist such evidences, their existence will offer no legal significance other than a mere confirmation of a matter regulated by the law. In short, the courts' inquiry for a written evidence registered with a court has no legal basis at all.

As regards the ruling of the Federal Supreme Court, the Court apparently endeavored to do away with the flaws committed by the regional courts. It rightly decided that the petitioner was entitled to share the common property with her husband without the need for the requested proofs. Nevertheless, the Court replaced the flaws in the previous decisions with another flaws of its own. This is evident from its ruling and reasoning whereby the Court denied the respondent the right to benefit from the legal presumption of common property. It appears fair and simple that a person who did not contribute to the labor and efforts invested in the acquired property should not free ride on the economic benefits derived thereof. Yet, this implicitly imports the notion of joint effort or contribution as a pre-condition for the ultimate share in the property. This appears to be the overriding presumption of the Court in seeking for the contribution, if any. No matter how fair this may appear, there does exist no such a requirement under the relevant provisions pertaining to the legal presumption. There is no "joint contribution or joint effort" requirement as such in the law to determine the character of a property and the share therein. Indeed, it the presumption of joint contribution is meant to encourage the existence of common property between spouses. However, this general assumption should not override the explicit rules of the law. It is too far away to equate the philosophy underpinning business partnership with the purpose behind marital property. Despite the general similarity with regard to common economic interests, the purpose of the latter goes far beyond ensuring pecuniary interests. As it is

partly based on the spouses' duty to assist each other and contribute to their common expenses, which are some of the several legal effects of a marriage, the existence of the legal presumption would also reinforce the integrity of personal relations between the spouses. The provision of the Constitution for private property is too general to justify the misconstruction by the Court. It only provide for a general principle to acquire private property. This does not preclude a spouse from sharing a common property acquired as a result of the personal effort of a spouse as long as the property is acquired during a marriage. The preclusion within the context of marital property would have a legal basis had the fabricated "*joint effort*" requirement of the courts been inserted into the existing relevant provisions.

Furthermore, the law does not restrict the application of the legal presumption only to a property obtained during a continuous co-habitation. Nor does the law equate the consequence of desertion of a co-habitation with that of a formal dissolution of marriage. As long as the marriage is intact between the spouses, its legal effects perpetuate to exist. The marriage can be deprived of its legal effects for non-cohabitation if the legislature so desires. The law has already regulated the consequences of legal relationship due to non-cohabitation.[37] It is not within the mandate of the courts to fictitiously construe to limit the scope of application in search of fairness. Indeed, it is beyond the scope of this article to grapple with legal consequence of the precedent set by the Federal Supreme Court. It suffices to mention that a decision that contradicts with the very scope of the Court's judicial power as set by the FDRE Constitution does not have any legal effect despite the legal force it purports to have based on a misconstruction of the legal provisions.

[37] The direct consequence of non-cohabitation in particular following an agreement for separation is the presumed non-existence of sexual relation between the spouses in an action of disowning paternity. *See* Art. 186 of the Oromia Family Code.

Therefore, the foregoing cases as a whole vividly indicate the trends in the practice of the courts. As can be noted from the cases, the practice of the courts sometimes, if not often, derogate completely from the law in determining personal and common property during dissolution of marriage. In particular, the important rules enshrined in the cardinal presumption of common property are grossly overlooked. Serious legal errors are committed in determining personal and common property on the basis of the presumption.

1.2.2. Proof of Personal Property

It has been pointed out that the determination of personal and common property by operation of the law shall be made primarily on the basis of the presumption. This cardinal presumption of common property would only be rebutted by a preponderance of evidence.

Thus, it is absolutely necessary that a claim to personal property has to be substantiated sufficiently with the required proof. That means, proof is a condition for personal property and the onus of the proof is thus on the spouse insisting on the assertion of the sole ownership of a given property. Therefore, only a successful proof made by the spouse so claiming would determine the character of the property as a personal one.

Usually, a proof of personal property may pragmatically be a cumbersome task for the spouse under duty to adduce sufficient evidence in support of his/her claim. Often, relevant evidence may not be readily available. Besides, it strictly requires the court's meticulous consideration of the evidence adduced as proof of personal property. There may also arise complicated

issues necessitating cautious scrutiny by the court in determining the personal character of the property.

Before an attempt is made to bring into light the practice, the writer opts to highlight some major approaches followed in the course of the proof. Accordingly, there are some approaches on the basis of which proof of personal property is to be made. A closer scrutiny of the relevant provisions of our law indicates that the approaches, as followed by some foreign legal systems, are more or less enshrined in our law with certain limitations. Herein under are some of the selected approaches conforming to those embodied in our legal system?

i. Proof on the Basis of Tracing

As has been mentioned with special emphasis in this article, it is a general presumption that property acquired during marriage constitutes common property. The source of the property so acquired may however vary. In such a case, one method of rebutting the general presumption is to trace the acquisition to personal property based on its source. Thus, "tracing" is the process of determining the character of the property by identifying the source from which it is derived.[38] The approach is based on the notion that a property acquired subsequently retains the character of its source. For instance, if the property in question was acquired in exchange for entirely personal property during marriage, it will be personal property up on the demonstration of such a fact.

In this example, the approach as employed in foreign legal system merely refers back to the character of the source of the property acquired later.

[38] Menell & Brykoff , *supra* note 17, p138.

However, under our law, the significance of the application of such a method to rebut the presumption in this instance is often incumbent upon the decisive declaration of the court approving the property so acquired to be personal. A mere indication of the source of a property through tracing alone is of no significance to determine the personal character of the property particularly when the source of the property is personal property.[39] This is one of its limitations when employed under our law. Nevertheless, where the property in question is acquired in exchange for a common property, the property would unconditionally be common. This also seems somehow to be superfluous for the property, even without tracing, shall automatically be common. Anyways, the spouse asserting that a certain property is his/ her own personal property can rebut the presumption by adducing evidence tracing to the source of the property. This approach can also be used to obtain a judicial declaration of the personal character of a certain property. The spouse requesting the characterization shall prove the source of the property by tracing. Thus, it is significant in the determination of personal property as it serves as a mode of proof required for the initial designation of the property. Moreover, its importance should not be underestimated as the approach can be used to supplement the other modes of proof explained below.

ii. Proof on the Basis of Time of Acquisition

[39] This can be noted from Art. 58 of Revised Family Code that a property derived from personal property would be personal only when it is so designated by the court (emphasis added). That is, declaration to that effect is a necessary condition.

In case the source of the property in question cannot successfully be traced or even if traced, where the approach proves to be of no help in determining the character of the property, then its time of acquisition is material. On the basis of this second approach, property acquired prior to marriage would be personal one up on production of evidence showing such time.[40] Therefore, during dissolution of a marriage, if any dispute arises between the spouses as to the character of a certain property, the determination would be made on the basis of the time of its acquisition.

The approach may not, however, function where there existed a valid agreement that had transmuted the property acquired prior to marriage into common property.[41] Thus, the mere reliance of the spouses on the approach may prove to be of no use where the other contesting spouse successfully produces the agreement showing the community of the property.

In connection with the approach at hand, despite its apparent simplicity, some delicate issues deserving special emphasis may crop up in determining the character of a property. Unavoidably, problems arise in case the process of acquisition overlaps both pre-and post-marriage period.[42] For example, what is the exact point at which an asset is said to have been acquired when there is a series of steps in the acquisition? The acquisition of a property is usually the net effect of a series of acts over a period of time. One may thus

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[40] Even if the property acquired prior to marriage shall remain personal property as per Art. 57 of Revised Family Code, proof being necessary to retake such property, the legal presumption of common property would be rebutted only when such time of acquisition is proved. *See also* Biruk H/Eyesus v. Fanaye Abebe, *supra* note 7, p.3.

[41] *Id.*

[42] This is not a mere hypothetical assumption. Time has shown that this has been practically the case in Ethiopia. Recently, the Federal Courts of Addis Ababa have been seized of a case evidencing the scenario. *See*, fn.44, *infra*.

hardly point out the exact time of acquisition to determine the character of the property.

For such a perplex issue, some foreign legal systems apply the theory of "*inception of title*" that fixes the character of the property at the time when a property interest is acquired.[43] The theory usually characterizes property at the point in time when it expands from a "*mere expectancy*" to a property interest which may vary depending on the nature of the property.[44] In this regard, it may be important to envisage instances like when property is acquired through prescription or adverse possession or like the case of insurance policy for which the process of acquisition may overlap both pre- and post-marriage period.

For example, an insurance policy purchased by the husband on his life and in which no one was designated as a beneficiary would be personal property of the spouse under the inception of right test up on its purchase through the first payment made prior to marriage despite the subsequent payments made during marriage.[45] In this regard, Art.659 of the Commercial Code of Ethiopia provides that the insurance policy shall come into force on the day when the policy is signed unless otherwise expressly specified to the effect that the policy shall only come into force after the first premium has been paid. Thus, the characteristic of the inception of title theory is that the

[43] Menell & Brykoff, *supra* note 17, p144. (This classic theory is followed in Louisiana, Texas and New Mexico.)

[44] *Id*. This approach has been apparently adopted by the Federal Supreme Court in the Endalkachew v. Bizualem, in which the Court held the view that the acquisition of the property to be acquired through a draw is said to have occurred only when the draw for the property is won instead of the time when registration is made for the draw. *See* Endalkachew Zeleke v.Bizualem Mengistu, Cass. File No.51893/2002, Federal Supreme Court Cassation Decisions, Vol.10, pp.83-84.

[45]*See* Menell& Brykoff, *supra* note17, p149.

character of a property remains that which it was at the inception of right unless positively changed by operation of law or act of the parties such as transmutation agreement or gift.

At this juncture, based on the foregoing example, the writer desires to draw the attention of the reader to contemplate the case where the insurance policy with no designated beneficiary is entered into during marriage. From a quest to this end in the cumulative reading of Art.705 and 706 (3) of our Commercial Code, it could be noted that where no beneficiary has been specified in a life insurance (whether the policy is entered into prior to or after the marriage), the capital to be paid by the insurer to the subscriber-spouse shall be regarded as the personal property of that spouse.

One may wonder at this instance whether there is an inconsistency between the aforecited provisions of the Code and Art. 62(2) of the Revised Family Code. In particular, the possible inconsistency is worth considering where the insurance policy is entered into during marriage. The writer's opinion is in the affirmative.

The Commercial Code, which specifically deals with life insurance as per the aforementioned provisions, characterizes the sum obtained thereof as the personal property of the subscriber-spouse, whereas the Family Code generally characterizes "*all property*" acquired onerously during marriage as common property unless declared personal as per Art.58(2) of the Code. In such a case, the apparent inconsistency can be removed by the operation of the rule of interpretation. As such, the relevant provisions of the Commercial Code arguably special to prevail over that of the Family Codes that are phrased in general terms. There is a strong reason to support this interpretation as the provision of the Commercial Code specifically

characterizes the insurance capital as a personal property. The Family Codes that generally regulate and determine the character of pecuniary interests have made no mention of such a property nor does it indicate its possible character.

Nevertheless, the recent cassation decision of the Federal Supreme Court has triggered the same issue that has been disposed of differently.[46] The Court ruled that the insurance sum due on a life insurance shall be partitioned between the subscriber's spouse and his/her heirs as long as the beneficiary was not specified in the insurance policy. In its reasoning, the Court noted the inconsistency between the two codes. Yet, it opted for positive rule of interpretation instead of the *lex speciale derogate lex generale* rule of interpretation as it found both provisions to be of similar legal status, i.e., special legal provisions. In effect, the court endeavored to strike a balance between the interests of the persons entitled to claim under the respective codes.

It has to be however noted that there is no legal basis to warrant the application of the approach despite its apparent fairness as both provisions are blatantly inconsistent to be read together and be given equally effective application. It is rather a case where either of the two shall be opted for in disregard of the other. The Court's attempt to fictitiously fill in the gap seems to be beyond the scope of its judicial mandate and slips into the realm of legislative power. In view of the earlier argument based on the interpretation of the provisions of the respective Codes, this writer holds a different position for the reasons made above.

[46] *See* Genet Belay v. Fenet Teklu, Cass. File No. 44561/2002, Federal Supreme Court Cassation Decisions, Vol.10, 2003, pp 88-94.

In a nutshell, despite some complicated issues, the proof of personal property may be made on the basis of the date of its acquisition.

iii. Proof on the Basis of the Manner of Acquisition

The manner of acquisition, like the foregoing ones, may also be used as a ground of proof of personal property. On this ground, the spouse claiming the property as personal one may prove it by showing unequivocally the manner in which the property was originally acquired. This approach may be of a great importance as far as the property is acquired gratuitously.[47]

In this respect, the spouse may rebut the presumption of common property showing that the property in question was acquired through inheritance or donation solely made in his/her favor. To this end, the spouse could produce the document such as the will or the act (instrument) of donation evidencing the gratuitous acquisition of the property. But, in case the spouse fails to prove these facts persuasively to the satisfaction of the court, the legal presumption remains intact to operate in favor of common property.

iv. Proof on the Basis of Declaration by the Court

It has been expressly provided under Arts. 58(1) & 62(2) of the Revised Family Code that all property onerously acquired during marriage shall be the personal property of the spouse so acquiring it, subject to the declaration to be made to that effect by the court as per Art. 58(2) of the Code. That is, the declaration of the property as personal one by the court would eventually be used as a ground to rebut the presumption of common property during

[47] *Id*.at 146. Because when the property is acquired onerously, from the very beginning, it shall be common property as per Art. 58(1) & 62(2) of the Revised Family Code.

dissolution of marriage where the spouse so claiming could simply produce evidence showing the declaration.

The declaration has an overriding importance as compared to those discussed herein above in that proof on the basis of the declaration is so simple as far as the declaration is made. The distinction between tracing and declaration by the court should be well noted. It is true that the judicial characterization of a property as personal involves tracing its source to onerous acquisition from a preexisting personal property. By contrast, proof on the basis of tracing does not necessarily depend on the existence of court's declaration. These exceptional cases are however few. A typical instance may be the case of the personal characterization of money procured in the form of damage due to a bodily injury sustained by one of the spouses.[48] Proof by tracing the source of the money would enable the court to characterize it as a personal property upon dissolution of the marriage. This exceptional scenario makes the approach still relevant without the need for a judicial declaration. Indeed, where there exists a court's declaration, a resort to the aforementioned approaches would be of no significance as such for the demonstration of the declaration itself suffices to rebut the presumption.

It must further be noted that such declaration should be made during the continuance of the marriage. Because when the marriage is terminated, the issue would normally be the determination of personal and common property in consequence of the liquidation of pecuniary relations rather than the declaration required under Art. 58(2) of the Revised Family Code. With this point in mind, a question may be posed as to whether separation of the

[48] *See* Civil Code, Art.2144.

spouses without dissolution of the marriage has the same effect regarding the declaration.

In this instance, as opposed to the formal dissolution, the separation of the spouses does not prohibit the spouses from requesting the court for the declaration. Surprisingly, the Supreme Court, in one case,[49] held an erroneous view that Art. 648(2) of the Civil Code, which is a corresponding provision to Art. 58(2) of the Revised Family Code, is inapplicable to the spouses when they are living apart. There is nothing in the law suggestive of such a restrictive interpretation of the provision. It is totally against the purpose of the law to legally equate the separation of the spouses with the termination of their marriage. In fact, the law accords recognition to their right to agree to live separately that the way the court construed the provision lacks legal foundation.

An important point worthy of note is also that the scope of art 58(2) in accordance with which the declaration may be made by the court is limited only to *property acquired by onerous title*(emphasis added).[50] Thus, for a proof of a certain property acquired gratuitously, such as inheritance and donation, there is no instance to rely on the ground of the declaration since no declaration would totally exist for the property so acquired.

Generally, the proof of a personal property acquired during marriage may easily be made by showing the fact that the property has been declared personal by the court. But where there is no declaration to that effect by the

[49]*See* Supreme Court. Civ. App. No. 2133/78 (unpublished) .

[50] Though this could explicitly be noted from the reading of Art. 58 & 62(2) of the Revised Family Code, in practice, the courts however seem to extend the scope of the provision to property acquired gratuitously as well. In the case under the preceding footnote, the then Supreme Court appears to have entertained the erroneous view that donations fall in the scope of Art. 648(2) of the Civil Code.

court the property shall *ipso jure* be part of the common property unless proved to the contrary on the basis of other grounds. Moreover, in the course of making the declaration itself, the court must be furnished with convincing evidence showing that the acquisition was made with onerous title of a personal nature. Inability to adduce the required evidence to buttress the request entails its rejection and consequently reinforces the application of the presumption.

As a recent case[51] indicates, there seems that disparity however exists among courts and judges in their interpretation of the effect and purpose of the required declaration. In the case, the Federal First Instance Court and Federal Supreme Court in Addis Ababa ruled contrary to the spirit and purpose of the required declaration. The disputed house purchased during marriage by the money obtained from the sale of a personal property acquired prior to the marriage was characterized as the personal property of the respondent-wife. Nevertheless, both courts followed slightly different lines of reasoning. The lower court's reasoning was essentially based on the fact that the property was exclusively acquired from the money derived from the sale of the pre-existing personal property. Moreover, the court required the applicant wife to prove the acquisition of the property through his personal effort during marriage. In effect, the court emphasized the source of the disputed property instead of the mandatory requirement of declaration by the court. On the other hand, the Supreme Court stated in its reasoning that the required declaration by the court to confirm the personal character of the disputed property would be applicable only as regards a dispute between the spouses and third party. In other words, the declaration is necessary only to safeguard the interest of third party when the character of the property is disputed. This

[51] Gezahagn Dilnesaw v.Tewabech Demeke, Cass. File No. 37275/2001, Federal Supreme Court Cassation Decisions, Vol. 8, 2003, pp237-240.

is clearly against the very purpose of the required declaration which is basically designed to regulate the pecuniary interests of the spouses between themselves.

Even the decision of the Federal Supreme Court in its cassation division was subject to a split in opinions among the judges. The dissenting opinion was in support of the personal character of the property as long as there was no possible blend between the disputed property and other common property. In the opinion of the dissenting judge, the purpose of the declaration by the court is to avoid the possible intermingle between the properties. In other words, the declaration is unnecessary as long as intermingling is unlikely to arise. It is true that the declaration can be of an importance to retake a personal property from a common property. Nonetheless, this is not the primary purpose of the required declaration. The overriding purpose seems to avoid the possible conflict of interests between the spouses by confirming the character of the property as it undergoes changes affecting its character.

The other method employed, for instance, under French law to establish the character of the property is *property title*. Under its family law, in particular, for immovable's, property titles usually prove the origin of the property either as personal or common property.[52] This is apparently not the case in Ethiopia. Even if the property title is issued in the name of a spouse, the property is presumed to be common as long as it is acquired during the continuance of the marriage.

Therefore, in all the foregoing approaches, the spouse claiming for a personal property during dissolution of marriage is duty bound to adduce sufficient evidence to buttress her/his allegation. The approaches may be

[52] Planiol and Ripert, *supra* note 4, p 267.

used separately or jointly depending on the nature of the case. In nutshell, for a proof of personal property, there are several grounds under our law on which a claim for personal property may be made.[53] Those grounds are, in one way or the other, embodied in the approaches comprehensively illustrated above and need not be reiterated further.

For any of the assertion made on any of those grounds, it is necessary that the claim must be substantiated with sufficient proof. The evidence required to substantiate such a claim may not always be of the same sort as the evidence has to be determined in light of the grounds for the allegation having due regard to the relevant provisions of the law.

In an attempt to bring into light an instance of the practice concerning the issue of determination, the writer has observed a certain case,[54] in which the then Awradja Court disregarded the stringent requirement of proof in relation to a claim for personal property. In the case, the husband alleged that a certain house constructed during marriage was his personal property. He claimed the house as his own arguing that it was constructed by him alone with his own money personally borrowed from a bank the debt of which was later satisfied by the proceeds from the sale of his personal property acquired prior to marriage.

In support of his assertion, he produced some documents showing merely the sale of his personal property but which does not totally indicate the fact that the proceeds thereof was really used to satisfy the debt. Surprisingly, the

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[53] The grounds are enshrined in Arts. 57& 58of the Revised Family Code/Arts.73&74 of Oromia Family Code.

[54] W/ro Tiruwork Aseffa v. the heirs of Ato W/Mariyam Wube, Civ. App. No 613/93, Federal Supreme Court Case Report, Vol. 1, Addis Ababa, 2002, p 8-23.

Court relying on such insufficient evidence decided that the house was the personal property of the spouse. In reaching the decision, the court was fully aware of the fact that there existed no designation of such property acquired onerously during marriage to be personal one subsequent to its acquisition. Even the documents produced by the husband do not warrant the conclusion that the house was ultimately acquired with his own money. There existed no tenuous nexus between the documents evidencing merely the sale of his personal property and the acquisition of the property in dispute. It is possible that the alleged proceeds might have been used for other purpose rather than for payment of the debt.

Thus, in the writer's view, the purported evidence adduced was not sufficient to rebut the presumption of the common property at all. The failure to adduce the required proof should clearly entail the application of the presumption.

Similarly, in another case cited in the preceding section,[55] the respondent-husband asserted that a certain house was built with money received as a personal gift from one Miss Mattern. He thus claimed the house as his personal property even if it was built during marriage. To this end, he produced as a proof a mere letter indicating that a certain sum of money was sent from Switzerland in the name of the respondent. The Supreme Court was then erroneously satisfied with the letter as a proof of an act of donation consisting of the money.

In this case, one may rightly question the sufficiency of the bare letter as a proof of an act of donation. The mere letter *per se,* in the absence of any specification, does not necessarily constitute an act of donation for the mere

[55] *See* Bruktawit Gebru V. Alebachew Tiruneh, Supreme Court, and Civ. App. No. 2133/78 (unpublished).

fact that a certain sum is specified therein. The sum could have been sent in consideration of something done by the respondent for Miss Mattern, the fact which the court failed to contemplate in the case under scrutiny.

Seemingly, the Court also went further and ventured to conclude that the purported "*donated sum*" would be considered as if it was exclusively granted to the respondent husband when made during the period of separation. This seems to be a clear misinterpretation of Art. 652(3) of the Civil Code which has been reiterated in verbatim under Art.62(3) of the Revised Family Code. As per the provisions, property donated conjointly to the two spouses shall be common, unless otherwise stipulated in the act of donation.

Even assuming the letter in issue as constituting an act of donation during marriage in which there existed no specification (as it could be noted from the record of the case), the so-called donated sum shall be common in the absence of stipulation to the contrary. A mere separation of the spouses, when the donation was made, would not render the provision inapplicable in so far as the marriage was not legally terminated.

In general, in the case at hand, the respondent did not discharge his burden of proof as required by the law. The court also misconstrued the provisions of the law. The court gave credence to the respondent's allegation quite liberally to the neglect of the stringent demand for proof of personal property.

Moreover, all the recent cases analyzed above to demonstrate the misapplication of the legal presumption are all relevant here to demonstrate the judicial practice with regard to the required proof of personal property.

Though reiterating the cases in their entirety here would simply amount to unnecessary redundancy, it suffices to draw the conclusion that the proof required for personal property would not be met as long as the legal presumption is misconstrued. All those cases in which the courts shifted the burden of proof, on various unwarranted grounds, up onto the spouse claiming for common property imply courts' failure to give due weight to the presumption.

This can possibly be noted from cases involving two major scenarios. Accordingly, the first instance is where the courts had initially denied the claimant the benefits due to him/her under the legal presumption of common property. This is evident from cases where the courts simply rejected the claims for common property from the very outset for want of evidence supporting the claims invoked. In this regard, the courts in effect avoided the subsequent burden of proof to be discharged by the other spouse challenging the assertion. This amounts to a gross neglect of the due consideration that should have been given to the stringent requirement of proof for personal property.

The second scenario evidencing the deviating practice of the courts is a case where courts accepted the claims of a spouse asserting personal property without sufficient evidence. In this regard, the Federal Supreme Court correctly noted in the *Argaw v. the heirs* case that the Federal First Instance Court of Addis Ababa had misconstrued the required degree of proof for personal property.[56] In particular, the decision of the Federal Supreme Court, in affirming the ruling of Federal High Court revealed the lower court's failure to consider the available immovable register in possession of the

[56] *See Argaw* vo*te heirs*, *supra* note 32.

concerned authority despite the persistent request of the petitioner claiming the property as common property. The appellate courts correctly characterized the disputed house as a common property based on the evidence ignored by the lower court. As indicated above, the relevant documentary evidence was found to indicate the acquisition of the property during the marriage. Hence, even if there is no fixed degree of proof explicitly dictated by the law, it is a general and settled rule of evidence in civil suits that the courts should not simply be satisfied with an assertion without concrete evidence. Such a practice would undermine the very purpose of the fundamental legal presumption which can only be rebutted by a sufficient evidence.

The foregoing analysis of a few cases, therefore, indicate clearly the existence of disparity between the practice of the courts and the provisions of the law in determining personal and common property. Sometimes, the courts do not fully apply the cardinal presumption of common property. Furthermore, the strict requirement of proof in relation to a claim to personal property is often disregarded. It is also not unusual to find the misinterpretation of the provisions of the law in the course of the determination.[57]

II. DETERMINATION BY WHOM MADE

The second major prong of the issue of the determination concerns the appropriate tribunal that is competent to decide on the issue. As such, this

[57] Even though the author could not readily find recent cases, this trend is still apparently the case in some courts, both at federal and regional levels. In one pending case before Oromia regional courts of different levels, the author personally witnessed such a practice.

section would specifically indicate the power of the court and the family arbitrators under the Revised and Oromia Family Code on the issue of determining personal and common property, particularly during dissolution of marriage.

It should thus be noted at this juncture that the scope of this article does not go beyond indicating the specific power of the tribunals over the determination. It does not deal with the whole power of the tribunals over the entire pecuniary relations between the spouses apart from indicating their power in determining personal and common property usually at the end of the marriage.

2.1.The Power of the Family Arbitrators and the Court under the Revised Family Code

2.1.1. The Adjudicatory Power of the Family Arbitrators

In general, as opposed to their power under the 1960 Civil Code, the power of the family arbitrators over divorce and its effects under the Revised Family Code has been greatly reduced only to limited instances. For example, the former power of the family arbitrators to entertain a petition and pronounce a divorce has been totally done away with in favor of the court.[58] The court may merely direct the spouses to settle their dispute through arbitrators of their choice who shall make reports to the court regarding the outcome of their attempt to reconcile the spouses.

Following the dissolution of marriage by divorce, upon the refusal of the spouses to agree on the conditions thereof, the family arbitrators may also be authorized by the court to decide on the conditions of divorce which is in fact

[58] As per Art. 117 of the Code, only the court is competent to decide on divorce, decide or approve the effects of divorce. *See also*, Art.98 of Oromia Family Code.

subject to the approval of such court. Hence, the power of the family arbitrators to determine personal and common property of the spouses as one of the conditions of the divorce depends *ipso jure* on the authorization from the court.

Moreover, they have been denied of their former power to designate a certain item of property as a personal property of the spouse making the request. The power has been vested on the court which had formerly no such power to designate the property.

Therefore, from the foregoing overview, it is clear that the former immense power of the family arbitrators under the previous Code in settling pecuniary disputes during dissolution of marriage has been shifted to the court. The reason behind such a gross shift of power may be attributed to the ineffectiveness of the institution as it was supposed to be.

2.1.2. The Power of the Court

As indicated under the proceeding topic, the adjudicatory power of the court over family matters under the current family law is too broad as dissolution of a marriage and its pecuniary matters, *inter alia*, exclusively fall within the competence of the court. For example, only the court is competent to decide on divorce as well as to decide or approve the effects of divorce, among which liquidation of pecuniary interest is so important.

Likewise, where the marriage is dissolved on other grounds, it is the power of the court to regulate the consequences thereof. Because, once the marriage is terminated by the order of the court as a sanction or by the declaration of absence, as the case may be, it is logically within the power of the court to settle, *inter alia*, matrimonial issues arising thereof.

The court, in determining pecuniary issues arising in relation to the liquidation of pecuniary effects may rely on the agreement of the spouses or the law or both as is thoroughly elucidated in this article. The court may thus base the exercise of its power on the agreement as its basic frame of reference for purposes of determining personal and common property at the end of the marriage.

In doing so, the court shall have due regard to the true expression of the intention and free consent of the spouses to avoid any adverse effect on the interest of the spouses. Where there existed no valid agreements or contract of marriage to serve as a frame of reference, as per Art. 83(2) of the Code the court may by itself or though arbitrators, or experts, or by any other means it thinks appropriate, decide on the conditions of divorce. In such a case, the court would determine personal and common property through the operation of the gap filling provisions of the law as elaborated earlier.

Finally, as is repeatedly mentioned in connection with various issues, as per Art. 58(2) of the Code, it is the power of the court to declare a certain item of property acquired onerously during marriage to be personal property up on request by the spouse concerned. In reality, however, most spouses do not request the court as they are unaware of the existence of such a requirement.[59]

In conclusion, the power of the court under the Revised Family Code to determine matrimonial issues is quite broader than that of the family arbitrators. Strictly speaking, the family arbitrators have no power to determine personal and common property of the spouses except when they

[59] *See* Tilahun Teshome, "*Reflections on the Revised Family Code of 2000*," The International Survey of Family Law, 2002, p 159.

are authorized by the court to do so. Even in such an instance, the decision of the arbitrators shall be subject to the scrutiny of the court.

III. CONCLUSION AND RECOMMENDATIONS

3.1. Conclusion

Repeatedly stated in this article is the core issue of determination of personal and common property to be made at the end of a marriage based on the agreements of the spouse. Such agreements, facilitating the smooth liquidation of pecuniary relations, would be used as a frame of reference for the purpose of the determination as they usually differentiate between the characters of the marital estate. Moreover, even the courts would be relived of the controversies likely to emerge with regard to the question of determination.

Failing such agreement(s), the operation of the law ultimately comes forth to regulate the issues of determination arising during dissolution of a marriage. The determination when made in accordance with the law, therefore, involves the application of the legal presumption of common property and the subsequent proof of personal property that rebuts the presumption.

Undoubtedly, the presumption of common property is a cardinal principle of an immense importance in the determination of personal and common property during dissolution of a marriage. As enshrined in our family law, the comprehensive nature of the presumption hardly calling for a detailed elaboration has profoundly consolidated all the pertinent issues of determination in favor of common property. In doing so, the law has implicitly marginalized the existence of personal property subject to the strict requirement of proof.

Thus, the importance of this cardinal presumption for the determination of the character of certain property during dissolution of marriage being so paramount, the spouse claiming for a common property would rely on the presumption for which he/she bears no burden of proof. The proper application of the presumption itself bars *in toto* the need for adducing evidence in support of the claim. That is, there is no onus of proof on the spouse alleging that certain matrimonial asset is a common property.

As opposed to the principles of the law as outlined above, a look into the practice nevertheless evidences explicitly that despite the unfettered rules embodied in the cardinal presumption that shall carefully be applied to determine the character of marital property, there is a gross deviation of the practice from the law.

3.2. Recommendations

In view of the practical problems analyzed in this article, the following major recommendations should be taken into account to bridge the gap between the law and practice. First, in the course of determination of personal and common property, it is so imperative that the fundamental legal presumption of common property should fully be applied. There must be a complete observance of the unfettered rules implicitly embodied in the presumption. Second, the courts, adhering to the provisions of the law, shall not require the spouses claiming for common property to adduce evidence in support of his/ her assertion. There is no onus of proof on the spouse so asserting. Third, the pertinent provisions of the law applicable in the determination of the character of the property should be construed correctly in light of the spirit of the provisions and the purpose contemplated

therein. Fourth, no undue credence of probative value should be attached to the mere registration of a marital property in dispute, the consequence of which would in effect impede the complete application of the fundamental legal presumption. Registration alone is not decisive in itself to warrant the personal character of the property and preclude the operation of the legal presumption. Fifth, for proof of a personal property, the requirement of proof must be complied with, the failure of which shall entail the operation of the legal presumption. The courts should meticulously determine the sufficiency of the evidence adduced on the basis of the required standard of proof before derogating from the presumption.