Gifts to, from and between Spouses - Present Regulation in the Nordic Countries

1. Introduction

The property relations and the intimate relations between the spouses in a marriage have always made it necessary to specifically regulate and restrict transactions between the spouses and transactions between the spouses and third parties.

Deferred community property\(^1\) is the default marital property system in all the Nordic countries. In this system, the total assets of the spouses are divided equally after deductions have been made for debts.\(^2\) It is referred to as deferred community property because the community appears only when the marriage relationship is dissolved by death or marriage breakdown.\(^3\) The term does not indicate actual co-ownership of property, as some other community property regimes do, and as the community of property regime in the Nordic countries did until the 1920s.\(^4\) Within a marriage, deferred community property does not, as a main rule, limit the right of a spouse to dispose of what he or she owns or later acquires.

Separate property,\(^5\) on the other hand, is not divided upon dissolution of marriage. In the Nordic countries separate property is established either through an agreement (marriage contract)\(^6\) between the spouses or it is set as a condition to a gift or a testamentary disposition. As a rule, such a condition must be established at the latest when the gift is transmitted to the beneficiary.\(^7\)

The Nordic marriage property regime of deferred community of property has necessitated regulation of how a third party can prevent a gift or inheritance from him or her from becoming a part of the community property and thus being shared.

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\(^1\) Referred to as felleseie in Denmark and Norway and giftorättsgods in Finland and Sweden.

\(^2\) See e.g. the Norwegian Marriage Act of 4 July 1991 No. 47 Section 58 (1).


\(^5\) Referred to as særeje/særeie in Denmark and Norway and enskild egendom in Finland and Sweden.

\(^6\) Referred to as ægtepagt/ektepakt in Denmark and Norway and åkentskapsförord in Finland and Sweden.

between the spouses upon termination of the marriage. Donors and testators – especially donors or testators who are close family to one of the spouses – often wish to exclude the gift or inheritance from the community property.\(^8\)

The nature of the community property has also triggered regulations on the legal consequences of gifts from spouses to their descendants. Is the gift or inheritance given in advance supposed to be deducted from the descendant’s share when distributing the estate after the death of one of the spouses? And do gifts from one of the spouses have consequences for the spouses’ shares of the community property upon dissolution due to marriage breakdown or death of one of the spouses?

The regulations of gifts between spouses and gifts from the spouses to their children should also be seen in the light of the regulations on the descendants’ forced share. In all the Nordic countries there is a statutory forced share reserved to the children of the deceased that cannot be taken away by will.\(^9\) The rationale behind the forced share regulations has led to restrictions not only on testamentary dispositions in the strict sense, but also on gifts donated under such circumstances or on such terms that the gift by its purpose can be equated with a testamentary disposition.

A final reason why gifts between spouses and gifts from the spouses to their children are subject to specific regulations is the interests of the spouses’ creditors. In a marriage, the spouses usually live together, use the same furniture, drive in the same car, and spend their holidays in the same cabin, irrespective of who is the owner. The married couple constitutes a consumption unit.\(^10\) As long as they stay married and live together it does not matter to the spouses what is mine and what is yours. However, this does matter for the spouses’ creditors.

A common purpose of all the above-mentioned regulations on gifts to, from, and between spouses is to prevent unwanted donation cultures. Donations may be unwanted because they damage the interests of spouses themselves, or they may be unwanted because certain donations are given at the expense of third parties – i.e. the spouses’ heirs or creditors. In the following passages I will describe how donations to, from and between spouses are regulated in the Nordic countries in order to prevent unwanted donation cultures.

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\(^8\) NOU 1987: 30, p. 81.


2. Gifts to spouses

a. Introduction

Gifts or donations may of course be given by third parties to a married person or to the spouses as a couple. But there are some special issues that rise in connection with gifts given to spouses by third parties. First, it is sometimes uncertain whether the donation has been given to one of the spouses or to the both of them as a couple. Second, there is a question of what conditions may be put upon a donation to a married person, with respect to the marital property regime of the said donation. The main features of these regulations are quite similar in all the Nordic countries. However, there are differences in the details and in how they are interpreted in legal practice.

b. Requirements as to form

If the separate property condition is established through a testamentary disposition – a *dispositio mortis causa* – the separate property condition must be established in the form of a will. If there is an *inter vivos* donation given on the condition that it is separate property, there are generally no requirements as to form. In Finland there is, however, a requirement that a gift deed shall be dated, signed, and witnessed by disinterested persons in order to be valid.11 Even where it is not required, most conditions to gifts are established in a written document.

c. Conditions set by the donor or testator

The condition in a gift or a will may relate to all the varieties of the arrangements of the assets that are possible in the respective country. The Norwegian Marriage Act section 48 states that “A donor or testator may provide that the legacy or gift shall be conditional on such an arrangement as is mentioned in sections 42 to 44.” There are similar provisions in the Danish and Icelandic acts.12 The Finnish Marriage Act does not specifically address the question of whether it may be prescribed that a gift be separate property in the case of divorce, but community property in the case of a spouse’s death. However, the Finnish Supreme Court has ruled that such a combination is acceptable.13 It is not clear whether such an arrangement is valid under Swedish law.14

11 The Finnish Marriage Act, Section 66.
12 Cf. the Danish Act on the Legal Effects of Marriage section 28 a and The Icelandic Marriage Act section 77.
13 HD 2000: 100.
Donors or testators who are related to one of the spouses often wish to make sure that the gift or inheritance is not divided between the spouses upon termination of the marriage. This may be prevented through a separate property clause. However, not all donors and testators are aware that they may impose such clauses. In the preparatory works for the present Norwegian Marriage Act of 1991, the Marriage Act Committee argued that most donors or testators would wish that the gift or inheritance not be shared between the spouses upon termination of the marriage. Thus, it was assumed that when a separate property clause was not made, this was often due to ignorance or because the donor or testator had not considered the possibility of a marriage breakdown when the donation was given or the testament was written. ¹⁵

This assumption was one of the main reasons for the important exception from equal sharing of community property in the Norwegian Marriage Act, the so-called unequal division rule in the Marriage Act section 59. This rule states that a claim may be made to withhold from the division “the value of assets that can clearly be traced back to means that one spouse had at the time the marriage was contracted or has later acquired by inheritance or by a gift from a person other than his/her spouse.” There is no equally broad exception to the equal division of community property in the other Nordic countries. ¹⁶

A further question is whether the limits on arrangements of the assets that may be agreed between the spouses also limit the conditions that may be established by a third party. The Norwegian, Danish, and Icelandic acts specifically list the conditions applicable to the married couple. This may lead to the conclusion that the possible arrangements of the assets available for the spouses is also an exhaustive list of conditions that may be imposed on the donation from third parties.

In Nordic legal literature it is debated whether a third party may impose conditions to a gift or testamentary disposition other than those that may be agreed on by the married couple in a marriage contract. Some authors presume that a third party cannot impose conditions other than those that are available to the spouses when it comes to the marital property regime for the assets involved. ¹⁷ Others argue that the limitation to the contractual freedom of spouses does not apply to third parties. ¹⁸

However, most authors agree that a donor or testator is free to impose whatever conditions he or she wishes on issues outside the marital property regime – for example, time limits.

A condition that the inheritance shall be separate property may be imposed by will even if the inheritance is a part of the heir’s forced share. This is expressly stated in the Danish Act on the Legal Effects of Marriage section 28 a, the Icelandic Marriage Act section 77, and the Norwegian Inheritance Act section 31. The same probably applies in Sweden and Finland, although it is not expressly stated in the legislation.\(^{19}\)

Interesting questions arise in connection with mixed transactions that include both elements of a gift and elements of compensation, the so-called *negotium mixtum cum donatione*. May the donor or testator impose separate property clauses in these cases? If so, does the separate property clause apply to the entire property, or does it apply only to the gratuitous part? The traditional view in all the Nordic countries has been that one may impose separate property clauses even if there is an element of compensation, and that the separate property clause then applies to the entire object of gift or testation.\(^{20}\)

In a Danish case, U 1987 p. 763 H, a real property valued at 1.5 million DKK was transferred with a separate property clause. The gratuitous part of the transfer amounted to 13.67 percent of the entire value of the real property. The Supreme Court held that the entire real property was separate property. In a Norwegian case, Rt. 1986 p. 164, the gratuitous part amounted to about two-thirds of the total value. The Supreme Court held that gift character of the transaction was so distinct and the compensation so subordinate that with respect to the separate property clause it was reasonable to consider the entire transaction as a gift. In a later decision from the Norwegian Supreme Court, Rt. 1990 p. 432, the parties agreed that the compensation part – 14/25 – was community property. Their dispute related to the gift part, the other 11/25. Based on this case law, the ruling opinion in Norway is that the separate property clause applies to the entire asset if the gratuitous part amounts to less than two-thirds,\(^{21}\) whereas in Denmark the ruling opinion is that the separate property clause applies to the entire assets even if the gratuitous part is as small as 10 to 20 percent.\(^{22}\) A Swedish Supreme Court decision reported in NJA 2008 p. 457 has


\(^{22}\) Ingrid Lund-Andersen and Irene Nørgaard, *Familieret* (Copenhagen: Jurist- og økonomforbundets forlag, 2nd ed., 2012), pp. 155–157. Some Norwegian authors argue that the Danish standard should also be applied to Norwegian law. See Thomas Eeg, *Deling av ektefellers formuer* (Bergen: Fagbokforlaget, 2006), p. 229 ff; Per
accepted a mixed transaction in which the gratuitous part was between 37 and 58 percent as a gift to which a separate property clause could apply.

All the cases mentioned above were decided before there was a possibility in Denmark and Norway of agreeing on so-called fractional separate property. Some argue that mixed transfers should lead to a mixed marriage property regime for the assets involved. If the gratuitous part is 30 percent, then the separate property clause should apply only to that 30 percent.\(^\text{23}\)

Unreasonable results of this rule may be adjusted through claims for compensation. If, for instance, debt on an item that is considered separate property is paid off by ordinary community property means such as the owner’s income from his work, this will increase the value of the separate property at the expense of the community property. Such dispositions may actuate claims for compensation in all the Nordic countries.\(^\text{24}\)

d. Under what circumstances may the spouses alter the conditions?

All the Nordic marriage acts state that the beneficiary may not alter the conditions imposed by the donor or testator unless this has been specially authorized or clearly stipulated by the donor or testator. This is expressly said in the Norwegian, Danish, and Icelandic acts.\(^\text{25}\) In Finland and Sweden this follows from the explicit principle that separate property established through a marriage contract can be transformed into community property through a new marriage contract, whereas there is no legal authority to alter a condition imposed on the spouses by a third party.\(^\text{26}\)

If it is specially authorized or clearly stipulated by the donor or testator that the beneficiary may alter the conditions imposed by the donor or testator, this may be done unilaterally by the beneficiary. Since the alteration is an alteration of a marriage agreement, the alteration must be done in the form of a marriage contract. The other spouse, however, does not have to participate in the contract, since the marriage settlement is to the advantage of one of the spouses only. Such a marriage contract is valid even if the spouse who benefits has not taken part in creating it. In the words of

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\(^\text{25}\) The Norwegian Marriage Act section 48; the Danish Act on the Legal Effects of Marriage section 28 b; the Icelandic Marriage Act section 77.

\(^\text{26}\) The Finnish Marriage Act section 41; the Swedish Marriage Code chapter 7 section 3.
the Norwegian Marriage Act section 54 (1), “If the marriage settlement is to the advantage of one of the spouses only, it is valid even if the said spouse has not taken part in entering into the marriage settlement.”

The issue of whether the beneficiary may transfer to his or her spouse property given on the condition that it is separate property is a complex one. There seem to be different answers to this question in the various Nordic countries. The traditional Danish view is that the Act on the Legal Effects of Marriage section 28 b prohibits the beneficiary from selling or giving the property to his or her spouse, as such a transfer would violate the condition that the property is the beneficiary’s separate property. 27 Section 28 b second subsection states that a marriage contract may not provide anything contrary to the conditions laid down by the donor or testator regarding separate property. In Norway, it is considered contrary to the separate property clause if the beneficiary gives the property to his or her spouse. Selling the said property to the spouse on market conditions is, however, considered to be outside the scope of the provision in the Marriage Act section 48 prohibiting alterations of the provisions made by the donor or testator. 28

In Swedish legal theory, on the contrary, it is argued that the beneficiary may transfer the separate property to whomever he or she wants, including his or her spouse. 29 Finnish law seems to be in line with the Swedish view. 30

3. Gifts between spouses
   a. Introduction

Gifts between spouses have always been subject to specific regulations. Traditionally the legislation has also been quite skeptical towards such gifts. An early illustrative example is the wording of the Law of Jutland of 1241 chapter 43 on how much a husband and wife may convey to each other:

As much as a wife conveys to her husband or husband to wife, whether they have children together or not, it is not valid unless their heir will keep it after they are dead.

But if one of them, by circumvention, conveys something to other men outside the partnership, and this one afterwards conveys the wife’s land to the householder or the property of the householder to the wife, then it shall not be upheld unless the rightful heir wills it, as it is likely that the householder will then either by fear or by caution move the wife

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to convey what he wants; and there also some women who are so cunning that they can get their husbands to convey to them what they ask for.\textsuperscript{31}

There are certain specific provisions regulating such gifts even in modern legislation. According to the Nordic Marriage Law legislation from the 1920s, gifts between spouses required the form of a marriage contract. Thus the marriage contract could work both as an instrument to arrange the marriage property regime (community property and separate property) and as an instrument to transfer property between the spouses.\textsuperscript{32} The requirement of a marriage contract in order to transfer gifts between spouses still applies in the West Scandinavian countries of Denmark, Iceland, and Norway. In Finland and Sweden there are requirements as to form, but it is not required that a marriage contract be used.

There are two main reasons why certain restrictions on gifts between spouses are imposed by law. First, the spouses’ personal relationship may lead to hasty and ill-considered gifts. Requirements as to form provide some protection to the spouse against impetuous decisions. Second, they provide some protection to the heirs and creditors of the donor.\textsuperscript{33}

The requirements as to form do not apply to gifts that must be considered customary.\textsuperscript{34} The wording of the various acts varies to some extent, but they all use terms such as “customary,” “ordinary gift,” and “personal presents not disproportionate to the donor’s economy.” Although it is not expressly stated in all the acts, one has to take into consideration the donor’s economy while judging whether a gift is customary or ordinary.\textsuperscript{35} According to Danish, Icelandic, and Norwegian law, gifts consisting of a pension, life insurance, or similar benefits which provide security for the other spouse are valid without the form of a marriage contract.\textsuperscript{36} Danish and Icelandic law have also kept an old provision from the common Nordic marriage legislation from the 1920s that allows a spouse to transfer half of the surplus of his or her income during the year to the spouse. Such a transfer does not require the form of a marriage contract.\textsuperscript{37}

Even when the requirement as to form is fulfilled, a promise of a future gift may be invalid. This is expressly stated in the Danish, Icelandic, Norwegian, and Swedish

\textsuperscript{31} Translation by Helle Vogt.
\textsuperscript{32} Anders Agell, Nordisk Äktenskapsrätt (Copenhagen: Nordiska ministerrådet, 2003), p. 215.
\textsuperscript{33} See NOU 1987: 30, p. 119.
\textsuperscript{34} The Danish Act on the Legal Effects of Marriage section 30; The Icelandic Marriage Act section 72; the Finnish Act on Gifts section 6; the Norwegian Marriage Act section 50; the Swedish Marriage Code chapter 8 section 1.
\textsuperscript{35} Anders Agell, Nordisk Äktenskapsrätt (Copenhagen: Nordiska ministerrådet, 2003), p. 216.
\textsuperscript{36} See the Danish Act on the Legal Effects of Marriage section 30; the Icelandic Marriage Act section 72; the Norwegian Marriage Act section 50.
\textsuperscript{37} The Danish Act on the Legal Effects of Marriage section 31; the Icelandic Marriage Act section 78.
acts. Denmark and Sweden has a general prohibition, whereas the Norwegian and Icelandic acts allow future gifts if they are ordinary household goods in the common home. There is no statutory prohibition of such gifts in Finnish law.

b. Requirements as to form

As mentioned above, Danish, Icelandic, and Norwegian law demand the form of a marriage contract in order for a gift between spouses to be valid. There are, however, certain differences between the countries’ requirements for marriage contracts. According to Danish law, no witnesses are necessary, whereas Norwegian law demands two witnesses – the same requirement as for wills. In Iceland one can have either two witnesses or a confirmed signature from a lawyer or notary.

In Danish law, a marriage contract must be registered judicially and made public in order to be valid. Prior to registration the marriage contract is not valid between the contracting spouses, and it does not have legal protection against third parties. According to Norwegian law, on the other hand, marriage contracts are binding on the spouses and on their heirs, as long as they satisfy the form requirements for gifts. In order to have legal protection, however, they must be judicially registered in the Register of Marriage Settlements. A marriage settlement that transfers real property from one spouse to the other must furthermore be judicially registered by the registrar for judicial registration of title to real property, pursuant to the general rules. The same applies to other items of property, the assignment of which requires judicial registration or other registration in order to obtain legal protection. Such items are subject to a so-called double registration. The registrations are not advertised to the public, but the public may acquire information from the register about marriage contracts for specific individuals.

Swedish and Finnish law no longer require the form of a marriage contract for gifts between spouses. However, if the gift is intended to be the other spouse’s separate property, a marriage contract is required. Even though a marriage contract is not necessary, there are form requirements. The gift must, as a rule, be registered in order to be valid. An application for registration is sent to the court, and the registration authority is Statistics Sweden. The court is obliged to advertise the gift.

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38 The Danish Act on the Legal Effects of Marriage section 30; the Icelandic Marriage Act section 72; the Norwegian Marriage Act section 50; the Swedish Marriage Code chapter 8 section 2.
39 The Danish Act on the Legal Effects of Marriage section 37.
40 The Norwegian Marriage Act section 54.
41 The Norwegian Marriage Act section 55.
43 For the details, see Lars Tottie and Örjan Teleman, Åkenskapsbalken (Stockholm: Norstedts Juridik, 2nd ed., 2010), p. 195 ff.
in a gazette for public announcements, but this is not a requirement for the gift to be valid. 44

Between the parties a gift may be valid even without registration, as long as the gift is fulfilled. The condition for a gift in movables to become valid is that the object has come into the beneficiary’s possession and the donor has been excluded from further disposal of the property. The principle of transfer of possession is thus applied in this case in all the Nordic countries in relation to third parties. Change in possession can be difficult for spouses. Thus, registration is often required.

c. Voiding of a fulfilled gift and claims of earlier creditors against the recipient spouse

Even if a gift is fulfilled and it satisfies the form requirements of a marriage contract or other form requirements, there are some measures given in the interest of the donor’s creditors.

If the donor is under bankruptcy, gifts from the bankrupt spouse to the other spouse may be voided by the bankruptcy estate, provided the gift was given within a certain time prior to the bankruptcy. 45 The creditors are also provided some protection prior to bankruptcy in Denmark, Iceland, Norway, and Sweden. If one spouse has given the other a gift, any person who at the time had a claim against the donor and who cannot recover the claim in full from him or her may look to the other spouse for the value of what was transferred. However, this does not apply if it is proved beyond a doubt that the donor was still solvent when the gift was transferred. If compensation has been paid, it shall be deducted when calculating the value of what has been transferred.

The voiding regulations in the Norwegian Creditors Recovery Act are considered more creditor-friendly than the corresponding regulations in the other Nordic countries. 46 A gift from the debtor to his or her spouse may be voided any time up to five years after the gift was transferred, provided it cannot be proved beyond a doubt that the donor was still solvent when the gift was transferred. If the receiving spouse acted in bad faith, the gift may be voided any time up to ten years after the transfer. 47

d. Voiding of a gift if the gift is considered a donatio mortis causa

If the spouses have children from previous relationships, they will often try to find solutions in order to secure the family home for the surviving spouse. If this is done in a will, it may violate the forced share. In order to circumvent the forced share

47 See the Norwegian Creditors Recovery Act (Act 8 June 1984 No. 59) sections 5-2 and 5-9.
regulations, some couples make arrangements through gifts. We can take as an example a case where the husband, who has three children from a previous marriage, is the owner of the family home. He wishes to secure the family home for his present spouse by transferring it to her and making it her separate property. This is of course a major risk if the couple divorce, but if they are both elderly people and their marriage is relatively stable, this is probably a risk he is willing to take.

In Sweden and Finland this question is linked to the regulation of the forced share, as the forced share protection is extended to certain *inter vivos* gifts – the so-called extended forced share protection. This term applies to gifts donated under such circumstances or on such terms that the gift by its purpose can be equated with a testamentary disposition. Such gifts are often referred to as *mortis causa*, although there is not a requirement that violating the forced share was a purpose of the gift.

In Norwegian law and to some extent in Danish law there is a similar legal instrument developed by case law. The Norwegian Inheritance Act section 35 states that gifts which are to be fulfilled after the donor’s death or are given on the donor’s death-bed are valid only insofar as they do not violate the forced share. Such gifts are also subject to the form requirements for wills, as stated in the Norwegian Inheritance Act section 53. In case law, however, gifts have also been voided even if they are not given on the death-bed or intended to be fulfilled after the donor’s death, as long as the gifts had limited consequences for the donor during his lifetime and are not actually properly fulfilled. Danish law has a more narrow approach to what is considered *mortis causa* gifts. The Danish case law is more closely related to gifts fulfilled after the donor’s death and gifts on the death-bed.

There are five cases from the Norwegian Supreme Court dealing with the situation where the husband has transferred the family home to his spouse, making it her separate property, and where his children from former relationships have contested the transfer. The transfers were voided in the cases referred in Rt. 1961 p. 935; Rt. 1963 p. 518; and Rt. 1979 p. 1200, whereas the transfers were considered valid in the cases referred in Rt. 1963 p. 803 and Rt. 1971 p. 300.

There are some decisive criteria to be drawn from these cases. First, the age of the parties is of relevance. If the parties are very old when the estate is transferred, this is

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49 Cf. the Swedish Inheritance Code Chapter 7 section 4 and the Finnish Inheritance Code chapter 7 section 3.
an argument for considering the transfer mortis causa. Second, if the age difference between the spouses is large and the donor is much older than the recipient, this is also an argument for considering the transfer mortis causa. Third, it is of relevance whether the estate is transferred in an early or late stage of the marriage, and if the transfer is made shortly after the estate was purchased or at a later stage. If the transfer is made shortly after the purchase and at an early stage of the marriage, it may be considered an inter vivos disposition. If, on the other hand the transfer is done after thirty years of marriage and a long time after the purchase, it will more likely be considered mortis causa. Fourth, the risk of marriage breakdown is of major importance. This risk usually decreases with the duration of the marriage and the age of the spouses.

4. Gifts from spouses to third parties
   a. Introduction

Spouses may of course give presents or donations to third parties. These can be gifts for charity or presents to friends and relatives. From a legal point of view, the most interesting is the regulation of gifts from spouses to their children. When parents give their children inter vivos gifts of a certain amount, one may raise the question of whether these gifts should be deemed as inheritance in advance, and thus be deducted from the inheritance devolving on the recipient when the parents’ estates are divided. In Sweden and Finland this question is linked to the regulation of the forced share, as the forced share protection is extended to certain inter vivos gifts, the “extended forced share protection” described above.

There are rules on deductions from inheritance in all the Nordic countries. The aim of these regulations is to equalize inequalities between the heirs stemming from the fact that some but not all of them have been given something in advance worth a certain amount. The regulations vary quite a lot among the different countries, in terms of both requirements and legal effects. The regulations are given in the Danish Inheritance Act section 43 to 47; the Finnish Inheritance Code chapter 6; the Icelandic Inheritance Act section 29 to 33; the Norwegian Inheritance Act section 38 to 43; and the Swedish Inheritance Code chapter 6.

According to Danish, Icelandic, and Norwegian law, the regulations on deductions from inheritance are only applicable to lineal descendants. If a person wishes to equalize inequalities among heirs that are not descendants, such equalization must be made in a will. According to Finnish and Swedish law, however, the regulations on deductions from inheritance also apply to heirs who are not descendants. I will focus here on deductions from inheritance concerning lineal descendants.

Traditionally, deductions from inheritance, collation, took the form of a claim for restitution in natura to the estate of what was given (so-called collatio vera) or
restitution of the value given (so-called collatio ficta). None of the Nordic countries applies collation in this traditional form today. The main rule in all the Nordic countries is that the inheritance given in advance is deducted from the heir’s share of the estate, but the heir is not obliged to bring back a value that exceeds his or her share of the estate including the inheritance in advance. However, the parent may set as a condition that the entire amount be paid back when the donor is dead. If such a condition is accepted by the heirs, the amount given is not an inheritance in advance but an agreed loan between the parties.

b. The requirements for deduction from inheritance

According to Danish, Icelandic, and Norwegian law, inter vivos gifts from parents to children do not automatically lead to deductions from inheritance. The forced share is not protected against inter vivos dispositions. However, the parents may impose deductions from inheritance as a consequence of the gift.

In Danish law, deductions must be agreed between the parties. This means that a condition that the value of the gift shall be deducted from the inheritance devolving on the recipient cannot be imposed after the gift is made. In Norwegian law, there does not have to be an agreement on deductions as long as the decedent has made a provision on deductions, or if it is proved that deductions would be in accordance with the decedent’s intentions. The recipient does not have to know the decedent’s intentions, and deduction may be imposed after the gift is made.

Finnish and Swedish law is based on the assumption that the gift shall be deducted unless the decedent has otherwise decided. The parent may free the heir from deduction after the gift is made.

In Danish law, all gifts may be subject to deductions. No deductions are made unless there is an agreement or understanding between the parent and the recipient child. Thus there is no need for any threshold for what size gifts may be subject to deductions. According to the Norwegian Inheritance Act section 38, the gift has to be considerable in order to be subject to later deductions upon the distribution of the decedent’s estate. The rule regarding considerable gifts applies correspondingly to paying insurance expenses or the like for the benefit of the descendant. However, expenses for the descendant’s support, medical aid, and education are not considered.

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53 The Danish Inheritance Act section 46 stk. 2; the Finnish Inheritance Code chapter 6 section 6; the Icelandic Inheritance Act section 32; the Norwegian Inheritance Act section 41; the Swedish Inheritance Code chapter 6 section 4.

54 The Danish Inheritance Act section 43.

55 The Norwegian Inheritance Act section 38.

56 The Finnish Inheritance Code chapter 6 section 1; the Swedish Inheritance Code chapter 6 section 1.
an advance on inheritance as long as the expenses merely represent a parent’s duty to provide for the welfare of his children.

The requirements in Finnish and Swedish law are quite similar. The starting point is that gifts are subject to deductions unless they are given to cover the child’s expenses relating to support or education, or if they are gifts that are customary and not disproportionate to the resources of the estate.\(^{57}\) Not only gifts in the strict sense may be deducted, but also mixed transactions (\textit{negotium mixtum cum donatione}).

c. The deduction sum

The basis for finding the deduction sum is the same in all the Nordic countries. It is the value of the advance inheritance at the time when it was received by the heir.\(^{58}\) Later changes in value of the gift are, as a main rule, at the risk of the child, as in the Norwegian Supreme Court decision reported in Rt. 1996 p. 710. However, the deduction sum may be decreased or increased if it would be obviously unreasonable to use the value of the gift at the time when it was made. According to the Icelandic Inheritance Act section 31, the deduction sum may be revised if the assets given have decreased in value to such an extent that this should be taken into account in pursuing the goal of equality between the heirs.

d. How deductions are made

The regular way of carrying out deductions is to add the deduction sum to the estate and divide the estate by the number of children. The deduction sum is then subtracted from the recipient child’s share of the estate.\(^{59}\)

An important question is whether the deduction sum is added before the forced share and the spouse’s share of the deferred community property are calculated.

Danish, Finnish, Icelandic, and Swedish law expressly state that the inheritance in advance subject to deduction is added before the spouse’s share of the deferred community property is calculated and before the forced share is calculated.\(^{60}\) In Finnish and Swedish law, it is also expressly stated that the inheritance given in

\(^{57}\) The Finnish Inheritance Code chapter 6 section 4; the Swedish Inheritance Code chapter 6 section 2. For further details, see Peter Lødrup, \textit{Nordisk arverett} (Copenhagen, Nordiska ministerrådet, 2002), p. 109.

\(^{58}\) Cf. the Danish Inheritance Act section 46; the Icelandic Inheritance Act section 31; the Finnish Inheritance Code chapter 6 section 5; the Swedish Inheritance Code chapter 6 section 3; the Norwegian Inheritance Act section 40.

\(^{59}\) The Finnish and Swedish Inheritance Codes chapter 6 section 5 (both).

\(^{60}\) The Danish Inheritance Act section 47; the Finnish Inheritance Code chapter 6 section 7 [cf. chapter 7 section 7]; the Icelandic Inheritance Act section 33; the Swedish Inheritance Code chapter 6 section 5.
advance shall be primarily deducted from the forced share.61 Thus, the parent may give his or her children the entire forced share during his or her lifetime, and have full freedom of testation over his or her remaining assets.62

According to the Danish Inheritance Act section 47 the inheritance in advance is also added before the spouse’s share of the deferred community property is calculated. The same applies in Finnish and Swedish law, although not expressly stated. 63

Norwegian law takes a different approach on these issues. The Norwegian Inheritance Act section 43 states that deductions do not affect the right of a surviving spouse to a part of the estate or the right of a person to dispose of the inheritance by testament. The forced share and the surviving spouse’s share of the deferred community property is thus calculated on the basis of what is left at the time of the first spouse’s death.

If inheritance in advance is given when both parents are still alive, and the parents’ marriage property regime is deferred community property, special provisions apply. If one of the parents or both parents have given inheritance in advance to a common child, the inheritance in advance shall be fully deducted from the inheritance after the first parent dies, if the estate is divided at this stage.64 If the heir’s share in the first deceased parent’s estate does not cover the entire inheritance in advance, the rest may be deducted on the division of the second deceased parent’s estate. The advance is primarily deducted from the share of the first deceased parent, even if the advance is given by the second deceased parent.65 If the inheritance in advance is given out of separate property, however, the deduction is made in the heir’s share after the parent who makes the advance.

5. Conclusions

Gifts to, between, and from spouses are surrounded by a wide range of regulations that are not found to the same extent in relation to gifts to, between, and from other parties. The purpose of these regulations is mainly to protect various kinds of third party. It may be the donor or testator who donates or wills property to a spouse on the condition that is separate property. It may by the spouses’ descendants – especially when they are the offspring of only one of them – who are protected from their parents’ giving away their inheritance. And it may be the spouses’ creditors who are protected against dispositions putting their receivables at risk. But the

61 The Finnish Inheritance Code chapter 7 section 7; the Swedish Inheritance Code chapter 7 section 2.
64 The Danish Inheritance Act section 44; the Finnish Inheritance Code chapter 6 section 1; the Icelandic Inheritance Act section 29; the Norwegian Inheritance Act section 39; the Swedish Inheritance Code chapter 6 section 1.
purpose of some of the regulations is also to protect the spouses from themselves and from the influence of a manipulative spouse. Overall the provisions described above have the purpose of preventing unwanted donation cultures.

Even though the regulations in the Nordic countries are quite similar, there are some differences:

The protection of the lineal descendants of the spouses is stronger in Sweden, Finland, and Norway than in Denmark. The forced share is largest in Norway (two-thirds of the deceased’s estate) and smallest in Denmark (one-fourth of the statutory share). In Finland and Sweden, although the forced share amounts to one-half of the statutory share, the extended forced share protection makes the system more consistent, as there is not a sharp distinction between wills and dispositiones inter vivos.

The design of the deduction or collation rules also shows this difference between Denmark, where all deductions must be based in an agreement between the heir and the deceased, and Finland and Sweden, where the rules take the opposite starting point that deductions shall be made unless otherwise agreed.

The protection of creditors is stronger in Norway than in the other countries, as seen above in discussing the Creditors Recovery Act. It is worth mentioning that Norway is the only Nordic country where there is still a condition that at least one of the heirs must take personal liability for the deceased’s debts if the heirs are to take over the estate without involving the Probate Court. In the other countries the heirs – as a main rule – have no liability exceeding what they receive as inheritance.66

Though the differences between the Nordic countries on these matters are not great, they may nevertheless indicate different priorities. Equality between the descendants is given high priority in the Eastern Scandinavian countries, Sweden and Finland, and less priority in the Western Scandinavian countries – especially in Denmark. Freedom of testation and freedom of contract are, however, given higher priority in Western Scandinavia than in Eastern Scandinavia. This is illustrated by stronger protection of a donor or testator’s wishes against dispositions from the spouses and a broader variety of alternatives for marriage property arrangements.

There is no strong trend towards harmonization on these matters. However, there are draft proposals from the Probate Act Commission and the Inheritance Act Commission in Norway proposing amendments to the liability regulations for heirs.67 The amendments will bring Norwegian law closer to the other Nordic countries. The Norwegian Inheritance Act Commission also proposes amendments...

66 See NOU 2007: 16, p. 76.
to the deduction regulations and the forced share regulation that would bring the deduction regulation closer to Danish Law and the forced share regulation closer to all the other countries.\textsuperscript{68}

\textsuperscript{68} See NOU 2014: 1, p. 166 ff. and p. 137 ff.