

## **PREMARITAL (marital) AGREEMENT**

### **Abstract**

The regulation of property relations between future spouses is among the central topics of modern family law, provoking great interest in the public opinion. The increasing relevance and interest in the property relations of the intending spouses results from the new legal developments. Under the new legal concept, an increasing importance in the regulation of property relations of the intending spouses is given to the contractual regime, more precisely to the regulation of these relations before the marriage by concluding a premarital agreement. The contractual regulation of these relations by signing a separate agreement may seem at the first glance as a pragmatic and strict business relationship, where detailed care is taken for the protection regime of the property interests of the intending spouses. In contrast to the above mentioned, today's legal practice is very supportive toward this type of agreement, noting that the prenuptial agreement is achieved by means of legal certainty and that it is an instrument that improves the overall property standing of the prospective spouses. Despite the indisputable fact that it is a novelty in the field of marriage law, the progress in the sphere of regulation of property relations in prospective marriages indicates that this type of agreements enters the modern law, followed by strong resistance.

Keywords: premarital (marital) agreement, autonomy of will, family law, spouses, property.

### **Introduction**

The issue of regulation of property relations between spouses or future spouses is one of the most complex issues of modern family law.<sup>1</sup> This is because the marital property regimes are very diverse and they always carry with them an inherent characteristic of the country of origin. For this reason, today we hear more and more requests in favor of harmonization of law in this area in the European Union, primarily in order to achieve legal certainty. However, it is a fact that even though we started the unification in this area, it is difficult to

---

\* Assistant Professor, Faculty of Law Nish, Serbia.

<sup>1</sup>Matrimonial property relations are special property relations. Their features derive from the specificity of the relations between the owners of the property as marital. These are the existence of marital relations and personal relations between the spouses arising from the connection, the conditional legal knowledge of specific types of assets, their modes of management and disposal and the division of property resulting from the termination of marriage. See: Kovaček-Stanić G., *Comparative Family Law*, Novi Sad, 2002, p. 43.

reach the desired results, for the reason that the legal systems of different countries are diverse and based on different grounds.<sup>2</sup>

In such a range of different legal systems, some authors suggest that the unification of marital property regime<sup>3</sup> could also be achieved by introducing a legal mechanism, such as premarital or marital agreement. This agreement would regulate the issues of property relations between the future spouses or spouses, including the prospective and existing property. In this sense, we believe that the contracting regime, which has been so far accepted by numerous European countries, could represent the subsidiary source of family law. It could always be approached in the situations when this issue is not solved by applying the positive legal regime. Since the legal regime is a clear and precise in almost all countries discussed in this paper, an emphasis will be given to the contractual regime, i.e. the premarital or marital agreement as a modern instrument of regulation of marital and premarital property legal relations.

### 1. Contractual regime

In many countries, the modern law envisages that spouses are entitled to regulate the issue of their property rights by means of contractual regime. In addition, as a synonym for marital property regime, frequently used term is marital or premarital agreement.<sup>4</sup>

However, it is necessary to point out that in this case the contracting regime does not provide an absolute contractual freedom among the contractual parties. Namely, it is, generally speaking, limited with the morality, good customs and the imperative rules of civil and family law.

Under the provisions of the French law, spouses are entitled to conclude prenuptial agreement (CC art.1387-1581).<sup>5</sup> The agreement must be signed and notarized by notary and certified by court. The purpose of signing such an agreement, as it is said, is to avoid certain negative consequences of the marital property regime.

The German Civil Code provides two legal forms of marital agreement. The first one envisages a simple separateness of property, according to which each of the spouses keeps his own property, which

---

<sup>2</sup>Pinters W., 'Grundgedanken und Perspektiven einer Europaisierung des Familien-und Erbrechts-Teil 1', *Zeitschrift fur das gesamte Familienrecht*, no. 6/2003, p. 333.

<sup>3</sup>Premarital relationships or marital agreements were subject to a written question addressed to the European Commission. P-written question 1905/00 contained in itself two questions. First, can the Commission confirm that engaging in premarital agreement and marital agreements, which are signed and consistent with the law of a Member State of the European Union are useful before the courts of another Member State. The second question concerned the issue of whether the Commission can ensure that the Parliament will take all necessary measures to protect the rights of citizens in such situations? Majstorović I., *Marriage contract – newspaper - Croatian family law*, monography, Pravni fakultet u Zagrebu, Zagreb, 2005, p.127.

<sup>4</sup>See: Ponjavić Z., 'Contracts in family law - especially the marital agreement', *Proceedings Developments in Family Law*, Niš, 2006, p. 163-176.

<sup>5</sup>The practice shows that only 10% spouses use this opportunity. See: Kovaček-Stanić G., op. cit., p. 63.

he possessed before the marriage and for the duration of the marriage. The second is the regime of common property, which embraces most of the property of the spouse already acquired before the marriage and the one gained for the duration of the marriage.<sup>6</sup> Both of these agreements should be concluded in the presence of notary and certified by court.

According to the family and marital law in Sweden, the agreement on behalf of the marriage has two legal forms. The first is a form of premarital agreement, while the second takes the form of marital agreement. With these agreements, the spouses or future spouses may determine the property that already belongs to one of them, or the one that will be acquired by one of them would be considered as a separate or common property. In addition, by signing a new agreement, the spouses may change the status of the property and define it as a marital property.<sup>7</sup> These agreements must be compiled in writing, signed by the spouses or future spouses and notarized.

According to the contractual regime of Greece, the contract shall be constituent in the form of notary act. The spouses have contractual freedom, which means that they can decide whether the property they acquired before marriage and the property acquired after marriage conclusion would be regulated as common or separate property.

In Italian law, premarital agreements are not allowed. They are seen as agreements against the public order and against the nature of family law, because they could negatively affect the spouses in a way that they would in advance (before the marriage) regulate the issue of division of property in case of termination of the marriage – mostly in case of divorce. On the other side, these agreements may be concluded for the duration of the marriage or after its termination. Additionally, the spouses can agree on ownership, management and disposition of the common property, so that the provisions of this agreement can be valid only in certain specific situations. Both of these agreements are required to be notarized.

## **2. Marriage agreement**

Marriage agreement is a formal agreement concluded by the spouses or future spouses after the conclusion of marriage or before marriage. It regulates the issues of their property relations in marriage. So, depending on when the contract is concluded, the distinction between marital and premarital agreement is made.<sup>8</sup>

According to the current legal theory as well as in practice, the practice of making arrangements in the field of family law is seen

---

<sup>6</sup> In German law, detached property is very common, as common property is very rare in practice.

<sup>7</sup> This means that with such concluded agreements, spouses cannot regulate other issues other than qualification of property as marital or separate. See: Tottie L., *Family Law, An introduction to Sweden Law*, Stockholm, 1988, p. 210.

<sup>8</sup> If a marital agreement is concluded prior to the marriage, then it is a matter of a premarital agreement, whose actions are expressed only after the conclusion or after the moment of conclusion of the marriage.

as a major obstacle in the manner of regulating of the relations.<sup>9</sup> It is an obstacle to the unwinding of family relationships, due to the reason that the acceptance of the role of individual will is often followed by a deviation of the fundamental values of the family institution. However, the emergence of the ideology of human rights changes the point of view and offers a new scale of social values.<sup>10</sup> Under the influence of the new ideology, the very understanding of the role of the agreement in the area of marital law has been modified. More and more, we come to the conclusion that the marital and premarital agreements are not anymore a reflection of gender inequality. The contemporary agreement of marital law is limited with many regulations, primarily imperative legal norms, the principle of fairness and honesty and, perhaps most importantly, the principles that affect their personal relationship. The last principle highlights and emphasizes that this is not an agreement among opposing parties, but on the contrary, the contracting parties are led by common purpose.<sup>11</sup>

By concluding marital agreement, the spouses or future spouses introduce and regulate their matrimonial property regime. However, this agreement can also regulate other issues, such as the questions of gifts and inheritance. In this case, these agreements appear as annexes to existing contracts.<sup>12</sup> Thus, one can conclude that it is a very specific contract of family law. Its specificity primarily results from the specificity of the relationship existing between the contracting parties, respectively spouses. "It is a family pact, because it determines the regime of family property that will occur with the conclusion of marriage".<sup>13</sup> From this, we can conclude that it is a subsidiary source of family law, which can always be applied in a situation where it is deemed that legal property regime would negatively impact the future spouses or spouses.

### 3. Characteristics of the marital contract

Starting from the definition of marital agreement, we may observe its basic features. The definition explains that it is a contract concluded in writing between future spouses or spouses before the marriage and for the duration of the marriage and it regulates issues related to management and disposal of property, the existing and the

---

<sup>9</sup>Traditionally, contracts are only those agreements with binding property impact. Consequently, they are discussed within the law of obligations.

<sup>10</sup>See: Ponjavic, op. cit., p. 164.

<sup>11</sup>These specifics of marital and premarital agreement are relevant in the legal theory major debates, especially when question is posed on the nature - is it a contractual agreement or it is a specific agreement on family law and each agreement has common features with the contract.

<sup>12</sup>Additional agreements of marital property regime that are in the marriage contract are those that are completely independent of property between spouses. They are not tied to the marriage contract (negotium), but only with the instrument, which is a purely formal relationship: it is the legal documents that are included in the same content marriage. They are rather different and subservient to their own rules and may remain in place when the marriage contract becomes null. It is for example the case of recognition of illegitimate paternity. Idem, p. 169.

<sup>13</sup>Idem, p.170.

one that will be acquired in future. Therefore, the following features can be noticed:

- 1) Marital, i.e. premarital agreement is a formalist agreement that has to be in a written form and certified by a court or a notary.
- 2) Marital, i.e. premarital agreement is a formal agreement that is concluded by the spouses in order to regulate the existing and future property relations.
- 3) Marital, i.e. premarital agreement is an accessory agreement, because it causes action even after the conclusion of marriage. On the contrary, this contract cannot produce any causes.
- 4) Although it is anticipated that it may be concluded during the duration of the marriage itself, the marital, i.e. premarital agreement before the marriage regulates not only the future marital community property, but also the previously acquired property in the marital community.
- 5) Marital, i.e. premarital agreement is concluded as any other contract with the agreement of the will of the both sides, which means that it can be terminated with the agreement and the will of both sides. Thereto, it is considered that a new agreement will be composed. This latter agreement will cancel the action of the former agreement. From this, it can be concluded that the marital, i.e. premarital agreement can neither be concluded nor terminated with the unilateral will of the spouses.
- 6) Marital, i.e. premarital agreement, in case of termination of the agreement must not have negative effects to a third party. In case of termination of the agreement, all legal matters concluded with third parties remain in force and they do not change.<sup>14</sup> There is the commitment that the marital, i.e. premarital agreement regulating the status of property is obligatory registered in the state's registry in order to ensure legal certainty in the legal traffic with third parties.
- 7) Marital, i.e. premarital agreement has an institutional character, since it regulates the status of the family property. Therefore, it must not be contrary to the rules and norms of the family law.
- 8) Finally, it can be said that marital, i.e. premarital agreement has an optional character because it can be concluded only if the future, i.e. the present spouses are willing to.<sup>15</sup>

#### **4. Terms of signing**

As it is the case with other contracts, in order to be valid, the marital agreement or premarital agreement needs to meet certain material and formal conditions. In material terms, the consent of the will of the parties and the ability of contracting are included, while the

---

<sup>14</sup>This limits the autonomy of the will of the spouses in favour of third parties.

<sup>15</sup>See: Ponjavic, op. cit., p. 166.

formal requirements embrace the persons before whom this agreement is concluded and the manner of its conclusion.

Starting from the material conditions for concluding a marital or premarital agreement, the consent of will of the parties is mentioned as the first requirement. In fact, this is the most important requirement when it comes to contractual right. The consent of the will of the parties (in this case the spouses or future spouses) needs to exist at the time of signing the contract, before marriage or for the duration of the marriage. The statement of consent must be given in a way that expresses a statement of free will, which is not preceded by any previous malice and fraud actions. In case of existence of such actions, this agreement as well as the other legal contracts with the same flaws would not produce any legal effect, according to the general rules of the law on obligations. Here, among other things, it should be emphasized that the specificity of this agreement is the insisting that the statement of will has to be given by the persons who enter into contracts. Namely, it is clear that authorized person in certain cases may sign a legal action. It follows that in case an authorized person signs the marital agreement, it could have legal effect. Nevertheless, because of the specifics of this legal matter, the emphasis on personal consent is placed.

In addition to the consent of the will of the agreement, it is required that the parties (intended spouses or spouses) are contractually able persons. "In order for the marital agreement to be valid, the spouses have to fulfill the requirement that determines the ability for concluding a marriage. This capability must exist at the time of signing the marital agreement. It should be considered that the marital agreement can be concluded by minors before marriage, provided that they have at least 16 years and possess recognized marital capability. In addition, this agreement could conclude and older minor over 16 years, who has become a parent, based of court decision that recognizes legal capacity.<sup>16</sup> The conditions for validity of the marital agreement in these cases do not require consent of the legal representative." When it comes to people who are only partially deprived of legal capacity, there is a rule that the marital agreement can be concluded in the presence of a legal representative. In case of no legal capacity or complete deprivation, the conclusion of marital agreement is not allowed.

As we mentioned before, the formal terms include the manner and competence of concluding a marital agreement. It has been emphasized several times that a general feature of this contract is its conclusion before a notary or in presence of a judge in those states where public notary have not yet been introduced (eg. Serbia).<sup>17</sup> Also, it is necessary that the marital and premarital agreement is concluded in writing.

The agreement is considered concluded at the time when its endorsement is made. If marital agreement regards a real property, it

---

<sup>16</sup>See: Ponjavic, op. cit., p. 172.

<sup>17</sup>In the Republic of Serbia there is new Family law since 2005. It envisaged that the marital agreement should be concluded before a competent judge who assured that the parties who signed the contract understood the importance of this agreement. It should be notarized.

is referred to the public register in which evidence of property rights is obtained, to ensure that its existence is recorded. In this way, third persons are allowed to be introduced to the content of the contract, which is very important in terms of legal certainty in the legal trade.<sup>18</sup>

### **5. Contents of the marital agreement**

Starting from the principle of autonomy of will that is one of the most important principles of general contract law, we arrive to the conclusion that the spouses or future spouses are free to determine independently the content of their marital or premarital agreement. In addition, we must not disregard the important fact, and that is the one which stipulates that this agreement must be made and thus its content must be determined only within the imperative legal norms and principles of fairness and honesty.

Bearing in mind these circumstances, it is left to the contracting parties to determine independently the subject matter of this agreement, no matter if it concerns existing property rights or property right that would be acquired in future for the duration of marriage. Further, it means that the future spouses or spouses may agree on accepting a regime of separate or common property, management and disposition of property, termination of the marital community and division of property in case of termination of the marital community.

Thus, with this contract the spouses or future spouses may provide regime of separate or common property, they can arrange their relationships so that only certain goods enter the common property or that the common property includes only those goods that are considered as *res mobile*. Also, this regime enables the spouses to provide for themselves greater rights than those provided by statutory property regime.

### **Instead of conclusion**

The introduction of the premarital agreement as a novelty in the regulation of property relations of spouses or future spouses was for the first time introduced as a legal decision in the early 90's in the countries belonging to the continental legal systems. According to the previous legislation (as well as some which is still valid, although in a much smaller extent), the imperative common property regime was applied, which means that the spouses were free to enter into only those contracts which were in accordance with the aforementioned legal property regime. In addition, the question of determining the share of spouses in acquiring joint assets was a major problem in practice.

The Republic of Serbia also encountered many problems in practice when attempting to establish the proportion/share of spouses in acquiring joint assets.<sup>19</sup> In recent years the situation has improved, mainly with the adoption of the Family Code of the Republic of Serbia in 2005, where along with the common property regime, the possibility

---

<sup>18</sup>See: Ponjavic, op. cit, p. 173; Majstorović I., op. cit., p. 88.

<sup>19</sup>See: Ignjatovic M., 'Marital property contract right of Serbia', *Pravni zivot* no.10/08, p. 487-501.

of regulating the property relations of the future spouses by signing special marital agreement was envisaged. So, today the modern family law of the Republic of Serbia prescribes the possibility for the spouses or future spouses to regulate property relations of existing or future property by signing a separate agreement in writing.

However, although the issue of regulation of property relations of spouses or future spouses in terms of the existing and future property has been legally regulated, today's legal practice notes a very small number of such agreements concluded in the Republic of Serbia and in the region of ex-Yugoslavia.<sup>20</sup>

#### REFERENCES:

1. **Ignjatovic M.**, 'Marital property contract right of Serbia', *Pravni zivot*, no.10/08.
2. **Kovacek-Stanic G.**, *Comparative Family Law*, Novi Sad, 2002.
3. **Majstorovic I.**, *The marriage contract-newspaper-Croatian family law*, monographs, Faculty of Law in Zagreb, Zagreb, 2005.
4. **Ponjavic Z.**, 'Contracts family law, especially the marriage contract', *Proceedings of the "Newspapers in family law"*, Nis, 2006.
5. **Pinters W.**, 'Grundgednken und Pespektiven einer Europaisierung des Familien -und Erbreshts-Teil 1', *Zeitchrift fur das gesamte Familienrcht* 6/2003.
6. **Tottie L.**, *Family Law, An introduction to Sweden Law*, Stockholm, 1988.

---

<sup>20</sup>Marital law, especially family law in ex-Yugoslavia "was not unique, but there was a variety of marriage regulations, governed not only by territorial principle, but also by personal, according to the religious beliefs of citizens." See: Prokop A., *Commentary of the Basic Law on Marriage*, Zagreb, 1969, p. 385.