FACTA UNIVERSITATIS
Series: **Law and Politics** Vol. 5, N°1, 2007, pp. 61 - 69

PRENUPTIAL AGREEMENT

UDC 347.626.2

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Abstract. *The new tendencies and developments in the positive law have generated a significant interest in the issue of regulating property relations between prospective marital partners. In line with the new legal concept, contractual agreements have an increasing significance in regulating property relations between prospective spouses, particularly the prenuptual agreement which is contracted before entering into marriage. The contractual regulation of these property relations, by signing such a specific agreement, may resemble a pragmatic business-like affair which meticulously concentrates on the details of protecting the proprietory interests of prospective spouses. However, the present-day legal practice is very supportive of the prenuptual agrement, which is percieved as an instrument which provides legal security and promotes the overall proprietory standing of prospective marital partners.*

There is no doubt that the prenuptual agreement is a new development in the field of matrimonial law which may significantly improve the regulation of property relations in a prospective marriage. However, it cannot be denied that there is a certain resistence or reluctance to introduce the prenuptual agreement into the current legislations. In addition, the general public does not have sufficient information about this new kind of agreement and the opportunities it provides. For these reasons, the author of this paper will endeavour to objectively explore the concept of prenuptual agreement, considering all the arguments for and against the application of this instrument in regulating premarital property relations between prospective spouses.

Key words: *prenuptial agreement, autonomy of will, new development.*

One of the central issues in the contemporary family law today is the regulation of property relations of prospective spouses, which has generated a great deal of interest in the general public. The growing interest in regulating property relations between prospective marital partners is the result of the new tendencies and developments in the positive law. In line with the new legal concept, contractual agreements have an increasing significance in regulating property relations of prospective spouses, particularly a prenuptial agreement which is contracted before entering into marriage. At

Received November 29, 2008

first sight, such a contractual regulation of these property relations by signing a special agreement may seem brutally pragmatic, very much resembling a business affair where the contracting parties are meticulously concentrated on the tiniest details which are to protect the property interests of the prospective spouses. However, the present-day legal practice is ever more supportive of the prenuptial agreement, which is perceived as an instrument for achieving legal security and a means for promoting the overall proprietory standing of prospective marital partners.

PRENUPTIAL AGREEMENT

The issue of regulating premarital and marital property relations is one of the most complex issues in matrimonial law. Its complexity is directly caused by the different nature and character of spousal relationships. On the other hand, the nature and the contents of the substantive law pertaining to this property relation is preconditioned by a number of different factors: historical, social, economic and political.

What makes the issue of property relations between prospective spouses even more complicated is the fact that it is not a standard "clear-cut" property relation, such as the one between the contracting parties in a business affair. The mutual relationship of prospective spouses is permeated with an array of emotional bonds. In order to ensure a better understanding of this intricate property relation, in the first part of this paper the author will provide a historical retrospective of property relations between mariatal partners. Then, the issue will be considered in light of the contemporary family legislation. Last but not least, we will consider the prenaptial (marriage) agreement, which has been given considerable attention in the contemporary matrimonial legislations both in Europe and worldwide.

1. A HISTORICAL RETROSPECTIVE OF SPOUSAL PROPERTY RELATIONS IN ROMAN LAW

In the oldest human civilizations, marriage was an entirely religious act of establishing a matrimonial community between a man and a woman. As this form of marriage was commonly accepted and widespread among nearly all the peoples of the ancient times, it was in this ancient history that we can trace the first archetypal models for regulating the relations between prospective spouses, including the issues which *inter alia* constitute the fundamental contents of this insitute.[1] Generally speaking, the aim in regulating these

[1] The most ancient period of the human civilization was dominated by the religious form of marriage, which implied that the issues of premarital property relations were primarily regulated under the rules of customary law. However, for a long period of time, there was a prevailing custom of abducting or purchasing a woman into marriage, where mutual relations developed only after the consumation of marriage. For more information: Mladenović M., *Pravne teorije o braku,* Anali Pravnog fakulteta u Beogradu, Beograd, 1961,207; Marriage by abduction (bride kidnapping) appeared in the period between savagery and barbarism, when the historical development of the family unit was characterized by the first traces of the monogamous family life - in the form of the syndiasmic marriage. In this form of marriage, a young man (usually assisted by his friends) would abduct a young woman and take her to his house; then, all the male family members would in turn have an intercourse with her, after which she would be officially considered the wife of the young man who had conspired the abduction. These customs were particularly associated with the barbaric tribes and the period

issues was to clearly define the position of the future spouses[2], including the rituals which preceeded the very act of entering into marriage (such as: offering gifts to the bride and dowery). In particular, however, the need for their specific regulation before marriage was justified by the need to perserve and possibly increase the existing property. It was the head of the family (a family elder), in most cases[3] the father whose son or daughter was to be married, who was in charge of this issue; he was the one who approved of the marriage with a particular person[4] by giving his consent and carefully minding the family origin and the property status of the prospective bride or groom. Such a role of the father of the family (*pater familias*) was quite common with almost all ancient peoples, which can be substantiated by specific provisions in their ancient codes.[5]

According the Roman law, the history of the premarital property relations was primarily a reflection of the progressive changes in property relations. The history of these reations can be traced back through the historical develoment of the institutes of ***sponsalie*** (engagement), ***donatio ante nupitas*** (offering gifts to the bride) and ***dotis dictio*** (ceremonious promise of dowery).

Sponsalia, a reciprocal promises of fiances to enter into marriage, marked the entire history of the Roman matrimonial law. In the archaic periods it was of religious character. However, after adopting the law of the Twelve Tables (which predominantly contained legal provisions), there was a tendency to comprehensively regulate all social relations. In that context, this historical period in the developemtn of the Roman sponsalia can be said

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when there was an insufficient number of women, unlike some earlier periods when there was no shortage of women. A Scottish author Maklenan described this type of marriage as "marriage by abduction" or "marriage by purchase". Such customs of contracting marriage by abduction were later to be encountered among the old Slavic tribes. For more information, see: Engels F., *The Origin of Family, Private property and the State,* (transl.) Belgrade, 1950, 47.

[2] The family patriarchal spirit (which was characterized by a subordinate position of a woman in the society) can be encountered among nearly all ancient peoples. Although the rules of customary law never equalled the position and the role of a husband and a wife in the family unit, the woman's position in the Babylonian Empire was not so disadvantegous as it was in some later systems. Even though the customary law never failed to emphasize that a woman's primary role in marriage was to be a housewife and a mother, neither the act of marriage nor her role in the matrimonial community deprived the woman of her legal and contractual capacity. Thus, she was eligible to be a witness in a court of law but also entitled to take an active part in a legal matter, not only in her own interest and on her own behalf but also on behalf of her husband. Futhermore, in case of a divorce, she could be the custodian to her children and independently manage her own property. All these characteristics undeniably lead to the conclusion that a woman's position in the Babylonian Empire was far more favourable than the position of a woman in a later history; for example, the most prominent characteristic of the Athenian society was a conventional male despotism resulting in an almost slave-like position of the Athenian woman. See: Jovanović M., *Neka razmatranja o društvenom položaju žene od antičkog do buržoaskog društva*, Zbornik radova Pravnog fakulteta u Nišu, Niš, 1981,359. *(Some Considerations on the Social Position of a Woman from the Antique to the Burgois Society)*

[3] If there was no *pater familias* figure, the role was usually performed by the wife's brother or cousins.

[4] *Inter alia*, this custom clearly reflected the patriarchal spirit of the family unit. However, an exception from this unwritten rule could be observed in the Babylonian Empire; the documentary evidence from that time shows that a divorced woman had the right to choose the man she would like to remarry. Moreover, under the provisions of Hammurabi's Code (art 175 and 176), a free woman could marry a court slave or a slave of a "nobleman"); in doing so, neither the woman nor her children lost the status of free citizens, which would later be the case in the Roman law. See: Jovanović M., Neka razmatranja o društvenom položaju žene od antičkog do buržoaskog društva, Zbornik radova Pravnog fakulteta u Nišu, Niš, 1981, 358.

[5] See: Višić M., Zakonici drevne Mesopotamije, Zagreb 1989. (The Codes of Ancient Mesopotamia)

to have been characterized by a gradual replacement of the *ius sacrim* provisions (of religious, sacral character) by the provisons of *ius civile* (civil law). The separation of religion from law was clearly evident in the classical Roman regulation of the insitute of marriage, including the legal regulation on the duty of the fiances to legally contract their marriage. In the classical Roman period, engagement was characterized by both religious and legal forms, which were mutually distinctive and exclusive.[6] In the post-classical Roman period, the institute of engagement was a direct consequence of a process started in the classical period (mediated by the 3rd century jurisprudence and legislation), which further led to reinstituting the obligation to marry. The compulsory nature of the principle specifying that engagement is to mark the beginning of marriage was quite convenient in the co-called advance engagement, which was a distinctive trait of the post-classical period. Actually, advance engagement was a combination of two fundamental principles, which governed the institute of engagement throughout the entire Roman history: 1) the ceremonious promise to enter into a prospective marriage, and 2) the initiation into a mutual relationship in as a betoken of marriage.

Another institute for regulating the premarital property regime of prospective spouses was the exchage of gifts between fiances prior to marriage *(donatio ante nupitas)*. Under the rules of archaic Roman law, the gift-exchange between prospective spouses was strictly prohibited.[7] However, in the classical Roman period, as there was an inclination that the fiances were obliged to keep their promises, they were given more fredom to regulate their premarital relation on their own, which consequently reflected on the institute of premarital gift-exchange. The classial Roman law clearly distinguished two types of gift-offering between finaces: the gift-offering as recognized by ***veters*** (ancient jurists*)* where the effects were definite and irrevocable regareless of whether there was a subsequent marriage or not), and the gift-offering where the effects became definite and irrevocable only upon contracting a marriage. In addition to these two types of gift-offering, the classical Roman law also introduced the possibility of returning the exchanged gifts in case when the engagement did not result in marrige because a donor had broken off the engagement for no specific reason. The obligation to marry, which was re-instituted in the post-classical period, was directly reflected in the regime of gift-exchange between fiances. In this period, the fiances were not allowed to freely regulate their premarital relation on their own; instead, the law expressly prescribed the legal scope of donation (gift-exchange), as a condition for entering into marriage. In Iustinian's time, the legislator went further in the legal regulation of this institute; in addition to the ***donatio ante nupitas*** (a premarital gift typically including certain assets or goods given by the prospective husband to the prospective wife, usually equalling the amount of the dowery that she brought into his family), the legislator also envisaged the ***donatio propter nupitas*** (a donation which could be established even in course of marriage, either as some kind of a gruaranteee for the wife in case of her husband's property failed to ruin or as a sanction for the husband who was to blame for the divorce.

[6]At the time, the legal regulation on the marriage obligation started being perceived as highly inadequate, almost uncivilised, and it was considered that the fiances should be allowed to freely regulate their future relation on their own.

[7] More: Horvat, M., *Rimsko pravo*, Zagreb, 2002, 140.

Dotis dictio was a ceremonious promise of dowery ***(dos),*** the property donation which was given to the prospective husband either by the wife or her *pater familias,* or by a third party, for the purpose of settling the costs of the matrimonial household (***ad matrimonii onore ferenda)***[8]. Another instrument for regulating the premarital property realtions between the fiances or prospective spouses was the ceremonious promise of dowery, which was materialized in three distinctive forms in the course of the Roman legal history. The first form was ***promissio dotis***, a stipulation including a ceremonious question of the prospective husband and a ceremonious response of the person who provided the dowery. The second form was ***dictio dotis***, a simple statement of woman's will, or a consent given by her *pater familias* or her male ascendent. The third form was ***datio dotis***, which differred from the previous one in as much as it actually enabled the transfer of some dowery goods to the husband. In the post-classical period, the ceremonious promise of dowery was of a less formal character.

By regulating the premarital property relations through these Roman law institutes, the legislator endeavoured to preserve a rational balance between the two basic principles which initially pertained only to engagement but in time (even before Iustininan's legislation) became the foundation of the overall Roman premarital property regime. These two principles were the mutual (reciprocal) ceremonious promise to enter into marriage and the initiation into a mutual relationship as a betoken of marriage. The marital property regime of prospective spouses directly rested upon the appropriate legal regulation and implementation of these two principles. These Roman law institutes were later used as the grounds for a further development of premarital property relations first in the medieval legislation and later on the the legislation of the burgois society.

Generally speaking, the matrimonial and family law of the medieval period was subject to a great deal of modification in comparison to the Roman law solutions. It is largely due to the fact that that the premarital and marital property relations of finaces and spouses were predominantly regulated by applying the rules of canon (church) law, whereas only a fewer number was regulated by applying customs and the provisions of Roman law. Thus, canon law primarily prescribed the conditions for entering into engagement and contracting marriage while the property relation issues between fiances and prospective spouses were generally regulated according to the provisions of both customary and Roman law[9].

The development of civil society brought a new dimension into the premarital property relations between prospective spouses. Although the origins of some contractual regulation of prospective spouses' property relations could be traced back to the classical Roman law, the contractual regulation of these matters was not actually possible in the true sense of the word until the 19th century and the adoption of the first major civil codifications. On the grounds of the fundamental principles on human and civil rights, these codifications endeavoured to introduce not only the statutory but also the contractual regulation of property relations between prospective spouses. Under this contractual regime, all the premarital and marital property issues were to be regulate by a

[8] See: Strohal, I., *Miraz za vrieme braka po rimskom pravu*, Zagreb, 1898,77. *(Dowery in the course of Marriage in Roman Law)*.

[9] More: Nikolić D., Opšta pravna istorija, Niš, 2007,218. *(General Legal History)*

separate agreement, as the basic instrument of contract law. The introduction of the principle of equality between the statutory and the contractual regime has contributed to the ever-growing use of premarital agreements in the contemporary law.

2. THE CONTRACTUAL REGULATION OF PROPERTY RELATIONS BETWEEN MARITAL PARTNERS IN THE CONTEMPORARY LAW

As a new development in regulating the property relations between prospective spouses, the prenuptial agreement was first introduced into the statutory framework of the civil law countries of the European-Continental legal system at the beginning of 1990s. Under the former statutory solutions (a small number of which still apply), the applicable regime was the common matrimonial propety regime as a binding statutory property regime, which implied that the spouses were free to enter only into those contractual relations which were in compliance with the marital community property regime. However, one of the underlying problems was the issue of determining each spouse's the portion in the acquisition of the common matrimonial property.

In the last period, the situation has significantly improved. In addition to the common matrimonial property regime which is now based on the rule of equal (fifty-fifty) acquisition, which was introduced in the Republic of Serbia by the new Family Act of 2005[10], the legislator also prescribed the possibility of regulating property relations between prospective spouses by means of a prenuptial agreement. Thus, the contemporary law does envisage the option that the prospective spouses may regulate their property relations on their existing or future property by contracting a special written agreement.

As the essence of marital relations is to satisfy one's emotional, sexual, legal, economic and social needs, these relations are not only the matter of interest in the field of law and religion but in the field of sociology (in a more general context). The ideal model of premarital and marital property relations should fundamentally rest upon the developments and the experts in these areas. Unfortunatly, we are witness that such an ideal does not exist, and that such a well-developed model of premarital or prospective marital relations has very little common ground with the actual reality. For this reason, there is an constant need to permanently improve these relations. A present-day attempt in that direction is certainly the effort to introduce the prenuptial agreement into the contemporary marriage law.

There is no doubt that the prenuptual agreement is a new development in the field matrimonial law, aimed at regulating property relations in the prospective marriage. In spite of the indisputable fact that the number of proponents of this new instrument is permanently increasing, there is some resistance in the process of entering the prenuptial agreement into the contemporary legislation. One of the circumstances which contributes to this resistance is the fact that the general public is insufficiently informed about this kind of contract and the possibilities it offers.

First of all, we have to point out that the prenaptial agreement is an alternative to the existing statutory regulation which applies to each matrimonial relation. It is an efficient

[10] See: Službeni glasnik Republike Srbije, br.18, od 24.02.2005.godine. Stupio na snagu 01.07.2005.godine.

instrument which safeguards the future spouses in case of a divorce, which has become quite common in the contemporary law. On the other hand, it is necessary to emphasize that this instrument may be used as a key for solving possible problems in the future but it should not have any influence on resolving problems in the mutual relations of prospective marriage partners. For this reason, there is a growing number of authors proposing the specific issues which should primarily be regulated by this agreement.

In the opinion of experts from the American Institute for Marriage and Family Relations[11], very few couples discuss the key marital issues before entering into marriage. The same resource provides a list of the most important questions which should be answered by the prospective partners, such as:

- Shall we have children? If yes, who will be in charge of taking care of the children?
- Do we have a clear idea about the financial liabilities and objectives of the other partner? Do we have similar attitudes to spending and saving?
- Who will be in charge of running the housefold? Have we mutually agreed on the distribution of the house chores?
- Have we discussed health issues? Are we fully aware of each other's medical condition?
- Is my partner loyal and devoted to the anticipated extent?
- Can we openly discuss our sexual needs and wants without anxiety or fear?
- Do we really listen to each other? Do we truly think about each other's ideas and remarks?
- Do we fully comprehend the spiritual needs of the other? Have we agreed on the religious issues, education and upbringing of our children?
- Do we love and respect the partner's friends?
- Do we appreciate and respect the partner's parents?
- What is it that bothers you about the behaviour of my family?
- Is there anything either of us cannot give up or do without in the course of marriage?
- If only one of us is offered a career away from the family and the other partner, are we going to move house?

The answers to these and similar questions would significantly contribute to the necessary stability of the family unit, which modern marriages are unfortunately deficient of. In that context, the prenuptial agreement should by no means be experienced as something that could jeopardize the existing affection between prospective spouses. It should be perceived as an instrument whose primary function is to protect the interests of prospective partners in case of a divorce. It further implies that this instrument will also ensure a faster and more efficient legal protection of spouses in the judicial proceedings. The efficiency of the judicial proceeding would be promoted by imploring the provisons of the prenuptial agrement, which apply absolutely in the distribution of the common matrimonial property. Therefore, the property which the prospective spouses individually possessed before marriage, inherited or received as a gift, or independently acquire in the

[11] See:www.amazon.com pristup 10.02.2008.

course of marriage, does not have to be distributed under the rules of statutory law. In the prenuptial agreement, the individual property and the common matrimonial property are treated as separate items in property distribution. It should be noticed that such a legal protection instrument primarily applies to a small number of rich people, who have some individual property before marriage and want to keep it either for themselves or for their posterity.

But, what about the middle and lower class people? Are they ready to separate the economic and the emotional aspect of their marriage? Could the prenaptial agreement have a negative impact on their emotional relations? The practice has proven that most people do not separate the two aspects. It is commonly believed that there is no room for such an agrement between couples who really love each other. Many couples think that such an agreement could affect the nature of their reationship. On the other hand, very few young people today have some more substantial property before getting married, which eliminates their need to protect the acquired property.

There is a range of other related questions. On the one hand, is our society ready and mature enough for this kind of regulation of marital property relations? Are there reasons against regulating the marital property issues in this way? On the other hand, could the absence of this instrument have some negative connotations within higher social layers?

Although these and many other questions still need to be answered, it must be pointed out that the current level in the development of our martimonial property relations has reached the point when we have to consider the key issue: how to deal with the existing conservatism. It is true that the prenuptial agreement might trigger some problems with people of poor means who entered into marriage without individual (personal) property, which may affect their self-confidence and undermine their self-respect. However, if we consider the issue from the point of view of those couples who have the same or similar property status, we cannot deny that it represets an efficient instument for the distribution of property in case of divorce.

We can, therefore, conclude that the prenuptial (marriage) agreement can find its justfied position in the family law of the European-Contiental legal system as a legal instrument for protecting the propety in case of a divorce or a termination of marriage before death. However, if we perceive it as a means of protecting ourselves from the person we love, trust and want to stay with for the rest of our life ("in sickness and in health, until death do us part"), then, it can undermine the very act of entering into marriage and a further subsistence of marriage itself. We cannot deny that this institute is an acquisition of the western world, which may seem a bit outlandish in terms of our general frame of thinking and mentality. As such, it causes a great deal of suspicion among the prospective marital partners, giving rise to a series of "negative" questions which make their relations colder even before the marriage has been materialized. For this reason, it is necessary to undertake a substantial reassessment of this instrument, considering the diverse standpoints and all the arguments for or against the application of this instrument in the contemporaty family legislation.

The prenuptial (marriage) agreement has entered our contemporaty family legislation under the impact of the EU law and the underlying necessity to harmonize our entire legal system with the EU legislation. In spite of the apparent need for its closer examination, the marriage agreement is generally considered to be a progressive development in the contemporary family legislation, which is particularly aimed at

regulating property relations between prospective marriage partners. However, generally speaking, this type of agreement is still insufficiently applied in the legal practice primarily because many young couples and prospective spouses do not have enough information about this instrument and all the underlying opportunities it provides for regulating marital property relations.

PREDBRAČNI UGOVOR

Marija Ignjatović

Regulisanje imovinsko-pravnih odnosa budućih supružnika, danas predstavlja jednu od centralnih tema savremenog porodičnog prava, za koju postoji veliko interesovanje javnog mnjenja. Aktuelnost ovog pitanja, danas, i interesovanje za njega, posebno u segmentu koji se odnosi na regulisanje imovinskih odnose budućih bračnih partnera, uslovljena je i novim tendencijama u pravu. Prema novom pravnom konceptu sve veći značaj u regulisanju imovinsko-pravnih odnosa budućih supružnika pridaje se ugovornom režimu, još preciznije regulisanju ovih odnosa pre stupanja u brak, zaključenjem predbračnog ugovora. Iako ugovorno regulisanje ovih odnosa, naročito potpisivanje posebnog ugovora, na prvi pogled može da deluje kao surovi pragmatizam, kao strogi poslovni odnos, gde se do detalja vodi računa o zaštiti imovinskih interesa budućih supružnika, današnja pravna praksa sve više govori njemu u prilog, ističući da je predbračni ugovor sredstvo kojim se postiže pravna sigurnost, odnosno da je to instrument za unapređenje sveukupnog imovinsko-pravnog položaja budućih bračnih drugova.

Ključne reči: *Predbračni ugovor, autonomija volje, novi razvoji.*