

PRENUPTIAL AGREEMENT, PROMOTION OF GENDER EQUALITY, TOWARDS SPOSES INDEPENDENCE

Blerina Dodaj
European University of Tirana, Albania
blerinadodaj@gmail.com

Emiljana Kane
emikola@hotmail.com

Abstract:

A prenuptial agreement is innovator legal institution; promoted by the social phenomena of the conflict between spouses to define the ownership of their respective assets should the marriage fail. On the other side, the legislation offers the possibility to protect the assets of each spouse without being conditioned by the institution of marriage, losing even the initial meaning of the last one. The chance for each spouse to protect their corresponding property rights and to ensure the possibility of increased wealth as well as the lowering of it independently looks like a hopeless attempt because the influence of social elements doesn't precede the development of the legislation. With the mutation of the social phenomena, the legislation should extend to their conformity and enable the regulation of any handicap towards the property relations. Actuality demonstrates the opposite, judicial conflicts with the object of the division of property between spouses increase day by day and the inability to determine to the assets belonging emphatically degrades the situation in serious consequences. My paper brings the evaluation of prenuptial integration, as an alternative institution for the destination of property between spouses, taking into account the legal elements this contract must contain, to realize the autonomy of spouses, to avoid final conflict for the division of assets if the marriage fails, a fact which also promotes gender equality in raising awareness of each spouse for their investment and the origin of the conjugal property. As the discriminated spouse is the wife, the property autonomy, gives her the opportunity to manifest her rights towards the husband.

Keywords: marriage, partners, property, prenuptial, gender equality

1. INTRODUCTION

Albanian legislation foresees for the first time the prenuptial agreement with the law act no. 9062 of 08.05.2003, leaving an embryonic space, it being the new institution it was. This act was a result of increased divorce numbers and spouses were found in impossible circumstances to protect their assets and also unaware of the consequences. Dissolution of marriage raised the possibility of recasting the legal means to not condition marriage by the assets of each spouse and at the same time instructed husbands in protecting their property rights towards unfair benefit of the other spouse. This was a change that should have coordinated and walked parallel to the social aspect, so that today after 12 years that it is integrated into our legislation the contract could be applied to wider and more efficient specter towards legal community which is currently in use.

Lawmakers at the time of the production of the legal norm considered the fact that the phenomenon precedes rate and it is about time to prepare our society for new legal institutes which normally benefit to individual service. The prenuptial agreement is a legal action which depends on the marriage and has power if the marriage is valid, this follows from the logical interpretation of Article 69 of the Family Code, in which the legislator says "the spouses"¹ and it is quite clear that it serves for each property transaction after marriage.

With the legal provision for the first time in 2003, it brought a modern treatment of both spouses in terms of their rights towards future wealth of each (Article 66 of the Family Code of the Republic of Albania), but until now it is seen as a potential access of the husband more than the wife, derivation of gender imbalance format.

The prenuptial agreement allowed spouses to regulate the mechanism of managing their assets, with free will, anticipating how to increase and decrease the assets without affecting the independence of each, this always in the service of the final moment when the contract applies for the division of property.

2. OVERVIEW OF THE PRENUPTIAL AGREEMENT

By treating it as a legal action which comes after another legal action (the marriage), its validity depends on the validity of the main action, specifically if the marriage is not constituted for any reason, the contract can not be enforced and no legal effect. Here arises the need to explain: when prenuptial agreement takes effect and when this contract ends?

Once the spouses have agreed voluntarily and free for the signing of the contract (Article 69 of the Family Code of the Republic of Albania), then with the constitution of the marriage, the destination of additional assets during the marriage is arranged by agreement. Another case, that the legislator has enabled subjects to a prenuptial agreement is even after marriage, this provided in Article 72 of the Family Code, which states that spouses can partially or completely change their wealth regime through the pre-nup, with the same way the law has defined for its conclusion, with a time limit, not before two years of marriage, which is a security designation for the third parties. This is the moment when this contract starts, while the termination of the contract is not expressly regulated by the law, but since for what Family Code does not provide for this contract it is regulated by the Civil Code, General Principles of legal actions and the criteria applicable to contracts in general, here recall the general principle *specialia generalibus derogant*. Given that this legal action depends on another legal action, as such it has legal effect as long as the marriage has as a legal action, so with the cases that the Family Code foresees for the termination of the marriage the pre-nup agreement is terminated too.

The subjects of this contract are limited in number and specific, as the law foresees very well that these are only the spouses, namely husband and wife. From this assumption we argue for restrictions ahead as the Family Code is crossed by two important principles, heterosexuality and monogamy, so therefore it is clear that the parties are the husband and the wife. Given that the latter are treated equally in marriage, it is perfectly clear that in the contract they are only equal parties, avoiding theory of liability stemming from the treatment of entities civil legal relationships, creditor and debtor (Semini)

¹ The prenuptial agreement must be notarized in the presence and with the simultaneous consent of both future spouses or their representatives.

or specifically by the legal action. In this particular case the subjects are limited in number, gender, wife and husband.

Legal Capacity of subjects to bind in a contract is easily determined as this again derives from the limited age for marriage and in this case the law provides the age of 18 years. What is important to clarify is that even in the case that the legislation has defined to allow the marriage before reaching the age of marriage (Article 7 of the Family Code of the Republic of Albania), with the authorization of the Court, the Family Code, does not attribute to this spouse that he/she can make a prenuptial agreement although with our law he/she acquires full capacity to act (Article 6 of the Civil Code). This because of the fact that this marriage is legitimized by giving priority to the cause of this exception in relation to age, the consequence of the destination of property is not evaluated as essentially necessary to be attributed to minors bonding in marriage.

Based on the essential elements of this contract it must be analyzed even the *willingness* to bind to a contract, because the essence lies in the fact that once the importance of the legal action is understood, how willing are the spouses to face a new format of determining the destination of their assets, unlike the one we inherited from the previous legislation. As their doubts may lie in many aspects, what is important is this contract to protect them from any deviation or impossibility of regulating future assets (Omari 2010, 142). In our legislation explicitly we see the manifestation of will as an essential condition in Article 69 which states "with the simultaneous approval of both spouses", this must be understood that the will is necessarily the free will, as required in any legal civil relationship. Compliance of the internal will to the external manifestation of the will is a *sine quo non* proviso, whose absence is reason for invalidity and its regulation in the prenuptial agreement cannot be presumed derived from the marriage as a legal action, as the spouses might want to marry but their willingness for their property regime during the marriage may be different. The existence of an element for a free will, would bring absolute nullity of the prenuptial agreement and therefore application of the legal property regime (Omari 2010, 144). Interpretative treatment of the phrase, in this case is worth making for the condition that is required "simultaneous consent", because it would be different if it was an obligations relationship that goes in its proposal and acceptance stages. Based on what I have described above, it is obvious that the spouses are not a creditor and a debtor, but are equal among them in rights and obligations and come as such from their status in the bonding of marriage. By the nature of the legal action, the will should be of that moment, as the law promotes equality of spouses in this provision, enabling direct approval of both simultaneously. The orientation of the will of the spouses is compatible and in different directions, this is explained in the fact that they can not match the will of a subject, as each represents its interests, this is understandable even in the continuation of the provision that says "their representatives" which means each spouse may have a representative but not the same as they protect different interests in the contract and their orientation must be in the interest of each spouse separately.

Given the positive approach of the prenuptial agreement, it is pertinent to mention, the contractual freedom that the prenuptial agreement offers, in connection with establishing the destination of their assets without the consent of the other spouse and without being limited by the other spouse for his economic activities. Based on this approach is pertinent to recall that in the legal property regime the spouses are conditioned in this liberty to alienate and prejudice the multiplication of assets. The freedom of spouses is intertwined with the social elements too, as with the increased activation of women in economic and political life in society, her independence is promoted and thereby has reduced the conditionality of keeping a marriage which function to live, to shelter or to enable continuance of safe family life has been completed.

With the inclusion of this notion in the law, we bear the unfamiliarity of this institute and what this contract brings, develops and provides. Based on this fact, the object of this agreement (contract) is still prejudged, in the Republic of Albania has not been advanced more than in the wealth object of this contract, specifying that the spouses can regulate with this agreement only destination of their assets and no further. On the whole the object should not be treated strictly as is the determination of the items, but in total it comes to the property regime, which is a set of rights in conjunction with the three duties of ownership, enjoyment, disposal and alienation. In many other countries this is exceeded but in reality our right does not foresee the ability of possession or regulation of human relations as the object of an obligatory relationship.

The formal setting of the prenuptial agreement, our legislation specifically provides the form that the prenuptial agreement must have as a solemn legal action which is effective only according to what the law provides. Specifically Article 69 of the Family Code, the expression of the will of the parties should be materialized in the form of a notarial act, a solemn act. So, any other form of the prenuptial agreement that is not signed before a notary, would be invalid. From this provision we understand that the form is not only a procedural condition but it is a condition for the validity of the legal action. Any other way to encode the will of the spouses is void for our law and will not bring the requested consequences by the spouses to fulfill this contract (Omari 2010). Determining the form as a condition of validity of the agreement (contract) can also be as a result of the derivation of the prenuptial agreement by the marriage itself, which is solemn enough under the law and has special and assigned procedures by the law to have the requested validity.

3. THE LEGAL POSITION OF EACH SPOUSE

Our legislation provides sufficient provisions to protect one spouse from the other spouse's arbitrary actions, in relation to the administration and any asset transaction without the other spouse's permission. This shows that the legal intercommunity, leaves space for abuse of the property rights for each spouse and the abuse is unfair to both spouses not only for one, notwithstanding that the practice cases have offered us violation of the property rights of women and the partner who is almost always defenseless is the wife, therefore the legislation besides the provisions for legal intercommunity also provides provisions to protect the administration between spouses.

Concerning the attitude of each spouse against property regime it is perfectly clear that the broad social relations and mainly the economic ones favor the wording of a contract between spouses in order not to encroach and to not violate none of them against their investment in the financial dealings. The institute of the prenuptial agreement (prenuptial contract) is sufficiently new to us, imposed by the consequences arising from the lack of it and the conflicts that have increased between spouses for the property regime moreover the attitude towards this contract (agreement) is always positive.

At the moment that each prospective spouse has the right to determine the way their material benefits will be added or reduced in their family, then spouses have defined how they will behave during the continuation of their lives even though each one has the opportunity to administer his property without infringing the marriage (Article 66 of the Family Code in relation with article 659 of the Civil Code). In the legal framework the prenuptial contract is a legal action that derives from the marriage but the orientation that the administration of the property has in relation to the particular investment is different and should not be confused with the legal intercommunity or the separate property regime.

Spouses today, are independent subjects of the society, are with the corresponding status achieved by each with commitment and the prenuptial contract offers them the opportunity to not consider marriage as a sacrifice and not be limited or affected by the marriage to invest.

Given that the current spouses age is bigger than before, we are before the fact that the contingent of society who is already married is confirmed and supplemented in his life and can not by the binding of marriage contribute as nominal capital his wealth to the marriage.

Prenuptial contracts lay the groundwork for a rational marriage. Parties enter into this relationship by recognizing each other's assets. Each party is authorized to understand the nature of financial relationships that will exist between the parties. The agreement may provide provisions for the treatment of income, investments, gifts, and the way how these will be available for each spouse in the termination of marriage, which is particularly assignment of the prenuptial contract.

By entering the family relationships with great clarity about how to add and how to orient the benefits of each spouse in marriage, this element increases transparency and directs spouses about his dues and his social attributes versus what he/she has invested. Spouses, at the moment that they are transparent against each other and still decide to get married, then we can say with certitude that they have fully realized the purpose of marriage and the purpose of the institution of marriage.

As a result of transparency, we could say that the prenuptial agreement promotes the feeling, affection and the investment ratio between spouses, orienting them for an eventual equality which in continuity will not affect their feelings, and the creation of a family will not limit either of them for realizing the purpose for which they married.

Since the moment in which the spouses sit down to negotiate for their own stand on incomes, contributes and belonging parts in the added wealth during marriage, then each one has their attributes and assets to invest in marriage orienting their stand since the first moment. The spouses know very well how their relation will go on and how their contributes will be managed, and normally the claiming doesn't start any more from the other spouse but from themselves, which means a good negotiation for a long way. The value of the prenuptial agreement is exactly to be able to predict the way how to fix more fairly the ratios of each spouse for the contribute and investment.

In this case it should be emphasized that the continuity and performance of the contract will bring durability between spouses and this time will be based in healthy relations, because this is the innovation that the prenuptial agreement (contract) brings, its effectivity should be seen in this angle. Forecasting how will be proceeded in every case the marriage fails, is exactly that moment where the prenuptial agreement gets its legal force to be applied and now concretely to defend the property rights of each spouse on every status that the subject changes during his life.

This way, with the prenuptial agreement (contract) could be avoided the social conflict of division of property and wealth and what's more important it will be avoided the legal conflict because it's not necessary to go through the juridical process of division of property, having it already very clear that everything will be fixed according to the prenuptial agreement, each is independent from the other. Just like they enter a marriage, that's how they go out of it, so their legal status does not affect their wealth one. Here, I'd like to stop and comment over the space that the prenuptial agreement leaves in accordance to the protection of the basic rights concretely, the property right will not be affected because the spouses on purpose and with full will have decided to get married without getting affected from each others wealth and properties and without being worried about the performance and security of their properties. Concretely, with the marriage failure, the cost of property division is in a low level from the division of property in the common property regime. This because this is the moment when the prenuptial agreement is seen with its values and its application is efficient when you notice the legal easiness in all the charges that the spouses take in this case.

The spouses, knowing since the beginning how it will be proceeded with their properties, will have a positive impact because, it's very clear to them that concerning the marriage they have to take care and worry even for their finances from there on, this for the safety of their family and also to understand more clearly the responsibility that they're taking in getting married and that their marital status does not bring the change of their economical status.

Like this, each spouse is stripped off of gender, now they're partners that collaborate as associates to build a social and legal cell, the family which requires responsibility without affecting each others independence. In whichever economical situation they are, the spouses have it very clear how they start their journey and how they'll end it if the marriage will fail.

4. CONCLUSIONS AND RECOMMENDATIONS

In the end, the prenuptial agreement (contract) is nothing more than a legal action according to which the spouses regulate the way how will the property case be managed in the future, differently from other contracts, this has a special status and fairly defined that the status of each spouse is independent from their economical situation. Normally, this contract predicts every possible conflict because it directs the spouses since the beginning for the position and stand that they have to keep in their life. Also, the prenuptial agreement activates both spouses in the family contribution, this because of the fact that they're both responsible and obligated to work and to contribute for the family, and not to take advantage economically in the name of the one who works the most and fulfills more their financial obligations in the family.

The spouses sign this status safely, knowing that each has their liability and right to contribute in the family for the way and amount of contribution. In these conditions the spouses feel independent from each other, from the family economy and also from the fact that if they didn't have the desire to stay with each other any more or the marriage would fail, would the hereditary rights take place.

From this prenuptial agreement (contract), they are transparent and in parallel away from the conflict. None avoids obligations for which they should respond abusing the economical potential of each other.

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