

The marriage contract as a judicial economy in the division of the property between ex-spouses

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Abstract

With the marriage dissolution one of its fundamental consequences is the termination of the community properties, where the spouses pass in the separate property regime after the date of the definitive form of the divorce tribunal sentence.

Meanwhile for the property that was placed during the marriage, the spouses who have been in the law community power, Albania's legislation provides that these subjects are placed in compulsory joint ownership in their entirety they should address to the Court to divide their property and take each part of it.

The object of this study is the division of the property between ex-spouses for any joint ownership during the marriage. If they choose the judicial way it will take much time to resolve the conflict. On the other hand with a marriage contract, every asset will be transferred to the owner. Prior of the Family Code commencement, dated 8 May 2003, the property established during the marriage was presumed to be the two spouses in equal parts, with no detention in the contribution of each individual when proved otherwise. Through quantitative and qualitative methods have been analyzed the advantages of marriage contract in the division of the property. Through the method of comparison for contractual and non-contractual marriages, at the end of the study, we conclude that when couples have entered into a marriage contract they shorten the time of the judicial process of property's division. Often doubts have been raised about the possibility of real identification of the contribution and consequently has been made a fair share of the all assets. Therefore this study takes importance not only for the positive approach of the marriage contract but also to make a contribution to the due legal process when every subject of the right is addressed.

Keywords: Legal community, agreement, marriage settlement, division of property, the right of the ownership.

Introduction

By the marriage bond the spouses in the purpose of the family creation and the contribution of family life they get involved in social, economic and legal relationships both together or separately, sometimes inevitably way and without calculating every detail in their interest.

In the wide range of the human relationships and the actions that each spouse performs during the day, case by case, it may also have consequences for the other spouse, remembering firstly the existence of the family and then the obligation to think mainly about the family and further for himself.

The involvement in joint reports is easily manageable as long as the marital relationship functions well and understanding clears any apparent conflict, while the relationship between the spouses breaks down, the desire to protect individual wealth arises and

at this moment are reminded of the contribution of everyone who has been mixed as a result of the legal regime effects of marriage.

All property, economic transactions during the marriage, for the way they move, will be called wealth regimes, and according to the latter, the formula for adding and reducing the absurdity is chosen (Dirigible Handbook, Giuffre 2004).

So, referring to the legislation of the Republic of Albania, the possibility to determine the matrimonial regime, narrows down in two apparent choices but in fact the alternatives are broader.

Firstly, it is the legal community when spouses do not determine what theirs are and what is not, but this is regulated by the legal formula (Article 73 Family Code), which does not require any action by the spouses but with the marriage bond, spouses are automatically included in the joint ownership in general and remain separate only in the specifics of the strictly individual properties (Article 77 Family Code). Representation in the civil legal relationship of each spouse is individual, meanwhile the consequence of legal action is in pairs, each spouse acts alone as if they were both. *Secondly*, the contractual regime (Article 108 and following the Family Code) necessarily requires the expression of free will to determine such a regime and to enable the spousal arrangement to be mutually consistent at the time of signing the contract prior or during the marriage.

The properties in the legal community regime

The regime is affected by a change in the status of partners or in a single case with the will of the partners without changing the status between them.

(Article 72 Family Code) as the law provides. The following regime changes if one of the spouses is separated from life, and if the spouses decide to get divorced the marital property regime changes from any type of regime would be, it automatically enters in the divided property regime, independently of the will of the spouse.

By the marriage bond, the law (Article 74 Family Code) stipulates that spouses are co-owners in respect of assets added separately or together, determining that, the legal community regime is a mandatory nature regime, for the rules it provides.

Concretely, the wealth of the community is the income earned from the work of each spouses if it is not consumed until the end of the communion, the fruits of the property of each spouse unless they are consumed until the end of the community as well as the commercial activity created during the marriage.

These assets are part of the joint ownership as a whole and as long as the marriage continues, the valuation of this property is done as a whole and not separately, while simultaneously engaging both spouses to care and engage together in legal and economic relations.

On the other hand, the legislator has also taken care of the spouses personal properties, which have been expanded with the new code and are determined exhaustively what these assets are, concretely listing them and at the same time limiting the legal community (Article 77 Family Code).

The incomes and assets acquired by donation, inheritance, personal reparations as well as property derived from them are personal property, as the law provides.

the favor of the individualization of the assets by increasing the range of personal assets. Therefore, the regime of the legal community in relation to personal properties, unlike the previous law (The Civil Code of 1981) that did not specify which were the personal properties but left it open only the concept that they are not in joint ownership property what is personal, has changed and evolved in favor of the assets own.

French legislation states that it is individual property, any property that is by nature individual one and is closely related to the person as well as the personal rights related to the privacy (Article 1404 of the France Civil Code).

The period of time of the acquisition of the ownership in the legal community is completely clear because it is directly related to the marriage bond, from that moment the spouses are incorporated into the legal community and are co-owners according to what is regulated in the Civil Code (Article 231).

Since the partners during the marriage do not worry about the rights holder, but both are committed to increase the wealth of the family, organizing the household without having to determine the parts of the investments and the obligations, then both are equally responsible towards the property.

During the marriage in the community regime, the ownership rights are composed by real rights and obligations.

That a property to be in co-ownership should fulfill in cumulative way two conditions: firstly, the thing should be acquired by any spouse during marriage and secondly, the item should not be part of the category of personal properties (Omari, 2012).

Concerning to the real rights, the ownership gain is known whether it is accomplished by one of the ways provided in the Civil Code, with the original title or derivative title.

Meanwhile, the credit rights are obtained through the contract and in these terms we refer to the provisions of the civil code that regulates the type of the legal action taken in the relationship of liability.

As long as the spouses are in the practice enforcement of the legal community regime, the presence of the two co-owners is not necessary to increase the wealth, to express the willingness to carry out legal action as it does not bring any violation of the right holder but rather adds the wealth of the spouse who is not present, favoring his economic position.

A contrario, when it comes to legal actions that have to do with the diminishing of the property, since the right holders are both spouses, they must express the will to both spouses in relation to the next transaction.

This mode engages both spouses responsible for legal action and places them in coherence with information about their assets.

The matrimonial regime by the contract

Another form of regulation of the marital property regime is also the one with the contract, under the conditions when spouses can freely determine how they want to add these assets and therefore they commit themselves to create the content of the

formula for adding assets.

The marriage contract is built on the basis of two principles as all the other contracts, the principle of consensuality and the principle of contractual freedom.

The consensuality principle is related to the fact that subjects should express both their will at the same time to sign a marriage contract and make a free-will-based agreement.

Following the freedom principle of the contract is understood as the principle that allows spouses first to choose this regime or legal one and secondly to decide freely what they want to include or not in the marriage contract.

By the marriage contract, spouses can decide on two types of regimes as the law offers, the separate property regime and the universal community, but it is not forbidden to formulate a mixed regime.

The principle of the freedom contract is embodied in the best way in the separate property regime as spouses in this regime are entitled to their rights, representing their own property and are free to determine the destination of the assets.

On the other hand, the regime of the universal community condemns spouses through the formula provided by the legal community, as the latter is conceived as the genesis of the universal community.

Briefly we will describe what spouses can do with the two regimes that are provided in the law. In the separate estate regime, the situation is simple and clear and spouses can easily identify their assets and have no doubt about their destination.

Primarily, the marriage contract is related to this type of regime and may allow any property to be subject to the legal community, with the will of the co-owners since their obligation to enter into a marriage contract is in the possibility of exemption from the joint obligation and not in one further involvement.

During marriage, the spouses do not have the necessity to be protected from the wrongful actions of the other spouse since they easily each individually determine what each subject has to do with his or her possessions.

In relationship with the third parties, the situation is also simple because each one represents himself and the formalization of the legal actions is simplified in the procedure as it is not necessary to confirm the two subjects but the owner of the thing, the person who invested in that item and there is no claim to a second subject owned. While the legal community regime enables to the spouses to engage in each other's assets beyond the legal community and thus it is created a symbiotic (Article 109 of the Family Code) regime based on the legal regime and further by negotiating with the personal property that spouses can allow them to join.

They can make movable assets in common prior the marriage bond, property gained from donation and inheritance, etc., but the assets provided in the Article 77 / c, ç, d of the Family Code cannot be shared in any way.

These assets such as c) the wealth of each individual's strictly self-employed use and the assets acquired as personal property accessories; ç) the necessary means of work for the exercise of the profession of one of the spouses, other than those assigned for the administration of a commercial activity; d) property gained from personal injury compensation, with the exception of income derived from the pension earned due to the partial or complete loss of job ability; are of their own kind of property

that cannot be united in the community as they have their individual form and are obviously personal.

In this case, the legislator cannot rule out the possibility of donating these assets, spouses to each other through a donation contract (G.Bonilini "Manuale di diritto di famiglia"), alienating those assets and losing their origins in relation to their personal character. In the following it is worth mentioned the fact that in the universal community spouses can decide to define part in this community, where this part relates to the way in which community co-owners are invested.

The division of the properties between the spouses

The judicial process of division of the properties between spouses is a process in the category of special processes that is subject to the perpetrators of the specific principles of judgment.

Spouses Refer to the Court for the division of the property, established during the marriage and this request is made after the community has been completed (Article 96 of the Family Code).

According to our legislation, the ending of the community is exhaustive and the reason the lawmaker has determined is not only for the spouses but also in relation to the third parties.

On the other hand, the law also recognizes the case when the community ends even during the continuation of the marriage when the husbands prove to have mismanagement of the wealth by the other spouse and when this has consequences for the family.

However, when the spouses are married, they will appeal to the court for the division of the property established during the marriage if they do not reach a consensus by the agreement.

The most complicated cases are those of the legal community and the contractual universal community, since the case of the property regime separated by contract is completely clear and does not require the spouses to address the court for the division of the property, recalling here also the foundation of the process of a division that takes value in case of the parties do not reach a consensus on the division of the property.

Thus, in the separate properties regime by contract, consensus-based is defined at the beginning and in the court cannot be opposed of the marriage contract, but there is a specific case when the parties can take the contract to the court when the marriage ends with the death of one husband and heirs seek property from the widow spouse or when dealing with third parties who have had contract during the marriage and the spouses avoid the obligation claiming to be one or the other obligation (Omari, 2012).

So when we talk about division of the wealth, we will mainly deal with the problems faced by the two regimes of communities by one law and the other by contract as in this case the court needs to do a fair and transparent evaluation and investigative work.

This process is governed by the Civil Procedure Code and specifically Article 369,

which states that the division will be subjected to, two stages of trial. In the first phase the court will determine the circle of owners, which because of the type of relationship are the spouses, are limited in number and gender according to the principles of monogamy and heterosexuality that has the main action, that marriage. The following will determine the assets that will be subject to the division and these assets should be determined on the basis of transparency and mutual cooperation of the parties in the judicial process. Both spouses' parts should be determined.

Regarding to the first two elements it is entirely clear that the legal property regime will be subject to division within the presumption of joint ownership whereas in the regime of the contractual universal community where the court will refer to the division of property starting from the formulas they have set in the contract.

Upon completion of the trial, the court decision is appealable in relation to the first stage, within 5 days of the appeal, as it is an interim decision whereby the spouses, if they do not complain at the moment of the proceedings, regarding the first phase fall into decadence (Court Decision No. 22 dated 13.03.2002).

Meanwhile in the second phase, the legislator has determined the division of the property in nature, which will be done by an expert, the report presented by the court and the conclusions of the first trial phase.

The passage of these two phases over time varies from case to case but we can reach a common conclusion regarding the time that the spouses need until they reach their property identification.

This time is a restriction of the right of the ownership, it is a restriction of the personal benefits in the use of them and it involves the inability of co-workers to engage in their economic and commercial activities for their own assets.

This legal process as a legal consequence of what is created during the marriage is considered harm caused to deny the opportunity to exploit its assets to each subject, only because of marriage.

This is also the main cause where recently the subjects of the law largely choose not to marry, as the long courtyards of the court hear scare until they recover their possessions. The judicial process of asset division in the Republic of Albania takes mostly from 2 to 5 years to realize the final allocation of assets.

We always talk about cases where spouses do not reach an agreement to divide their property and under such conditions require the intervention of the judicial system in giving justice.

It is enough to look at the official website of the Supreme Court on the process of property divisions and we can conclude with the years of these court proceedings.

In the H.Sh. against S.Sh. the District Court of Kruja has taken a decision for the first phase on 28 March 2012 while the case is being adjudicated at the High Court on 28 April 2016, more than 4 years and the trial has to do with the appeal for the first phase of division of wealth. In S.A. against S.A. which was rendered to the Court of the Judicial District T on 13.11.2006 a decision on the manner of division of property and the Supreme Court after the Court of Appeal's exhaustion, decides on 09.02.2012 to return the case for retrial. Almost six years and the case has not been resolved after being returned to the Court of Appeal for reconsideration and this is translated into suspended time to dispose of all three property titles owned by each spouse.

To enjoy the right to ownership means also being able to use its best function, this is also the meaning of Article 1 of Protocol No. 1 to the ECHR. Prolonging beyond the reasonable timeframes of having the property available to any owner in the present case is more difficult for the ex-spouse than anyone who enjoys the right of ownership over his property, the right guaranteed from many legal instruments, but on the other hand cannot be freely provided to the owner.

The marriage contract is a profiting time in the division of the property

What is to be considered starting from what has been discussed above, regarding to the marriage contract, is exactly what the former spouses are getting to get what belongs to each of them.

From this point of view, the marriage contract is considered as the maximum freedom in the fulfillment of the purpose of the contract, chosen by the spouses.

When the spouses have entered into the marriage contract they have been completely free and without any burden regarding to the determination of the modality they will accept with full willingness both to regulate the regime.

In fact, to properly understand the concept of judicial economy, we will have to outline the regime that spouses will choose with this contract. Under the conditions when spouses have opted for the regime of the universal community, the situation is simpler than the legal community, *ex lege* without contract, but more complicated than the separate property contract regime. The spouses can think about the best solution of the use of the properties when they decide to marry and in advance they feel safe in every legal action to protect their wealth. So we often say contractual freedom and consensus, are two principles that need not only be formulated but also before we reach it, knowing that the future spouses will express exactly at this stage what regime to choose.

Deciding on the regime of the legal community or the contract, they have previously received information on the consequences of one and the other and therefore choose. The freedom expressed at this stage is read at the final moment when they decided to divide the assets. In choosing the universal contractual community, we have to clarify that those in the contract can predict a simple modality by predicting that everything is $\frac{1}{2}$ or according to the contribution, case by case as the spouses agree.

Unlike the legal community regime we can state that there is a kind of advantage as to the fact that spouses are familiar with the mode they have chosen themselves and under these conditions, the time of opposition or inability to make a pact with the division here is not necessary as, co-owners in contractual arrangements are both very familiar with the outcome and have no expectation.

It is considered a priority for the time of the trial, the fact that spouses do not complain at the first stage, knowing that the assets should be subdivided and there is not to be any persecution.

Another important point at this stage is the fact that free-willing spouses have chosen this kind of regime and being peaceful at this stage makes them feel free from the pressure of the Court to resolve their conflict.

They can agree to divide their property under the contract by submitting to the notary

and realizing this situation with their full will, this is realized more simply than in the case of the legal community regime since in the case of the contract once expressed the will in about how the assets will be during the time of marriage.

Also with the marriage contract, in the separate property regime, which appears to be most effective and most usable recently in countries where the marriage contract is developing, namely in Belgium, France, the Netherlands, etc, the property map is visible and the spouses from the beginning to the end, if there is one, are fully aware of what the destination of their estate will be, both during and after the marriage.

Conclusions

During the study of this topic it has been noticed the fact that the contract freedom principle is used in two ways firstly when the spouses decide with regime to choose and secondly in case that the spouses choose the contractual regime they decide to exclude or include every sort of property.

Capturing legal procedures in the division of property promotes the marriage contract and as such is required more by the spouses.

According to the legislation in force, it is apparent that the spouses, if they have chosen the contractual regime of the universal community or that of the separate property, may freely volunteer before the notary and determine the manner of division of property under the marriage contract. Once our law recognizes the right of co-owners to share their property with their free will and if they do not do it with free will then they turn to the Court as this is the cause of litigation.

According to the comparison method of the two legal systems reveal the advantages of the new law and the possibility that this law gives to spouses.

Hence, the time spent in the judicial process for the division of property when spouses are under the rule of law community is time acquired in the division of property under the contracted regime. This time is in the service of the right of ownership and the facilities granted to the subjects of the right to use the law in his service.

In the conditions when the approach of the marriage contract is positive, with the quantitative methods the prenuptial agreement is promoted. A very important conclusion is the fact that with the marriage contract the spouses have everything clearer about their possessions in the properties.

have been analyzed in this paper, it is concluded that the spouses can possess their properties easily when they have signed a marriage contract. One of the most important condition of a state is the due legal process, concretely the time that the subjects of the rights take to realize their rights and that's why it is too important to promote every legal remedy that helps in abbreviation of the procedures. It has been concluded that the prenuptial and postnuptial agreements make everything easier in the process of the division of the property.

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