

## SCTMG 2020

### International Scientific Conference «Social and Cultural Transformations in the Context of Modern Globalism»

## PRENUPTIAL AGREEMENT: CONCEPT AND CHARACTERISTICS

Azukaeva Baira Andreevna (a)\*, Singleeva Baira Anatol'evna (b),  
Andreeva Saglar Nikolaevna (c), Aksenov Il'ya Chudeyevich (d),  
Dzhevakova Natalya Victorovna (e)

\*Corresponding author

- (a) Kalmyk State University named after Gorodovikov, Elista, Russia, baira4@rambler.ru
- (b) Kalmyk State University named after Gorodovikov, Elista, Russia, burl\_baya@mail.ru
- (c) Kalmyk State University named after Gorodovikov, Elista, Russia, andreeva-sn@mail.ru
- (d) Kalmyk State University named after Gorodovikov, Elista, Russia, akxenov\_ich@mail.ru
- (e) Kalmyk State University named after Gorodovikov, Elista, Russia, nat5109@yandex.ru

### *Abstract*

Modern family and marriage law of Russia presents a possibility to regulate family relationships by means of contracts and agreements concluded between the family members. Drawing a prenuptial agreement appears the most civilized method for resolving material and property issues before they arise. However, despite being a positive solution of this issue, prenuptial agreement is still unpopular. Subject to the existence of a prenuptial agreement, or, as its is often called in informal conversation, marriage contract, partition of property between the spouses in court will be based upon the relevant provisions of the agreement. In Russian, prenuptial agreement regulates only property relations between the spouses. This agreement cannot be used to regulate non-property rights and duties between themselves or with respect to their children. Its means that such an agreement does not regulate housekeeping, contact with children after divorce, as well as directions in case of death of one of the spouses, etc. In order to bring prenuptial agreement as an institute of the family law in agreement with the goals that its had been created for, a statutory regulation is needed to exclude contradictions. Its results in impossibility of unambiguous interpretation of various norms in practice. Theoretical foundation of the institution of prenuptial agreement also includes a number of issues. For instance, in legal science there is a polemics on statutory regulation and legal nature of prenuptial agreement, parties involved, essence of a prenuptial agreement. Resolution of such controversial points would facilitate broader practical application of prenuptial agreements.

2357-1330 © 2020 Published by European Publisher.

**Keywords:** Marriage, agreement, property, law, liabilities, contract.



This is an Open Access article distributed under the terms of the Creative Commons Attribution-NonCommercial 4.0 Unported License, permitting all non-commercial use, distribution, and reproduction in any medium, provided the original work is properly cited.

## 1. Introduction

Family is a basic institution of personal socialization. From the statutory regulation standpoint, the institution of family is quite hard to regulate. The problem lies in a complex combination of such categories as moral and legal prescriptions, personal and public interest. The material component of family life is one of the subjects of statutory regulation, where the main objective is in defining rights and duties of spouses in the area of property relations (Myskin, 2012).

Treaty regime of spousal property is regulated by Chapter 8 of the Family Code of the Russian Federation. Prenuptial agreement is an expression of wish of the two parties having taken a joint decision to enter into marriage or a joint decision of two persons already in the marriage to delineate their rights and duties of property nature in their marriage and for the case of its dissolution. Conclusion of the prenuptial agreement is a right of persons entering into marriage and spouses, and not a duty.

Agreement is a means of mutual relationships and in this capacity is known for a very long time; depending on complex structure of society, contract relations become more cultivated and complex.

Russian spouses, from the moment of appearance of such dispositive norm at the legislative level, obtained a right to independently decide on selection of the most convenient to them legal regime for the property in their ownership.

Russian legislature adopted norms from foreign legislation, in doing so providing citizens with a choice of variants for independent application of the regime of spousal property.

Legal fixation of prenuptial agreement is primarily related to the fact that due to transition to the market economy a need appeared in further developing property relations between spouses. Thus, special and close attention to family issues at the highest governmental level is understandable.

However, experience of foreign countries shows that more and more middle-class people conclude a prenuptial agreement when entering into marriage (Slepkova, 2005).

Doubtless, conclusion of such agreement between the spouses makes property relations more orderly and simplifies partition of property in case of divorce; it also allows more well-off spouse to avoid suspicions of the second party's dishonesty, etc. Use of such agreement in most cases allows more detailed regulation of property relations between spouses.

Prenuptial agreement becomes more and more common in Russia; spouses conclude such an agreement in order to dispose their property rights in marriage, as well as to protect their interest for a probable dissolution of marriage (Gordeiuk, 2017).

## 2. Problem Statement

Currently, there is the whole list of legal issues with this legal institution. One of them is that currently there is no unambiguous answer to the question of whether the prenuptial agreement is a full-scale civil law contract or an innominate contract. Answer to this question is not only of great theoretical significance, but of high practical importance. Civil law theory approaches the legal nature of prenuptial agreement ambiguously.

For instance, for many years, scholars cannot agree on defining the legal nature of the prenuptial agreement.

According to some scholars, prenuptial agreement shall be included with the civil law contracts (Braginskii & Vitrianskii, 2002). According to their opinion, conclusion of prenuptial agreement is provided in the Civil Code of the Russian Federation and thus many institution of civil law apply. Other scholars see the prenuptial agreement as an innominate contract within the family law framework (Tarusina, 2011). Article 4 of the Family Code of Russia emphasizes that application of civil law to family relationships has a subsidiary nature.

Still some others are of the opinion that prenuptial agreement is an ancillary contract of civil and family law (Maksimovich, 2003).

There is no unified opinion on the legal nature of the institution under consideration.

The authors assume that prenuptial agreement is ancillary by its nature, as it is simultaneously an institution of both civil and family law and may be considered a civil law contract only in the part that regulates legal property relations between the spouses, while in the part that regulates family matters it is an innominate family agreement.

### **3. Research Questions**

Contractual regulation of spousal relationships is less popular in our country than abroad where it is a common legal tool.

German legislature regulates in minute detail all the problematic situations that may arise due to conclusion of a prenuptial agreement (Buschendorf, 1987). It is interesting to note, that in addition to prenuptial agreement, a contract of marriage portion that allows delimiting and separating pre-marriage property of spouses is also valid in Germany (Jung, 1995).

The issues in legal regulation of prenuptial agreement lead to doubts about necessity of its conclusion among the public. So, the following causes for lack of popularity of prenuptial agreement in Russia may be given:

1. Psychological rejection, lack of understanding about existence of prenuptial agreement on behalf of parents of a newly married couple.
2. Conclusion of prenuptial agreement is meaningful only in a case where the persons entering into marriage already have their own property (apartments, vehicles, villas) and capital (bank account, shares, securities);
3. Often proposal from one of the married-to-be to conclude a prenuptial agreement induces negative emotions and thoughts about lack of trust, leads to doubts in correct selection of the life partner;
4. Priority of legal norm over contractual norm.
5. Lack of traditions to conclude prenuptial agreement and court practice in this area.

For the prenuptial agreement to comply with the law and be able to protect your rights with maximum efficiency, it shall comply with the law and have the following qualities:

1. Mutual agreement. Conclusion of prenuptial agreement is solely optional and is possible only on agreement of both sides to do so. At will of both sides, the prenuptial agreement may be amended or abrogated. Prenuptial agreement may not be abrogated or amended on a unilateral basis.
2. Voluntary participation. Nobody shall be forced into signing a prenuptial agreement, as conclusion of the prenuptial agreement is a right of spouses and not their duty. Such agreement is

concluded in writing, in one original and is signed by the parties. Thus, it shall be mandatory notarized. Without formal notarization, the prenuptial agreement is void. At that, notary's participation is not limited to checking the agreement for compliance with the law, but they also shall give guidance to the parties on the the meaning and significance of the agreement.

3. Documentation. The text of the prenuptial agreement shall be written in clear language and it shall not have any typos, corrections nor additions. First names, patronymics and last names shall be given in full form to prevent subsequent problems.

4. Agreement duration. Prenuptial agreement may be concluded for a certain duration (fixed-term agreement) or without stating the duration (unlimited term agreement). Prenuptial agreement may define rights and duties of the spouses basing not only on terms, but on some events.

For example, in the prenuptial agreement, spouses may establish that until the wife completes here higher education, the husband shall bear all costs of their family life.

5. Lack of contradictions between the prenuptial agreement and current legislation (in particular, the Family Code). Prenuptial agreement cannot limit legal capacity or ability to perform of the spouses, their right to go to court for protection of rights and duties of spouses with respect of their children, as well as it cannot contain any other conditions that humiliate one of the spouses or are in contradiction with the foundations of the family legislation. If a prenuptial agreement contains provisions that contradict requirements of the Family Code, it is deemed void.

6. The prenuptial agreement may be concluded with respect of present or future property of the spouses.

7. Non-property relationships (such as the right to communicate with a child in case of a divorce) cannot be a subject of the prenuptial agreement in Russia.

8. Marriage and prenuptial agreement are interrelated: marriage may exist without a prenuptial agreement, while the prenuptial agreement is void without the marriage (Article 41 of the Family Code).

9. The agreement under consideration regulates duties and rights of each spouse for material support of the other.

10. Prenuptial agreement shall be distinguished from a marital settlement agreement.

Unlike the document that partitions property jointly acquired during the marriage, the prenuptial agreement defines the regime for the pre-marriage property of the spouses as well as the property they acquire during the marriage. Only divorcing spouses may be parties to the marital settlement agreement, while a prenuptial agreement may be concluded by citizens planning to enter into the official marriage; unlike the marital settlement agreement, the prenuptial agreement requires notarization.

Prenuptial agreement is primarily intended for strengthening the institution of family, allowing for a more complete account of interest of each of the spouses thus reducing litigation and conflicts between them and allowing for civilized resolution of divorce and partition of property.

#### **4. Purpose of the Study**

The purpose of the study is to research prenuptial agreement within the framework of contractual structures that provide protection and security of family relationships in the context of developing market economy, revealing existing theoretical approaches to studying the institution of prenuptial agreement as

a regulatory tool for property relations between spouses, determining its attributes and existing issues in statutory regulation.

## **5. Research Methods**

The purpose of the study is to research prenuptial agreement within the framework of contractual structures that provide protection and security of family relationships in the context of developing market economy, revealing existing theoretical approaches to studying the institution of prenuptial agreement as a regulatory tool for property relations between spouses, determining its attributes and existing issues in statutory regulation.

## **6. Findings**

Prenuptial agreement has significant legal specificity with a particular parties composition, content and subject of the agreement. In establishing the prenuptial agreement, Russian legislature used the civil law principles and did not touch upon specific principles of family law. Such an approach does not allow purposefully protecting legal interests and rights of citizens in marriage and does not comply with the foundations of the family legislation. Theoretically, the question about including the prenuptial agreement with the civil contracts or separating it as a special case of family contracts (agreements under family law) is still unresolved. Applicability of civil law norms depends on that. For the prenuptial agreement to comply with the law and be able to protect the rights of current or ex-spouses with maximum efficiency, it shall comply with the law and have the certain qualities.

## **7. Conclusion**

Prenuptial agreement, being a regulator of property relations between spouses is an important legal institution. Currently, the prenuptial agreement is a guarantee related to property in case the marriage fails.

Civil law theory pints out to the ambiguous legal nature of prenuptial agreement. It has a mixed legal nature, simultaneously complying with civil and family law regulation. From analysis of the nature and functions of a civil law contract and prenuptial agreement, it should be concluded that the prenuptial agreement may not be seen as an independent family agreement (Levashova, Goricheva, & Tolochko, 2018). It has enough of legal specificity and unique legal content. It has specific composition of parties, content and subject of the agreement.

Among the main attributes of the prenuptial agreement are: mutual agreement and voluntary nature of its conclusion, documentation and mandatory notarization.

Prenuptial agreement does not regulate personal relations of citizens willing to enter or having already entered marriage. Non-property relationships (such as the right to communicate with a child in case of a divorce) cannot be a subject of the prenuptial agreement in Russia.

Conclusion of prenuptial agreement is solely optional and is possible only on agreement of both sides to do so. At will of both sides, the prenuptial agreement may be amended or abrogated. It assumes mutual agreement.

In addition to its regulatory function, prenuptial agreement also performs a security function, so it may be included with the means for family rights protection. It may provide additional measures for protection of property interests; the agreement may be amended or abrogated at any moment on mutual agreement of its parties. Such agreement needs to be formalized in writing and notarized. Conclusion of a prenuptial agreement allows spouses to avoid debates about jointly acquired property in case of divorce.

Prenuptial agreement, being a regulator of property relations between spouses is an important legal institution. Currently, the prenuptial agreement is a guarantee related to property in case the marriage fails.

The conducted research allows for the following principal conclusions.

Institution of prenuptial agreement needs more detailed statutory regimentation. The Family Code of Russia contains five rather small articles dedicated to the statutory regulation of prenuptial agreements, two of them are of referential nature. Civil law is subsidiary with respect to relations between spouses and is applicable only in the measure where it does not contradict the nature of family relations.

Civil law theory pints out to the ambiguous legal nature of prenuptial agreement. It has a mixed legal nature, simultaneously complying with civil and family law regulation. From analysis of the nature and function of prenuptial agreement, it should be concluded that it has enough of legal specificity and unique legal content. It has specific composition of parties, content and subject of the agreement.

Russian legislature constructed prenuptial agreement as a civil law tool, not as a family law one, as it is under a very strong influence of the civil legislation. However, such an approach does not allow efficiently protect rights and legal interests of spouses and also it does not comply with the foundations of the family legislation.

Application of the legal structure of the prenuptial agreement allows providing interests of citizens with differing property status, opening to more liberal disposition of property acquired before or during the marriage, as well as protecting property rights in case of divorce.

Among the main attributes of the prenuptial agreement are: mutual agreement and voluntary nature of its conclusion; documentation and mandatory notarization; the prenuptial agreement is concluded with respect of both existing and future property of spouses.

Prenuptial agreement cannot regulate non-property rights of spouses (e.g., the right to communicate with the child in case of divorce, fidelity issues, drinking alcohol, idle lifestyle, etc.).

Due to a wide spread occurrence of de facto marriages, the de facto spouses shall be legally permitted to conclude a prenuptial agreement after many years of cohabitation and joint housekeeping.

Prenuptial agreement is a strictly private contract, thus it may not be concluded by a legal attorney of a spouse or a person entering into marriage, nor by a trustee with a power of attorney.

The nature of the prenuptial agreement is not limited to regulation of property relations between the spouses, but includes also protection of family, in particular, minor children. Prenuptial agreement if certain provisions are included, may have a protective power, e.g., it may include a condition on transfer of property rights to the spouse with whom the child remains cohabiting. Such condition allows an ex-spouse and the child under their custody to preserve their habitual lifestyle.

The moment when a prenuptial agreement enters into force depends on its parties:

- if the parties are spouses, then the date of commencement is determined by the date of its notarization;
- if the parties are citizens intending to enter into marriage, the prenuptial agreement comes into force on the date of state registration of their marriage.

In Russian practice, there is a secrecy of prenuptial agreement. It is supported by the provisions of the Russian Constitution (family secret) and provisions of legislation regulating notarial system (notary secret). There are no provisions for access of interested parties to the content of the prenuptial agreement.

Conclusion of a prenuptial agreement is a right, not a duty of citizens. The will of each of the spouses (spouses-to-be) with respect of concluding the prenuptial agreement and its provisions shall be formed freely, independently, willfully and voluntarily. Otherwise, the prenuptial agreement concluded under the influence of violence, threat, fraud, confluence of reduced circumstances may be deemed void on a claim of the aggrieved party.

## References

- Braginskii, M. I., & Vitrianskii, V. V. (2002). *Contract Law*. Moscow: Statut.
- Buschendorf, A. (1987). Die Grenzen der Vertragsfreiheit im Ehevermogensrecht. *Unter besonderer Beruecksichtigung des Ehegueterrechts* [The borders of the contract freedom in the marriage property right. Under special consideration of the marriage law on property]. Frankfurt am Main.
- Gordeiuk, E. V. (2017). Marriage and contract: A comparative-legal aspect. *Annals of the Moscow Univer. of the Ministry of Internal Affairs of Russ.*, 6, 134.
- Jung, H. (1995). *Ehevertraege: Fragen des Familienrechts* [Marriage contracts: Questions of the family right]. Frankfurt am Main.
- Levashova, O. V., Goricheva, V. L., & Tolochko, A. V. (2018). Extradition as a Factor Affecting the State of Transnational Crime. *Modern J. of Lang. Teaching Methods*, 11, 551.
- Maksimovich, L. B. (2003). *Prenuptial Agreement in the Russian Law*. Moscow: Jurist.
- Myskin, A. V. (2012). *Prenuptial Agreement in the Russian Private Law*. Moscow: Statut.
- Slepakova, A. V. (2005). *Legal arrangements for property of spouses*. Moscow: Statut.
- Tarusina, N. N. (2011). *Marriage according to Russian Family Law*. Moscow: Prospekt.