

PRE(NUPTIAL) CONTRACT



VUKOVIC & PARTNERS
Advokatska kancelarija - Law firm



(Pre)nuptial contracts

‘Spouses shall be equal’; ‘The property of spouses may be either joint or separate’; ‘The property acquired by the labour of spouses whilst married shall constitute their joint property’; ‘Spouses may, under the conditions provided for by this Law, arrange enter into an agreement (a nuptial contract) to regulate their rights to existing or future property.’ These are just some examples of provisions of the Serbian Family Law (*Official Gazette of the Republic of Serbia*, Nos. 18/2005, 72/2011 – Other Law, and 6/2015), hereinafter referred to throughout as ‘the Law’, which governs the relationship of marital partners, primarily from the perspective of property and finances.

It will be clear, even to those with no legal training, that any property either spouse brings into a marriage is his or her separate property, whilst the assets they acquire during the marriage are deemed to be the joint property of both spouses.

But what does this actually mean? What are the practical consequences of this distinction? How and in which cases can one avoid the legal requirement to divide property in the event of divorce or whilst the marriage is still in effect? These questions will be discussed at length below, in particular with reference to (pre)nuptial contracts between future spouses or partners already married.

I. Concept and legal regulation

At the very outset, a clear distinction ought to be made between the commonly used expression ‘prenuptial contract’ and the term actually used in the Law, ‘nuptial contract’.

These two seemingly different notions in fact refer to one and the same agreement, with the same purpose. That being said, in view of the formal legal definition, the term ‘nuptial contract’ should properly be used. Yet, the likeliest source of the colloquial expression ‘prenuptial contract’ was the ingrained preconception that this type of agreement had to be entered into before marriage – which is not true.

Both married partners and spouses-to-be can enter into a contract to regulate their rights to existing or future property. Not only is being married not a decisive factor: it is not even considered a key one. By contrast, the desire of the partners to marry and their readiness to dispose of their property by contract surely are pivotal.



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II. Misconception

Prejudices and misconceptions about nuptial contracts can often lead to the wrong choices.

1. One misunderstanding stems from the prefix ‘pre’ used in everyday language, which may mislead one into thinking that what came ‘before’ the marriage matters – in other words, if the value of the individual property each spouse brings into the union is insignificant, there is no need to enter into a nuptial agreement.

This is not accurate, as all property acquired by the spouses by any means before marrying is legally their separate property, which they can dispose of freely, and always remains so. As such, these assets are not subject to any division of the joint spousal property, either during the marriage or after a divorce.

2. Another fairly common misconception is that a nuptial contract can only be used to regulate the property issues inherent in a marriage. However, this agreement can also govern other aspects of the spouses’ daily lives and their obligations of giving, acting, failing to act, and toleration that may all pertain to matters other than property.

Since even property-related nuptial agreements remain a novelty in Serbia, one step in the right direction – and away from our traditional worldview – would be to contractually regulate aspects of daily married life. Serbian law, public order, and high standards of ethical behaviour would preclude making some requirements allowed in other legal systems, such as, for instance, that one partner must remain below a certain body weight, or that a wife must have sex with her spouse a particular number of times a week. Any such clauses of a Serbian nuptial contract would be absolutely null and void. By contrast, the spouses could agree on an indemnity payable by an unfaithful partner to the other in the event of divorce. That being said, such provisions are doubtlessly rare.

3. Most Serbians, including public figures, the wealthy, and the better educated, generally associate nuptial contracts with glamour, or even a dash of eccentricity. This opinion goes hand in hand with the view that nuptial agreements are part and parcel of a distinct way and perception of life, that they are reserved for unusual individuals and incompatible with real, true love and honest emotions between a couple. Why is that so? Why would we have to agree in advance about how to divide that which we seek to acquire together if we love one another and are about to swear eternal love to each other? Why would we set limits in advance and erect fences for our love by signing pieces of paper? If emotions are heartfelt, why would one partner wish to enter into a nuptial contract and so let the other know what will never be theirs?

If readers believe these questions are entirely logical and lead to serious thought, they may be on the wrong track. The purposes of nuptial agreements will be discussed at greater length below.

4. Although it is a well-known fact that Serbian law treats common-law marriage the same as formal wedlock,¹ it may still be hard to understand and mildly confusing that common-law spouses can also enter into nuptial contracts. Even though the term is in this case not entirely appropriate, not only can common-law spouses sign such agreements, but doing so is even recommended, because a contract of this type makes it incontrovertible that a common-law union actually exists, a fact that may later be hotly contested, and indeed is often so in practice.

¹ See ‘Formal or common-law marriage – right to inherit’ in the News section of the Vuković & Partners web site, published on 31 August 2020.

III. Purposes of nuptial contracts and options for sidestepping legal rules

A nuptial contract regulates the property rights of formal or common-law spouses in advance, which serves an important purpose in the event that the partners decide to divorce or break up.

In many cases the spouses or partners will have vastly different levels of wealth at the time they decide to marry, and this disparity is highly likely to continue into the future. For instance, one partner may have his own business and a high income, whilst the other is unemployed; one spouse may be a successful businesswoman, actor, or athlete whose efforts and success have translated into earnings that greatly overshadow the salary of the other; or one partner may have held an asset before marrying that continues to generate revenue throughout the marriage.

People often tend to approach divorce in a dramatic and fatalistic fashion. These sentiments are by no means always unjustified, especially as the need to separate is frequently caused not just by the fading away of love or respect, but also by feelings of alienation, commitment to other values, and inability to reach agreement and find common ground even on the most mundane of day-to-day issues.

This welter of mixed emotions, sometimes dominated by a sense of defeat and self-centredness, frequently produces that well-known sentence: 'I don't know him (or her) anymore, it's as if he (or she) isn't the same person I married.'

The statutory assumption is that all assets acquired by the labour of the spouses during formal or common-law marriage constitute joint property. Hence, the partners' salaries, whatever their amounts, belong to both partners in equal measure. The examples cited above suggest that the statutory rules for joint property, based as they are on equality and equity, simply do not always reflect the realities of life, the relationships between partners, and their desires and wishes. The nuptial contract may offer the most appropriate remedy to this incongruity.

The partners may agree to divide assets acquired whilst married in accordance with their individual roles and contributions, for instance in a ratio of 70 to 30 percent, or by clearly stipulating that any income derived in the future from an asset held separately by one of the partners are to belong exclusively to the owner of the asset instead of being shared by both partners equally.

This exclusion of statutory provisions will obviously have to remain within the bounds of Serbian public order requirements, meaning that any contract must reflect the autonomy of wills of the parties whilst at the same time respecting national law and not seeking to circumvent legal rules to the obvious detriment of one of the parties as an individual, which would consequently be injurious to the entire legal system.

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IV. How are nuptial contracts entered into?

Entry into these contracts is preceded by negotiations, which need not necessarily be long and exhausting, but this will obviously depend on what the contract is intended to achieve and whether the party in the stronger bargaining position is seeking to obtain something the other party is unwilling or only partly prepared to concede.

The negotiation stage must be followed by the drafting of the actual contractual provisions that reflect the parties' intentions, which calls for much focus and close attention to detail. The significance of faithfully rendering the wishes of the partners underscores the importance of consulting a lawyer or another professional with experience in legal drafting.

Nuptial agreements are entered into before notaries public, in the presence of the parties and/or their legal representatives, as solemnised notarial instruments. This means that the notary is required to warn the partners about to enter into the contract that the agreement will supplant statutory rules regarding joint property, and will add the appropriate language to the clause executing the contract. If the agreement pertains to real estate, it would be desirable to register it with the cadastre service, since doing so will clearly show the special status of such property to anyone potentially interested in purchasing it.

Registration of a nuptial agreement can also prove useful guidance for creditors of either of the spouses, who can use official registers to find information they can rely on to carefully plan their approach to fully recovering what they are owed.

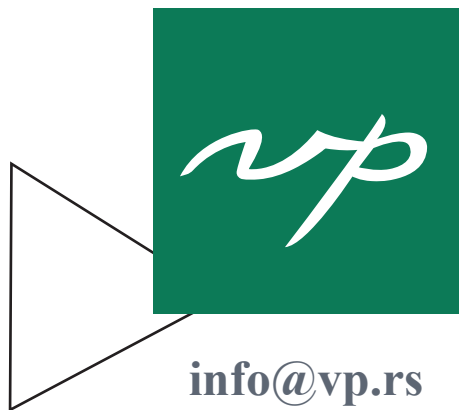
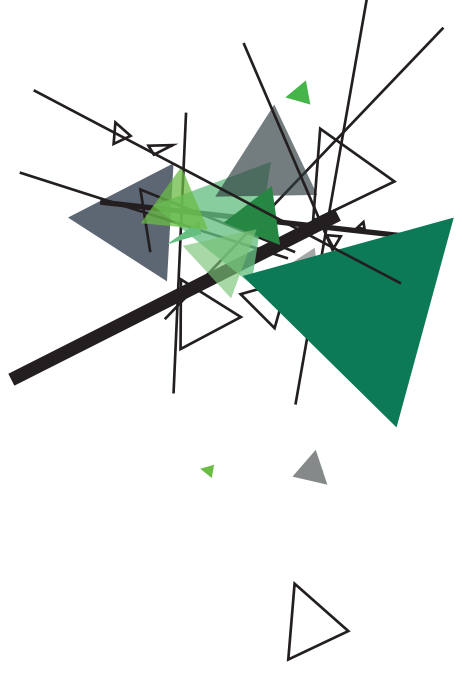
V. Conclusion

*'Marriage is governed by law only when all else fails. So don't let the law run your marriage. Make your marriage work for you, do it better and with more humanity than any law could ever envisage.'*¹

This note aims to demonstrate that there is nothing wrong with an adult acting prudently when making important decisions in life, especially when – as in this case – the issue is inextricably linked with emotions. Individuals are known to act impulsively when provoked by a betrayal of trust, infidelity, or nothing more than a change in character, and such actions may be motivated by pure spite and a desire to hurt their partner after they had caused them pain.

A nuptial agreement between self-confident partners should not be taken as an expression of a lack of trust or love. Such individuals ought to be aware that unforeseen consequences can arise if steps are not taken in due time to safeguard their integrity.

¹ From a text written by poet and journalist Duško Radović and commonly read by registrars as an introduction to civil ceremonies in Serbia.



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