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**FEATURES AND PROTECTION OF PROPERTY
RELATIONS BETWEEN SPOUSES AND CONTRACTUAL
REGULATION OF THE MARRIAGE CONTRACT IN THE
LEGISLATION OF EUROPEAN STATES**

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I hereby declare that I have compiled the paper independently
and all works, important standpoints and data by other authors
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Abbreviations

USA United states of America

FCC French Civil Code

GCC German Civil Code

Abstract

In different historical epochs, the institution of the family was the most important component for the full life of members of society. Meanwhile, over time, the legal characteristics of this institution have changed. When analyzing family relations from the legal side, it is necessary to take into account the norms of the law that enshrine the rights and obligations of spouses. An important aspect of marital relations is the relationship that develops on issues of their property.

The purpose of this study is to determine the essential need to supplement a marriage contract with provisions on more substantial protection of property rights, thereby increasing its importance, relevance and necessity, both in the modern world and in Estonia. Within the framework of this research work, theoretical methods will be used, in particular analysis and synthesis, since throughout the work, comparisons, analogy and identification of unidentified problems are necessary. In this thesis, the Author will consider the need for a marriage contract and answer the question of whether people need modernization and new opportunities. Can it be noted that marriage has evolved? What new opportunities can open up by introducing more conditions and opportunities in the marriage contract? Will this innovation change people's attitudes towards marriage, or will it affect it more negatively than at the moment?

Currently, the divorce procedure has changed markedly, as well as the laws in this area. Both spouses now have more powers in matters of marriage and divorce than before, and they also have equal rights in marriage. Now everything depends on the people themselves in marriage, on their decisions, goals and desires. There are different rules and moral ideals, and is it worth changing at all? Jurisprudence complements this definition of marriage, saying that it is the unity of several persons connected by any legal relationship. The substantive method is the legal regulation of relations through the rules of direct action. At the international level, the process of establishing uniform substantive rules is limited to certain areas of family law. The material method of regulation is also applied at the national level through the adoption by states of regulatory legal acts specifically aimed at regulation of relations also with a foreign element. In the substantive method, there is a direct regulation of relations.

Introduction

Society is interested in the relationship associated with marriage, namely everything that is associated with it. Conclusion and termination in the presence or absence of a marriage contract. The main issues of marriage are regulated by generally accepted laws, but there are a large number of unresolved issues regarding the marriage contract, but the most important of them is the one that asks what and how can be changed to make the branch of family law more understandable and simple, so that topic anyway is topicality and novelty. Therefore, the study of the marriage contract in countries such as Estonia and Spain is unique in its own way, since they have some differences, despite the fact that they are both states located in Europe. It is also interesting to study the fact that there are some contradictions in the norms of family and civil law, both in Estonian legislation and in Spanish legislation, which requires a detailed study. The main hypothesis of this study was the following: Women feel the need for a contract that would properly regulate property rights, also affecting the rights and interests of children. The purpose of this thesis is to determine the essential need to supplement a marriage contract with provisions on more substantial protection of property rights, thereby increasing its importance, relevance and necessity, both in the modern world and in Estonia. Within the framework of this research work, theoretical methods will be used, in particular analysis and synthesis, since throughout the work, comparisons, analogy and identification of unidentified problems are necessary. And also, during the study, the collection of information about the two countries will be used and the path of interpretation will be used, that is, the explanation of some important terms. As far as the structure of the thesis is concerned the first chapter is focused on theoretical and legal foundations of the marriage contract in Estonia and Spain:

- Marriage contracts in Estonia and Spain;
- The need for a marriage contract in Estonia and Spain;
- Regulation of property relations in Estonia and Spain.

However, among the variety of family forms, the classic model of marriage remains - a biologically determined union of a man and a woman, concluded, in principle, for life with the aim of creating a family, having and raising children, living together, maintaining a common household, providing mutual emotional support, recognized by the state and society. The second chapter consists of an analysis to identify the main differences regarding the marriage contract in both countries.

Despite the fact that both Estonia and Spain are members of the European Union, these countries provide an interesting example for broader consideration of the issue of the marriage contract in general. The purpose of the second chapter is to study marriage agreements, find similarities and differences in the legislation of these European states, as well as, by borrowing laws by one country, expanding opportunities, solving emerging problems in new ways and trying to prove that the marriage contract needs its large-scale modernization. In Europe, it is possible to conclude a marriage contract depending on the law applicable to the current regime of spouse's property. In other words, the spouses may by their agreement change the regime of their property only if the law currently applicable to their property rights and obligations allows it. The third chapter consists of the comparative analyses the researched information and finding ways to modernize the marriage contract and providing final recommendations for improving the legal regulation of property relations. It is also important to note that the property regime of the spouses will entirely depend on which province they live in.

1. THE CONCEPT AND LEGAL BASIS OF MARRIAGE CONTRACT BETWEEN SPOUSES

First of all, it is worth noting that the level of development of society sets a certain bar that determines the complexity of the system of regulation of the law on family law and property relations in marriage and beyond. Any state faces such a task to give people the opportunity to protect themselves, therefore, the regulation of family relations should take place in such a way as to always give people a choice. In this regard, the author wants to note that the marriage contract as a whole has a very long history. For example, the first marriage contract was enshrined in French civil law back in 1804, between Napoleon and Josephine. "According to Spanish lawyers, marriage is perhaps the only legal institution most studied by specialists in family law, civilists and canonists."¹ The challenges of the new time, change the stereotypes of the institution of marriage, the traditionalist positions and principles of this area of social relations are being lost: marriage is not an exclusively union of a man and a woman, and is not considered a unique form of relations. In Estonia, on January 1, 1995, a family law was adopted, in Art. § 129 stated that "the property relations of the spouses are determined by law and by the joint property agreement, if it has been concluded."² Further, it is worth noting that it was 2010 that became the decisive year for Estonia's further future, in the field of family law, regarding the ability to choose a suitable property regime. Until 2010, Estonia did not have the opportunity to choose suitable property relations, which means that they were very limited in their rights. And the acquired property in marriage, before 2010 and the entry into force of the updated resolution, in any case, was automatically determined as joint property.

¹ Rives Gilabert J. M., Rives Seva A. P. Evolucion histórica del sistema matrimonial español. Noticias Jurídicas. 2001. № 12. p. 14.

² Estonian Family Law Act RT I, 01.01.1995

Currently, the following regimes of property ownership in marriage exist in Estonia:

- Joint ownership regime
- Separate ownership regime
- Property gain mode

On July 1, 2010 in the Family Law, in Art. §24 was written “by agreement prior to marriage with an application for marriage, the parties may choose property relations from the types of property relations specified in Section 2 of this Chapter in accordance with the procedure established by the Civil Status Act. This Statement of Intent is effective upon marriage.”³ This contract has existed in Estonia for many years, but it does not inspire proper confidence, since it is obvious that many people do not see it as an auxiliary means for protecting personal property rights. “There are also some of the advantages of spouses in choosing one of the property regimes, for example, separate ownership of property provides independence.”⁴ “On the other hand, the common property regime provides for solidarity between spouses.”⁵ A marriage contract today is more widely regarded as a distrust of a spouse and is intended only for rich people who own certain property. Other European countries and the United States, consider the prenuptial agreement as an essential condition for the conclusion of marriage, therefore “the number of concluded prenuptial agreements reaches 70%.”⁶ And also, they stipulate the following: “Americans can even enter into prenuptial agreements and regulate many of their rights and obligations during marriage and divorce, especially with respect to the specific assets that they own. Prenuptial agreements are especially useful for prospective spouses who fit a certain profile. For example, people with children from previous marriages may choose to protect the financial future of these children through a prenuptial agreement.”⁷ Prenuptial agreements may also be more common among prospective spouses with wide differences in income or age. In addition, future spouses can choose under such agreements whether to keep their property separately, so that only their share can be used to pay off debts.”⁸

³ Estonian Family Law Act RT I, 01.07.2010

⁴ Boele-Woelki, K. Principles of European Family Law Regarding Property Relations between Spouses. Cambridge, Intersentia 2013.

⁵ *Ibid.*

⁶ A marriage contract as a way to protect the rights of spouses in the international space. LAW: history and modernity, 2019.No 2

⁷ Laquer, A, E. Marriage and divorce conflicts in International perspective. Duke journal of comparative and international law, 2017, pp 487-488

⁸ Ryznar, M. To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context. Chapman Law Review, 2009, pp 28-54.

However, even having the opportunity to draw up thorough marriage contracts and prenuptial contracts - "USA is one of the countries with a very high divorce rate."⁹ That is, even the fact that people can indicate absolutely everything they want in the contract does not give any guarantee that this marriage will not fall apart. Even so, nevertheless, the distinctive features of European and American marriage contracts may be of significant interest to Estonian law, which should probably learn from experience and take an interest in one of the richest practices, marriage contracts, in America as well as to those countries where the conclusion of marriage contracts is much more common than in Estonia. The problem of creating a marriage agreement was discussed by Scherpe, where he states that each jurisdiction has its own specific legal norms, acts and laws that give spouses the right to dispose of their property and money after divorce, by concluding a marriage agreement and under certain restrictions.¹⁰ "Marriage certainly is not a guarantee of success in family life. So, family structure (e.g., marriage) may be a shorthand way of referring to family interaction factors and dynamics such as conflict, control, communication, caring and trust, identity, support, to their peers living with both biological parents. etc., which other research has shown to correlate with delinquency. But that is the whole point of marriage as a dividing line or classification-research consistently shows that intact conjugal marriage is a statistically reliable "short-hand" for positive characteristics and the generation of positive social benefits and the minimization of negative social qualities and pathologies. Marriage provides a much better environment for the successful development and raising of children and for fostering successful, healthy adult intimate relationships than the various forms of non-marital cohabitation (including same-sex coupling)."¹¹ But in addition, it is necessary to provide maximum protection against possible actions of the spouses who, from their own motives and personal reasons, cause property damage to the other spouse, as well as to the child, so that the previous living space on which the family lived before the divorce process can become uninhabitable, as there may simply be no living conditions. The Author would also like to emphasize that with the development of society, the needs of people grow, and with them, accordingly, desires, implying the protection of property, both their own and their children. In this regard, it is necessary to modernize the law in such a way that the changes correspond to the needs and problems of modern society.

⁹ Garrison, M. What's Fair in Divorce Property Distribution: Cross-National Perspectives from Survey Evidence. *Louisiana Law Review*, 2011, pp 60-81.

¹⁰ Scherpe, J. *The Present and Future of European Family Law*. Cheltenham, Edward Elgar, 2016.

¹¹ Lynn D., W. *Marriage and Other Domestic Relationships: Comparative and Critical Equality Analysis of Differences in Form and Substance*. *Journal of Civil Rights and Economic Development*, 2012, pp 688-698

Therefore, today there is such a task to make the prenuptial agreement public, useful and as effective as possible for people of any social status, which will provide the level of property protection that everyone needs. The issues of legal regulation of property relations in the family and, first of all, in marriage as the basis of a family union are always relevant. The development of society is continuous, accordingly, the views on the rights and obligations of spouses do not remain unchanged. If marriage is undoubtedly the foundation of the family, then property is just as unquestionably the economic foundation of society. In this regard, one of the most important aspects of matrimonial property legal relations is the legal property relationship between spouses. As for the marriage contracts concluded by Spain, first of all the author would like to emphasize that the peculiarity of this country may be the fact that on its territory, the spouses may have an urgent need to conclude this contract. Just because „in the provinces of Spain there are various property relations and in order for the spouses to clearly understand what property they own, a marriage contract is necessary. Depending on the place of residence of the spouses, the property regime depends, which will be automatically established in the event that they do not choose otherwise. If a joint property regime is established in Madrid, then in some autonomies, such as Catalonia, Aragon, the Balearic Islands of Navarra, the Basque country, a separate property regime is automatically established, unless otherwise provided by the marriage contract.“¹² The Spanish kingdom has recently changed its attitude towards marriage contracts and today they are issued much more than before. In addition to the chosen regime of property and the distribution of property between the spouses, it is possible to specify a clause on the inheritance of the property of the spouses in the marriage contract. As for the existing property regimes in Spain, it can be noted that there are three of them in Spain, as well as in Estonia:

- The regime of joint ownership of property (Régimen económico de gananciales);
- Joint ownership regime (Régimen de separación de bienes);
- Mode of participation (*Régimen de participación*).¹³

¹² Joint ownership of property <https://espanarusa.com/ru/pedia/article/663891>

¹³ *Ibid.*

Since the subject of a marriage contract is the property rights and obligations of the spouses, that is, arising in connection with property and with regard to property, it is necessary, first of all, to understand what kind of property we are talking about. As a rule, property means separate things or their combination. The property of the spouses consists of the property acquired during the marriage and the property of each of the spouses. "When a marriage is dissolved in Spain, not only the property, but also the debts of each of the spouses is equally divided with the regime of joint ownership."¹⁴

1.1. Defining a clear problem of marriage contract arising from the not properly protected regulation of the property between spouses

Unfortunately, the author did not find the number of the court case, which will be described below, but this case clearly makes it clear why it is worth strengthening the protection of property rights through a marriage contract. The essence of this case is that "the machinations of the former spouse deprived a resident of Estonia of her legal property."¹⁵ The fact that a month after the divorce, a woman discovered that her joint property with her ex-husband (namely: a private house) was devastated, up to and including to all doors, windows, electrical wires, electrical appliances and furniture. Also, the spouse had the freedom to sell all the vehicles they had, which were available 3. Only the foundation remained from the shed, and he also cut 2.6 hectares of forest around this living space. In total, all the joint property was 140,000 €, and as a result, only 16,000 € were left of it, which they had to divide among themselves. After the incident, the woman and her children were forced to a rented apartment, since after these machinations of her husband, the living area became unsuitable for life. Despite the fact that the marriage was dissolved a month ago, the couple decided to postpone the division of the property to a later date. Everything that the husband decided to take out and sell, and take something for personal use, was undivided common property. This case suggests that in order to avoid such destructive, inadequate actions by one of the parties, you should never delay the division of property, especially after a divorce. The woman made a number of mistakes that allowed her husband to realize his unscrupulous plans for every conceivable and inconceivable property that can be imagined. The woman's indiscretion turned out to be that she did not have a prenuptial agreement, she probably did not even suspect that something like this could happen to her and

¹⁴ *Ibid.*

¹⁵ Estonian Case: the man sold the joint property within six months after the divorce.

<https://raha.geenius.ee/rubriik/uudis/hoiatav-juhtum-meis-muus-parast-lahutust-poole-aastaga-uhisvara-maha/>

she did not promptly insist on dividing the joint property, neither during the divorce proceedings, nor after it. This case was referred to the court. In hindsight, the spouse could only note that the man had abused his right to own joint property, thereby causing huge damage to her and the children. Since the joint property was partially or completely sold out, at best, the man would have to be obliged by the court to pay the property damage that he caused. All of the above is a confirmation of the fact that when entering into a marriage, a prenuptial agreement is necessary and it is also obvious that the introduction of provisions on more effective protection is becoming more and more necessary so that no matter how the situation develops, in one case or another, not than with a child in her arms. And also, if there are still doubts about whether it is necessary to conclude a marriage contract or not to conclude, the author would like to cite as an example the following case, which takes place and shows that a woman can also take what she wants, but in this case, this happened according to the law, but just like in the first case, the marriage contract was not drawn up, which means there was no protection of property. *Case of Chai v Peng*¹⁶ is the result of how many legal problems and lengthy litigation can arise if the question of what property will be transferred to the wife's possession in the event of a divorce, given his current financial situation, is not decided in time. Briefly describing the situation, it was as follows, a certain businessman Khoo Kay Peng had been married for about 43 years with his wife Pauline Chai. During this time in marriage, the man has created an impressive network of enterprises, as well as a British large-scale company, which is based on designer textiles and is called Laura Ashley. In 2013, the businessman's wife filed for divorce in London, and her husband strongly disagreed with this, since he was not satisfied with the English jurisdiction and filed his own divorce lawsuit in Malaysia. Khoo Kay Peng was originally from Malaysia, that is mean that there was an international element in this marriage. It is also important to note that if only one spouse always worked and the spouses did not enter into a marriage contract, it does not matter who divorced whom and how much worked, therefore, if the spouses do not have any agreements on the distribution of shares in jointly acquired property, then in this case, the general presumption established by law and the equal shares of the spouses will apply.¹⁷ Sörgjerd says that it is fair to regard both spouses as equal and that they both have contributed to their family, this implies their equality in property and money acquired during marriage.¹⁸ Spouses enjoy equal rights to jointly acquired property even if one of them was engaged in

¹⁶ Interesting Family Law Court Cases. <https://www.thelawyerportal.com/blog/interesting-family-law-court-cases/>

¹⁷ *Ibid.*

¹⁸ Sörgjerd, C. *Reconstructing Marriage. The Legal Status of Relationships in a changing Society.* Cambridge, Intersentia 2012.

maintaining household, caring for children or for other valid reasons did not have independent earnings, unless otherwise provided by the marriage contract.¹⁹ Due to the fact that a marriage agreement, which was signed on the territory of one state, according to the relevant laws and in the future, this agreement is tried to be enforced in another state, it may conflict with the law. A conflict of law can be resolved only in such a way that the relevant court itself chooses the law of which state will prevail in a particular case.

And there are two ways, the first way is the application of the law of the state, in which the marriage contract was accordingly signed, and the second way is when the courts apply the law of the state, the interested person in the marriage contract. It is not always possible to predict which choice the court will consider more correct.²⁰ „To facilitate the procedure for recognizing a marriage contract abroad, it is advisable to limit the choice of law to a marriage contract by the legislation of those countries with which persons who conclude it, there is a real legal connection. Availability the connection of persons or spouses entering into marriage with the law of a certain state will also allow avoiding the abuse of the choice of the law of a state in which more favorable conditions for rights and obligations under the marriage contract, but with which the parties to the marriage contract have no connection. As basic attachment formulas are considered hierarchically arranged collision bindings, which, are usually designed to regulate personal non-property and property relations of spouses“²¹

1.2. Comparison and discussion of Estonian statistics between concluded and divorced marriages with statistics with concluded marriage contracts.

First of all, the author would like to point out that due to the state of emergency, “490 couples entered into marriage and 359 couples divorced. Compared to the same period last year, there were 189 fewer married couples, and 130 fewer divorces.“²² “The decrease in the number of marriages and divorces in the last two months is natural, since it was very difficult to hold family events at that time. In total, there were more marriages in the first four months of the year than last year at the same time. Marriages were more common in February - 500. A special day was

¹⁹ Antsukh, N. S. Relationship of spouses in comparative and International family law. Minsk: BSU, 2014

²⁰ Nichols J. A. Marriage and Divorce in a Multicultural. New York, Cambridge University Press 2012.

²¹ Antsukh, N. S. Relationship of spouses in comparative and International family law. Minsk: BSU, 2014

²² Statistics: the state of emergency slows down the registration of marriages and divorces in Estonia <https://rus.err.ee/1092168/statistika-chrezvychajnoe-polozhenie-pritormozilo-registraciju-brakov-i-razvodov-v-jestonii>

20 February, when 130 marriages were registered."²³ “Last year, 6701 marriages were concluded in Estonia and 2790 divorces were registered. The number of people registering marriage has increased in recent years, and the number of divorces has decreased.”²⁴

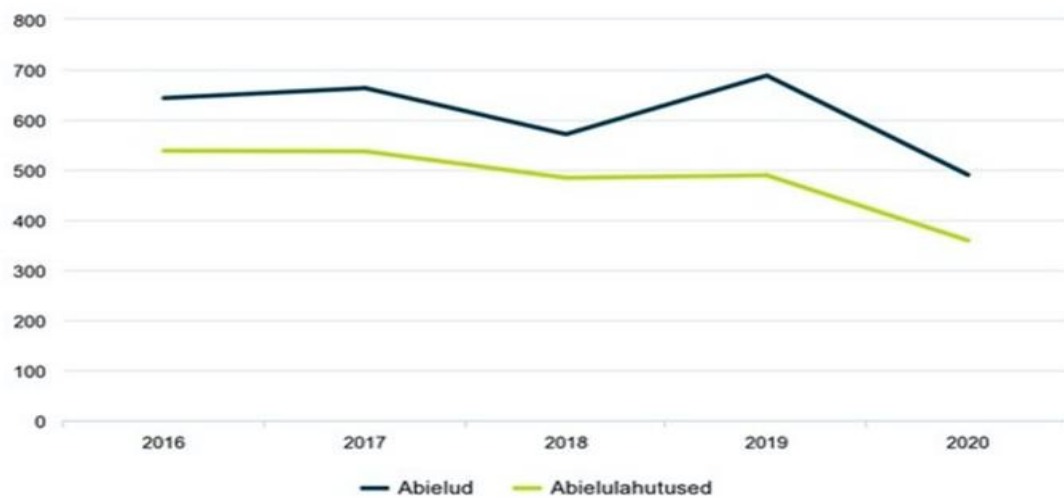


Figure 1. Marriages and Divorces from 2016 to 2020
Source: Statistikaamet

Regarding the conclusion of marriage contracts in Estonia, it can be noted that at the moment this percentage is extremely small, since from 2016 to the present, the statistics amounted to 0.34% of the number of all residents of Estonia, in total, this is 4523 marriage contracts executed in 5 years. This year, 1609 marriage contracts were concluded and this was 0.11% of the total population of Estonia. And 37% of 4523 marriage contracts were completed in 2020.

²³ *Ibid.*

²⁴ *Ibid.*

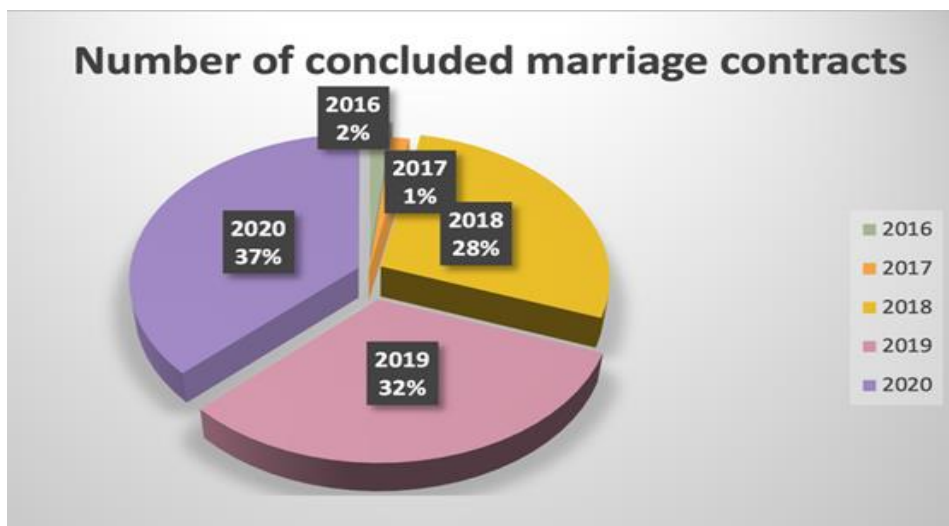


Figure 2. Number of concluded marriage contracts

A source: The picture was made by the author, based on data from the source - abieluvararegister

Based on the data in the table, which indicates the number of registered marriages, the number of which was 6701 last year, and divorces, the number of which was 2790. If you look at the divorce statistics for 2019, we can say that the divorce rate is extremely high.

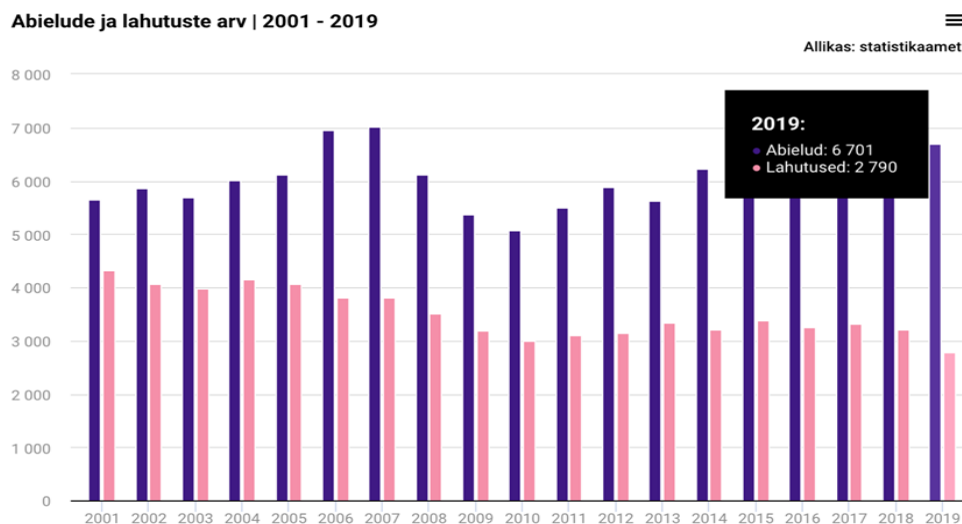


Figure 3. Number of concluded marriages and divorces

Source: Eesti Statistika

Probably, in order to reduce the number of divorces, it is necessary to make the conclusion of a marriage contract mandatory, and then decisions on marriage will be more deliberate and balanced. The conclusion of the contract will provide a certain level of protection for both spouses from the unforeseen behavior of each other, in the event of possible disputes and

disagreements, as well as determine and delimit the amount of matrimonial property. If the spouses, entering into marriage, do not conclude a prenuptial agreement, they thereby subordinate their property relations to the requirements of the law, that is, the spouses automatically establish a general property regime.

"The marriage contract can act as a guarantee for the spouses regarding the preservation of the marriage, since in the event of its dissolution, each of the spouses may lose a significant share of the property."²⁵ "Despite the growing practical importance of marriage agreements in Europe and other countries, their role is still a source of much controversy. So, it is important to understand why a contract that differs significantly from government-established separation rules might be jointly preferred by a couple entering into a marriage."²⁶

1.3. Is it necessary to make the conclusion of a marriage contract mandatory?

First of all, it is important to note that the marriage regime in Estonia is subdivided into contractual and legal regime of spouses' property. That is, the contractual regime is the one that is noted in the marriage contract, and the legal regime, which is established automatically at the time of the marriage. In some countries, the law does not provide for a legal regime for the property of the spouses, and the marriage contract is mandatory. The contractual regime of property arises between the spouses at the conclusion of the marriage contract, i.e. spouses are given the opportunity to settle property relations at their own discretion. In the event of a dispute between spouses during a divorce, the court will act not according to what is said in the law, but according to the provisions specified in the marriage contract.

European countries contain such normative acts as legal acts, according to which, the provisions that will be marked in it should not violate certain rules, such as:

- Equality of spouses in relation to each other
- Cancellation of any obligations towards each other

²⁵ Statistics *Supra nota* 3

²⁶ Rainer H. Should we write prenuptial contracts? *European Economic Review*. 2007, pp. 337-363

- Limitation of personal rights and responsibilities for raising children

Failure to comply with the above points will result in the invalidity of the agreement.

As mentioned above, the agreement contains a clause on the impossibility of limiting personal rights and responsibilities for raising children, but it also lacks the ability to protect their rights properly in a more in-depth regime, taking into account the rights and interests of children.

At the moment, the purpose of the marriage contract is to streamline property relations, meeting the interests of the spouses. The author has the assumption that it is necessary to expand the range of goals that the marriage contract will cover, namely, to indicate that the purpose of the marriage contract is not only the ordering of property relations, but also broad opportunities for protecting property rights in an in-depth mode.

To date, the provisions in the marriage contract are limited to the following points:

- Responsibilities and rights of spouses for mutual maintenance (in certain cases, or until the child reaches the age of 3)
- Procedure for incurring expenses by each of the spouses
- Ways of spouses' participation in each other's income
- Indications of the property to be transferred in case of divorce to each of the spouses
- As well as other other provisions governing the relationship between husband and wife

However, the marriage contract does not regulate such provisions, which imply more serious protection of the property rights of women and children. It is important to note that a prenuptial agreement is a way of protecting the rights of women and children, as well as protecting the rights of men. the legislator does not divide the subjects of family relations by sex.²⁷ But the example that given earlier, the case of the machinations of a man who set himself the task of taking almost

²⁷ Norbekova, Y, S. Marriage contract as a way to protect the rights of women and children. Electronic journal Alley of Science, 2018 No. 1 (17), pp 3

all the property and leaving 16,000 € for division between the spouses, is such an unthinkable act on his part that there is a clear need to introduce a certain provision in the prenuptial agreement in such a way that, if it exists, not a single man or woman would have a desire to do this, leaving a person with a child, with nothing. „Amatonormativity also encourages women to aspire to be wives at the cost of other aspirations and may make it difficult for women to leave abusive relationships.“²⁸ For this reason alone, it can be argued that the conclusion of a marriage contract must be made mandatory, not to mention the introduction of new provisions on the protection of property rights. This can be done in such a way, for example, so that the living space where the spouses lived with the child and have the same rights to it, after the divorce, in any case, remains to the spouse who will continue to raise and provide for the child independently. This need is required in order for the child to get used to the current situation and to the current state of affairs in general and to be able to adequately perceive the information that one of the parents will henceforth live in another place, separately.

And also, at the same time, despite the parents' divorce, the child's standard of living should not change for the worse. The amount of alimony set by the state (370 €) cannot cover all possible needs and most often does not coincide with the real expenses of the parent to fully provide for the child. Therefore, regardless of the place of residence of one or another parent and his relationship to the second spouse, the attitude and costs of the child should not change.

²⁸ Brake, E. *Minimizing Marriage, Morality, and the Law*. London, Oxford University Press 2012.

2. ANALYSIS OF LEGAL REGULATION OF MARRIAGE CONTRACT ON DIFFERENT COUNTRIES

The study of the marriage contract - from the point of view of protecting the rights of women and children, involves legal regulation and comparison of the contract in different countries. First of all, it should be noted that in other European countries, as well as in Estonia, legal relations arising between spouses are usually divided into personal and property relations. At the moment, the dominant place in the legislation is occupied by the regulation of property relations, which consist of those legal relations, which in turn relate to property in the family. According to articles 212-213 of the French Civil Code (FCC), spouses are obliged to mutual assistance and support. Together they ensure the development of the family morally and materially.²⁹ German legislation proceeds from the fact that marriage should be concluded for life, and the task of spouses in living together is to bear responsibility for each other (§ 1353 of the German Civil Code of 1869) (GCC).³⁰

“When getting married in England and the United States, the spouses getting married are obliged to create a conjugal community of life - a consortium. However, neither in legislation, nor in judicial practice, there is no precise and comprehensive definition of a consortium, but it is understood as a commonality of the table, hearth and bed.”³¹

And as far as marriage itself is concerned, in this case, Joseph said the following “there is no satisfactory and principled method of choosing a particular description of “ marriage ”as protected by the constitution. Only the simplest meaning of the word "marriage" - its manifestation as a personal relationship between individuals - can be considered a fundamental right if the Court intends to use a non-ideological approach in determining what the constitutional right to marriage means.”³² The author wants to emphasize that the rights and obligations of spouses, in general, by their nature, are very diverse, but not properly protected. It can also give the impression that people have little idea of the divorce process itself and its consequences. It is obvious that the joint property acquired during marriage is not automatically divided between the spouses upon divorce. Questions about the division of jointly acquired or future property and questions about

²⁹ Civil Code (Code of Napoleon) 1804

http://pnu.edu.ru/ru/faculties/full_time/uf/iogip/study/studentsbooks/histsources2/igpzio49/

³⁰ German Civil Code of 1869, Part 4, Art. 1353

https://ru.wikisource.org/wiki/German_civil_clause/Book_4/Section_1

³¹ The Legal Regime of Property of Spouses in Family Law of Foreign Countries. Omsk Academy of the Ministry of Interior of Russia, 2014

³² Joseph, A., P. Questioning of fundamental right to marry. Marquette law review, 2006, pp 23-24

the maintenance and place of residence of children, at best, should be decided in advance, taking into account the characteristics and lifestyle of a particular family. Spanish legislation, despite the reforms carried out, generally preserves the privileged position of the husband in the management of matrimonial property. That is, according to this provision, the husband alone manages the common property, and the wife's consent is not required.

In order to get a greater contrast in the differences between the available applications in the marriage contract when comparing not only European countries with each other, it is also worth citing the United States as an example, for the simple reason that the legislatures of each state establish their own characteristics. Accordingly, the more different features, the more opportunities for comparison and borrowing of ways to regulate the marriage contract from where it is better regulated. "Alimony obligations for wives and children are established only in those states in which the regulation of property relations between spouses is carried out by common law."³³ This approach is based on the unlimited duty of the husband to support the ex-spouse after the dissolution of the marriage. It is obvious that the basis for the termination of this obligation is a new marriage. "In this case, the court has the right to refuse the appointment of maintenance, despite the prescription of the norms of common law, if the circumstances of the case and the financial situation give grounds for this."³⁴ It is curious to note that the legal property regime in the United States has two options.

"In the first option, the separate property of each of the spouses and the property that is in common joint ownership is allocated. At the same time, an interesting point is the fact that the law establishes such a procedure for satisfying the claims of creditors, where the collection of debts arising from obligations that ensure the interests of the family are applied first of all to the common property, and secondly to the separate property of the obliged spouse."³⁵ "The second option for the property of spouses exists in states whose laws have adopted common law. The regime of community of property after marriage is highlighted. All property that spouses had legally and acquired during marriage, including inheritance and donation, is a common joint property that is not inherited but becomes wholly owned by the surviving spouse."³⁶

Speaking about the conditional generality regime, we can say the following. Such a regime is established in Germany and the Scandinavian countries. In the Scandinavian countries, all property of the spouses during marriage is their separate property. When the marriage ends, and

³³ Alimony obligations. Journal article, 2011
<https://irdeti.ru/zakon/63-2012-06-14-04-59-36/613-q-q-.html>

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

the property available, as well as cash, are pooled and divided into equal shares. The legislation establishes certain guarantees for the observance of the interests of the spouses in the management of property. So, for the commission of especially large transactions by one of the spouses, it is necessary to obtain the consent of the other spouse. If during the marriage a spouse has abused his right to dispose of the property belonging to him, ignored the property interest of the other spouse, he is obliged to compensate for the damage caused. Looking at the comparative study, one can see that De Cruz said that "France, England and Germany are similar in the context of family ownership. Spouses are considered equal, and regardless of the marriage agreement, the division of property will be fair."³⁷ Moreover, according to de Cruz, "husbands and wives know from the start that their equal joint ownership during marriage will result in equal property rights in the event of death or divorce."³⁸ In any case, both spouses contribute to the development and well-being of their family, which means that they equally deserve what was acquired in marriage, thus confirming that equality in the family plays an important role. De Cruz argues in his research that "it is fair to regard spouses as equals to each other, and even in the event of divorce, this should not change."³⁹ Both spouses realize that everything acquired together in marriage is divided equally in the event of a divorce. Estonia is included in the list of those countries where spouses are equal and deserve an equal share of ownership under the established regime of joint ownership. „It is important to emphasize the fact that the views and opinions of some European courts on the principle of equality may differ. For example, the courts have the right to deviate from the principle of equality if, when dividing common property, it may appear that it is not fair to one of the spouses."⁴⁰ "The main task of marriage agreements is to protect property and ensure equality between spouses. Due to the different legal systems in states, the mixing of common and civil law, a wide variety of features of national legislation in Europe, there is no harmonization of the general marriage contract."⁴¹ And also there is no certain level of protection, which could be considered high and widespread among many countries, including Estonia.

In Germany, the principle of equality applies: in the event of a divorce, the spouse who earned a higher salary must share the surplus with the partner „during marriage, property is divided, but the spouse who earned more during marriage knows that after the divorce he or she will have to

³⁷ De Cruz, P. *Family Law, Sex and Society: a comparative study of family law*. Oxon, Routledge 2010, p 72

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ Clarkson, C. *Matrimonial Property On Divorce: All change In Europe*. *Journal Of Private International Law*, 2008, 4 (3), pp 421-442, p 430.

⁴¹ Crowley, L. *International and European Developments in Family Law*. *International Survey of Family Law*, 2013, 1, pp 1-38, p 22.

give half the cost of the surplus to the other spouse"⁴², according to De Cruz. In cases where the prenuptial agreement was concluded unequally with one of the spouses, the Court definitely limits that dominant spouse in obtaining economic benefits after divorce.

In the legislation of a number of countries, it is also stipulated that the responsibility of the spouses includes the mutual maintenance of each other in marriage. As mentioned above, in the FCC, in Article § 212 it is said that "spouses are obliged to provide each other with mutual assistance, and similar provisions are enshrined in the legislation of Germany and a number of other countries."⁴³ The fact is that almost all states recognize the possibility of one spouse demanding from another the provision of material support, if the spouse is in need. However, at the moment it is not provided for one party to provide the other with compulsory material support, if necessary and while being divorced. But it is worth emphasizing that at the moment the concept of need is not disclosed either in the law or in judicial practice. Also, the amount of alimony to be collected is not determined, therefore, it is most often determined depending on the property status of the defendant and his other alimony and other obligations, with reasonable needs, property status and income of the other spouse and must comply with the ideas of justice (§ 1581).⁴⁴ And in § 1602 (GCC) it is also established that "only a person who is not able to provide for himself has the right to content. A spouse who does not have an independent income may be indicated by the court to the need to earn his or her own support if this can be expected from him in accordance with the individual conditions of his life, the characteristics of his work in the past, taking into account the duration of the marriage and the economic conditions of the spouses."⁴⁵

„Hague Convention on the International Procedure for the Recovery of Alimony for Children and Other Forms of Family Maintenance 2007 According to Art. 2. The Convention also applies to the recognition and enforcement or enforcement of a decision on maintenance of a spouse, if such an application was made in conjunction with a claim for maintenance obligations arising from a parent-child relationship under the age of 21, to maintenance of a spouse."⁴⁶

As effective enforcement measures, the Convention provides for withholding from wages, seizure of bank accounts and other sources of income, deductions from social security payments,

⁴² De Cruz Supra nota 21

⁴³ Civil Code Supra nota 9

⁴⁴ German Civil Code of 1869, Part 4, Art. 1581

https://ru.wikisource.org/wiki/German_civil_clause/Book_4/Section_1

⁴⁵ German Civil Code of 1869, Part 4, Art. 1602

https://ru.wikisource.org/wiki/Германское_гражданское_уложение/Книга_4/Раздел_2

⁴⁶ Antsukh, N. S. Relationship of spouses in comparative and International family law. Minsk: BSU.2014, pp 40-67

pledging or forced sale of property, withholding refundable taxes, reporting to the credit service, refusal to issue, suspension or revocation of licenses (including driving licenses), the use of mediation (Art. 34).⁴⁷ Referring to the principle of equality in relation to Estonia, here, the spouses independently dispose of the property, initially choosing a more suitable property regime, which is provided for by the legislation of the Estonian state. Hallik, on the other hand, argues that “a state system that has thought out in advance all possible options for autonomous solutions that imply the possibility of independent regulation of their property can be perceived as an official refusal of the state to take responsibility for ensuring at the same time equal and fair relations in regarding the property of the spouses.”⁴⁸ But in the current situation with self-regulation of property, one of the spouses, risks being left in a less favorable position after divorce than the other. Or there is a possibility that everything may turn out in the most unfortunate way, as it happened in the previously described court case, after which it becomes clear that property rights are not sufficiently protected and it is necessary to clearly define what can be done to influence the improvement of the regulatory system in this way, to make it mandatory to sign a marriage contract, which, first of all, will not imply distrust of the spouse, but a guarantee to protect against any unforeseen events that may occur even many years after the registration of the marriage.

An analysis of the legal regulation of the institution of a marriage contract in Europe and beyond leads to the conclusion that the laws of different countries largely regulate relations in a similar way, namely those that arise in the process of implementing a marriage contract, which speaks of mutual borrowing and adaptation to the certain conditions of different countries. However, there are conditions that have not yet been borrowed and it is worth revising the provisions on various options for unilateral maintenance of a spouse after a divorce, the grounds for termination of which will be a new marriage, or some other grounds, circumstances of the case or the financial situation of the spouse. At the same time, this provision, in the best possible way, provides support to the needy spouse, who, among other things, must provide for the child from this marriage. And for the most effective execution of this decision, you can also introduce a similar system of penalties, which was indicated above.

In connection with the above information, it can be concluded that the Estonian marriage and family legislation, in the case of augmented, specialized regulation in the field of legal relations between spouses, will be more effective in terms of protecting property rights, in a more advanced

⁴⁷ *Ibid.*

⁴⁸ Hallik, L. Regulations of Proprietary Relations between Spouses in the New Family Law Act: Towards Better Regulation by Means of Private Autonomy? *Juridica International*, 2010, pp 162-165.

mode, and will also correspond to the goal of the diploma. It is worth noting that the analysis of various property rights of spouses made it possible to determine the most optimal approaches to solving the research problem. In addition, to this, the author considers it expedient for the Republic of Estonia to join the property regimes of spouses in 1978, on the collection of alimony for both children and other forms of compulsory family maintenance. "As today's practice shows, this institution of modern law has a number of disadvantages and inconveniences. The absence of a clear mechanism of legal regulation causes many disputes between lawyers regarding the interpretation and application of certain provisions of this sub-branch of law."⁴⁹ "If our society takes a more serious approach to the issue of resolving problems in the registration of a marriage contract, it becomes clear that expanding its capabilities will only benefit. It will be possible to predict in advance the occurrence of various problems in marriage and prevent them in a timely manner. Initially, the emergence of the creation of a marriage contract was created because it was so established that the wife takes care of the house and children, and the husband has the opportunity to earn money to feed his family, thereby making a valuable contribution to her life."⁵⁰

2.1 Why protection of property rights is not properly protected now?

First of all, it is important to note that property rights are characterized by a relationship that implies that no one person should violate another person's rights, whether they are spouses or not. It is obvious that the system for protecting property rights is currently rather weak. Proof of this is that in the previously described cases, people were able to find a way to either legally take most of the property, which was the financial component of the joint budget in marriage, or break the law, take and sell everything that was jointly acquired, depriving the wife and child of their former place of residence. „The rights created by private relations (contracts, torts, unilateral actions) are submitted to different rules; such rights are seen to establish a relationship between two (or more) people by creating obligations. They are called rights in personam (or obligational rights).“⁵¹ It is important to emphasize that the case with the illegal seizure of all possible property took place in Estonia in 2019. And until such a thing can be done in principle, property rights in

⁴⁹ Marriage contract: current problems and ways to solve them
http://savostianova.ru/articles/brachnyy_dogovor__aktualnye_/, November 1, 2010

⁵⁰ Sörgjerd, C. Reconstructing Marriage. The Legal Status of Relationships in a Changing Society. Cambridge, Intersentia 2012.

⁵¹ "Property" rights and the ways of protecting entitlements – an Interdisciplinary approach. Journal of Contemporary Economics, 2015

Estonia are far from fully protected, even to a minimum. Considering the number of divorces registered over the past year, we can say that it is worth thinking about this and influencing the fact that a lot to change the provisions in the marriage contract, in terms of protection from such cases, so that the system itself becomes much more integral. More practical value and efficiency need to be brought into the new marriage contract system. In essence, it should be not only a regulator of property relations, which it is now mainly, but also an auxiliary means for the protection of property rights, having issued which, a person would understand why he is doing this, what purpose he pursues and what he has personal reasons and fears that he is wary of and wants to protect himself. Obviously, a marriage contract does not stop people from getting a divorce, no matter how many conditions are written in the document, but it helps to determine their true goals and desires, to understand whether he really needs to enter into a marriage relationship, if for this he needs not only to register a marriage, but also to sign a marriage contract with certain conditions, as well as the advantages and disadvantages that are meant by this.

2.1. What should be changed in the marriage contract regarding the property relations of the spouses, implying in itself more protection than at the moment?

In any marriage, any difficulties can occur and there is no guarantee of the good faith of the spouse, if he suddenly deems it appropriate in this situation, for example, "empty bank accounts, increase debts, and perhaps even sell a house or other family property.

And if it so happened that they were indeed deleted and, perhaps, wasted unwisely, it may be too late. It's best to play it safe and make sure that doesn't happen,"⁵² having drawn up a prenuptial agreement, which will imply serious protection of property rights and the above actions will simply be impossible for implementation. It is for this reason that it is necessary to supplement the marriage contract with such provisions that will accordingly imply protection of just this nature. Protection, which would be like insurance, like an airbag, which is necessary for each person individually. Then, for the current situation, it will be necessary to undertake as little time and effort as possible in order, in principle, to exclude the unwanted outcome of events. In any case, we live in a time in which it is very dangerous to be without insurance, in this case property.

⁵² Protecting your property in divorce or separation. Journal: Legal advice
http://www.hmbsolicitors.co.uk/uploads/documents/index.cfm?fuseaction=retrieve&doc_id=1557, December, 2013

Today, a marriage contract cannot fully protect and safeguard, therefore, the level of formalized marriage contracts in Estonia is extremely low. However, when people are faced with situations that they simply could not foresee, it may be too late. In the future, it is necessary to transform the marriage contract into something more, into something that can provide a guarantee of protection against dishonesty, tricks and deception.

Therefore, before getting married or being married, you need to understand “protecting property during divorce is a key goal for many people who are going through or thinking about divorce. Some are concerned about the consequences of the family home not being in their name and about where they and the children might live. Others own a portfolio of rental properties and have held a portion of the property in their spouse's name for tax purposes, and are now concerned with preserving the value and tenants of that portfolio during turbulent times. Indeed, this is a problem that concerns almost everyone, since in almost every case, real estate - emotionally or financially - is one of the most valuable family assets.”⁵³

⁵³ How Can I Protect My Properties During Divorce? Journal: StephensScown <https://www.stephens-scown.co.uk/family/finances-following-divorce-or-separation/how-can-i-protect-my-properties-during-divorce/> October 30, 2019

3. FINAL RECOMMENDATIONS FOR THE PROTECTION OF PROPERTY RIGHTS OF WOMEN AND CHILDREN THROUGH A MARRIAGE CONTRACT

The most important thing for the protection of property rights today is the question of how to protect property rights, that is, how to protect your property from an ill-wisher. First of all, you need to understand that any person can become an ill-wisher, especially if it is a spouse. Therefore, in order to protect himself from the loss of any property or all property in general, a person living in the modern world must know certain methods of protection that are available today, following which he can protect himself. In the described case, it was told about a woman who lost all her legal property and was left alone with a child in a rented apartment. This result suggests that she unconsciously committed a number of erroneous actions. Referring to the fact that the modern world is unpredictable, as well as the people living in it, this is one of the reasons why it is necessary to change the means of protection for more in-depth, more serious ones, which take into account a larger volume of possible negative events. In the event that a marriage contract had been concluded, then this situation would simply not have arisen. Therefore, the first recommendation is to conclude a marriage contract as a guarantee of one's protection.

The second, no less important mistake is consent to a later division of property than the divorce itself took place. This error led to such a reaction from the spouse six months after the divorce. The process of the division of property was extremely delayed to such an extent that the spouse felt that he had every right (quite possibly even as revenge) to dispose of the jointly acquired property that was not divided. The fact that the division of property was delayed played into his hands. Therefore, the second recommendation for the protection of property is not to delay its section. In addition to the fact that the spouse damaged not only the ex-wife, but also his children, leaving them homeless. According to the author, this is a very serious reason to renew the marriage contract by introducing into it a provision on the obligations of the spouse after divorce, if she does not have the opportunity to provide both herself and her children in full, so that they are in nothing did not need.

A provision is needed that will indicate the obligation of the ex-spouse to pay for the needs of the children by making a financial contribution, in addition to the alimony obligations.

Do everything possible to maintain a decent standard of living for both the mother (if necessary) and the child. It is necessary to discuss such moments in advance so that, faced with a divorce situation, it is easy and without difficulties to solve the issue of property, finances, alimony, and other payments to ensure a decent standard of living for the family that the person has decided to leave, but at the same time continues to provide all kinds of support and help.

Conclusion

Features and protection of property relations between spouses and contractual regulation of the marriage contract in the legislation of European states

In modern life, property relations between spouses have begun to play a significant role. It is the material side of family life that becomes one of the main factors that determine the role, rights and responsibilities of each of the spouses in everyday life. Property disputes are often the main cause of family breakdown. This is confirmed by judicial practice, the analysis of which shows that from year to year the number of disputes related to the division of spouses' property acquired in marriage is increasing.

Spouses are given a wide choice in determining the conditions of property relations, but this choice also has certain limitations.

Why not try to avoid the humiliating separation of things and maintain self-esteem, if there is a completely civilized way of resolving the conflict - drawing up a marriage contract.

The purpose of this study was to analyze insufficiently protected property rights and what can be done with these, as well as to find out whether a marriage contract is mandatory today and why, thereby increasing its importance, relevance and need for it among people in the modern world. The study showed that, in general, people need to modernize the part of family law that is associated with the marriage contract, namely the part that relates to the protection of property. An analysis was also carried out of some countries located in Europe, as well as another country, which was taken for visible contrast, so that it was more noticeable how the types of marriage contracts and agreements differ from each other. Even if we do not take America into account, but talk about comparing European states as a whole, in any case there will be such differences and features that are in one country, but absent in another. And even, as already mentioned, different laws may apply in different parts of the same country. Since in Spain, on the territory of the city of Catalonia, if the spouses do not choose the property regime, then automatically they will not have the usual regime of common property, but the regime of separate property. In principle, it always seems that legal issues in Europe are more or less similar in European countries to each other, but, as it turned out, the conclusion of an agreement on the territory of the Spanish state is a specific matter, and each individual case requires a separate study of all the nuances and small details. However, do not forget that neither a marriage contract nor anything else can guarantee a happy marriage. And the marriage contract is only an auxiliary

tool, the purpose of which is to regulate the property rights of citizens of various social status, to whom the marriage contract provides assistance, where spouses can clearly see the boundaries of the rights to any matrimonial property. Also, in the course of this work, the following methods were used, in particular, analysis and synthesis, since throughout the work, comparisons, analogies and the identification of unidentified problems are needed. And also during the study, the collection of information from several countries was used and the method of interpretation was used, that is, the clarification of some important terms. The main hypothesis of this study was the following: Women feel the need for a contract that would properly regulate property rights, also affecting the rights and interests of children. Obviously, a prenuptial agreement requires improvement in terms of protecting property relations, and this is a very urgent problem today, because this area of law must cover and solve a much larger volume of various legal problems associated with a prenuptial contract, as well as increase its effectiveness for people of any social and economic status. An integrated approach is needed to this issue, taking into account the problems that still occur today and pose a threat to the protection of property.

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