

Prenuptial Agreement To Secure Marital Properties

In western countries, many engaged couples are open to enter into a prenuptial agreement. On contrary, people from eastern countries, particularly Indonesia, are considered prenuptial agreement as a lack of trust in a relationship. Ironically, people would tend to cancel their engagement in many cases due to this issue.

Indonesian marriage system refers to Law Number 1 of 1974 on Marriage (“**Indonesian Marriage Law**”). As defined in Article 35 of the Indonesian Marriage Law, marital property consists of all of the property obtained by the spouses, whether individually or jointly, during their marriage (also called joint property), excluding the personal property, grants and inheritance of the spouses.

All spouses’ properties and assets shall not be considered as marital property if the spouses enter into a Prenuptial Agreement (*Perjanjian Perkawinan*). Prenuptial agreement shall basically govern distribution of husband or wife’s properties and liabilities. In case of divorce or death of spouse, they can clearly identify their respective properties and liabilities.

Some stipulations on prenuptial agreement that should be taken into account is provided under Article 29 of the Indonesian Marriage Law:

1. The agreement should be ratified by Civil Registration Office (*Kantor Catatan Sipil*) and shall also be applied to any relevant third parties.
2. The agreement cannot be ratified if any provisions are contradictory to law, religion and morality.
3. The agreement shall become effective on the date of marriage registration and remain valid during the marriage.
4. During the marriage, the agreement cannot be changed unless otherwise agreed by both parties and it does not harm third parties.

Prenuptial agreement shall generally governs the following matters:

1. Separation of properties, assets and debts of each spouse. They should be clearly mentioned which assets will remain individual property and which will be shared. Further, management of assets of each spouse and household bills during the marriage.

LEGAL ARTICLE



Further information please contact:

Kiki Setiawan
Managing Partner

Kiki Setiawan and Partners
Palma One Building, 5th Floor #500
Jalan H.R. Rasuna Said Kav. X-2 No. 4
Jakarta 12950 - Indonesia

M : +62 812 9691 3777
T : +62 21 3972 2042
E : kiki.setiawan@ksplaw.co.id
W : www.ksplaw.co.id

2. Potential issues such as rights and obligations of each spouse during marriage, jobs, prohibition on doing domestic violence (*Kekerasan Dalam Rumah Tangga - KDRT*) and/or no fusion of assets and incomes.
3. Liabilities on legitimate child of the marriage for daily needs and education as well as child custody in case of divorce.

Article 29(1) of the Indonesian Marriage Law initially provides that prenuptial agreement can only be made 'before or on the date of marriage'. This article was revised by Constitutional Court through its verdict *Putusan Mahkamah Konstitusi Nomor 69/PUU-XIII/2015 Tahun 2015* which basically allow prenuptial agreement is made 'during the marriage period'. It is also known as a Postnuptial Agreement.

This verdict has significant impact on the land ownership held by Indonesian who has married with foreigner, while she has not entered into a prenuptial agreement. It improves protection of land ownership of Indonesian land owner as mandated by Indonesian Agrarian Basic Law that adhere to the principle of 'prohibition on land exile (*gronds verponding verbod*)'. It means that any land in Indonesian territory is prohibited to be possessed by non-Indonesian nationals.

In the event of any Indonesian loss his nationality due to marriage, inheritance or any other way, thus he should transfer his land ownership to any other third party, otherwise it will be taken over by the Indonesian government. Therefore, prenuptial agreement plays important role for different nationality spouse to secure and manage their immovable assets in Indonesia.

Besides the foregoing, there are actually some other benefits of entering into a prenuptial or postnuptial agreement such as controlling consumptive behavior of spouse to stabilize family's financial life. Also, anticipating bad intention to acquire separate property after a divorce should be carefully considered, particularly for transnational marriage.

If one of the spouses is responsible for the debt, it shall only affect his/her assets, instead of marital property. Having the agreement in place, female spouse is allowed to establish a limited liability company and make cooperation with her husband because both spouses are not considered as an affiliated parties and no joint assets and interests.

Prenuptial agreement somehow demonstrates lack of commitment to the marriage, while mitigating potential legal and financial risk would be the main factor to have it in place by engaged couples on the other hand.