The Invisible Pre-Nuptial Agreement

In the previous article, we discussed how a prenuptial agreement could help keep certain properties exclusive to one spouse for purposes of reducing the possibility of future conflict.

Now suppose acouple opts to get married without a prenuptial agreement, will their marriage be automatically governed by the regime of absolute community of properties without exception?

No. Outside of filing a case in court to terminate the property regime, there are certain scenarios where the law affords a spouse exclusivity of ownership similar to that of an actual pre-nuptial agreement.

One such scenario is an item that's becoming rather common place.

It is not rare these days to see persons who either have become widows or widowers or have had failed first marriages which were annulled enter into a second marriage. If that previous marriage bore legitimate *descendants*, then the situation triggers the intervention of the law in so far as the property regime involving the subsequent marriage is concerned.

Article 92 of the Family Code decrees that properties acquired before the second marriage – including their fruits and income – exclusively belong to the spouse that owns them. But this rule will only apply if:1) there was a first marriage that had been legally terminated; and 2) there is a legitimate *descendant* from that previous marriage. When these two elements are present, a separation of property is mandated in so far as that spouse and her properties are concerned even without a pre-nuptial agreement.

Let's illustrate with examples of when this provision will not apply:

If a man has a live-in relationship that bore children and later marries another woman who is not the mother of his children, the rule will not apply since there is no first marriage to speak of.

If a married man with children commits bigamy by remarrying, the rule will also not apply because the first marriage has not yet been terminated.

If the marriage of a woman who has no child is annulled and she later remarries, the rule will also not apply because she does not have a legitimate descendant.

Suppose she has a child out of wedlock before she entered into her first marriage, which was subsequently annulled, the rule cannot also apply when she remarries since her child is illegitimate.

Again, the rule will only apply when the two elements mentioned above are present.

However, the same benefit is not extended to the other spouse in the absence of the two elements. This means that as far as the spouse with legitimate descendants form a first marriage is concerned, her properties would remain exclusive to her upon entering into marriage. But as far as the other spouse is concerned, all his properties would form part of the community property of the spouses upon their marital union.

It should also be noted that the *exclusivity* the law contemplates extends only to properties acquired *before* the second marriage. Any other property acquired during the second marriage necessarily becomes community property in the absence of a prenuptial agreement.

The intent of the law seems to be to prevent the dilution of what the legitimate descendants from a previous marriage would inherit from their parents should the parents remarry.