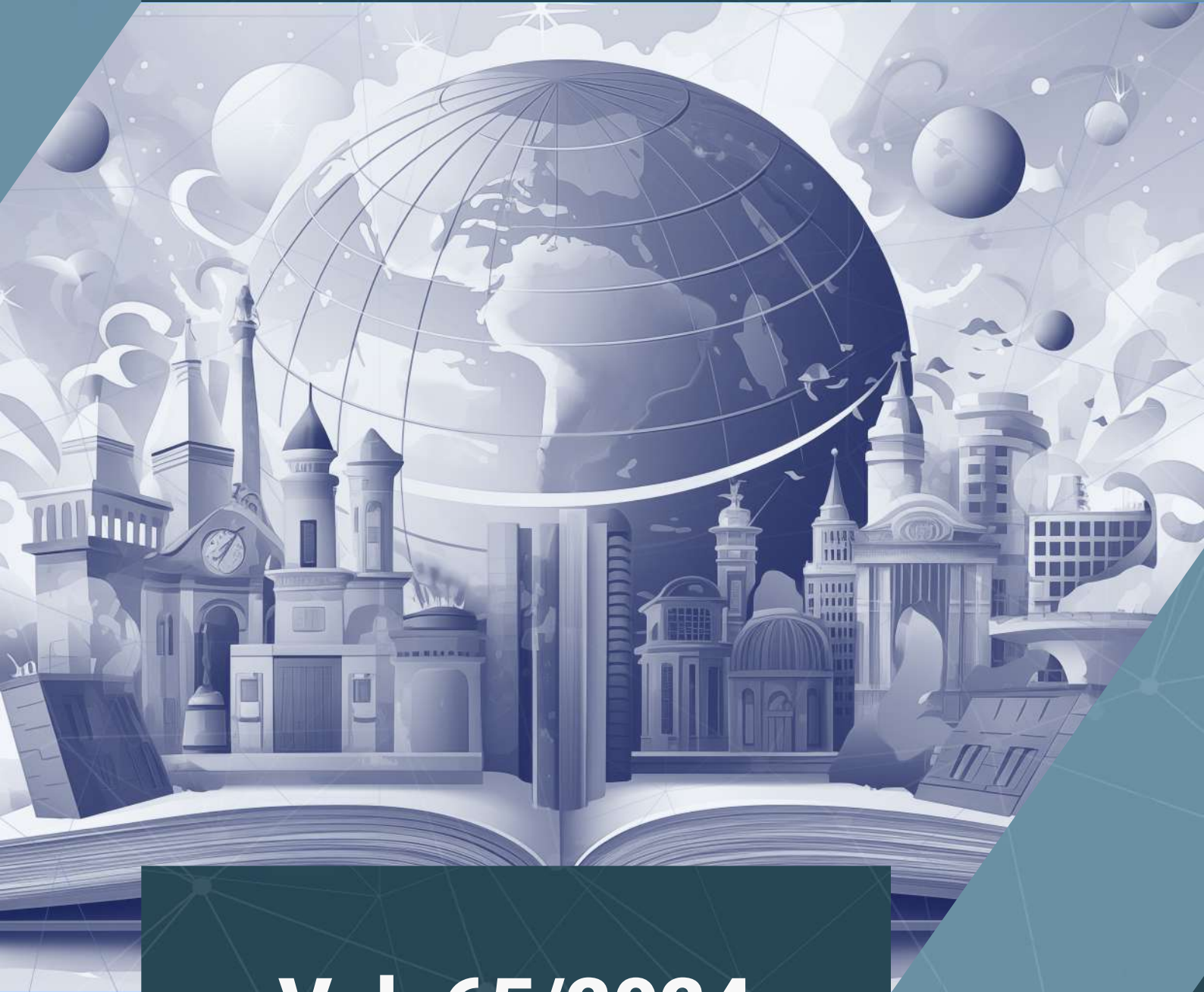




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COMMON PROPERTY IN THE PERSPECTIVE OF MARRIAGE LAW IN INDONESIA

Isye Junita Melo^{1*} Feibe Engeline Pijoh² Novita Marven Mongdong³ Roof Pajow⁴

* Corresponding author : isyemelo@unima.ac.id

¹²³⁴ Faculty of Social Sciences, Manado State University

ABSTRACT

Common property is the property acquired throughout the marriage, from marriage entered into to marriage termination or divorce, death, or court decision. The settlement of the common property is often complicated and sometimes difficult to solve. This is because each side argues that they are the most contributing to the acquisition of the common wealth among the others. The results of the study show that if there is an agreement in the marriage then the property and common property of both parties will have a permanent legal certainty if viewed from a legal perspective. The settlement of common wealth is usually done by separation of the property of the two parties. The settlement of matters relating to the separation of joint property through the court may also be proposed through the submission of a claim by the party in the dispute or mediator through a lawyer. And an application for separation of property cannot be filed at the same time as a divorce claim.

Key Words: *Common wealth, Marriage law*

1. INTRODUCTION

All humans have various needs. In an effort to fulfil these needs, humans interact with each other and build communication and harmonious relationships with one another. Marriage is one form of these human needs. Marriage is the most sacred event experienced by every human being, marriage means a contract that legalises the association between a man and a woman and creates rights and obligations between the two.

The human need for marriage is not due solely to biological fulfilment, but has many meanings. Through marriage, a family will be realised that will give birth to offspring. In a marriage, there is often what is called a marriage agreement. Making a marriage agreement for couples who are getting married is not a taboo in this day and age. A marriage agreement is a form of agreement made between one party and another party which usually regulates, among others, the separation of assets. This marital agreement is regulated in Article 29 paragraph (1) of Law Number 1 Year 1974 concerning Marriage (Marriage Law) jo. Constitutional Court Decision Number 69/PUU-XIII/2015 (Constitutional Court Decision 69/2015).

A marital agreement is not mandatory or optional. However, for couples who may be getting married soon,

it is better to consider entering into a marriage agreement with several considerations. basically, there are three conditions that are considered necessary to enter into a marriage agreement.

Firstly, mixed marriages. Under Indonesian regulations, foreign nationals cannot hold land ownership rights. So that in a mixed marriage, separation of assets is needed so that all forms of property, especially land ownership, can still be owned in the name of a spouse who is registered as an Indonesian citizen (WNI). If there is no separation of assets through a marriage agreement, then the status of land ownership is no longer a property right, but only a right of use that has a period of 30 years.

Second, married couples who have a business or business. It is important to separate joint assets if the husband/wife has a business or business. This aims to protect the couple's assets if one day the business goes bankrupt or bankruptcy.

And thirdly, polygamy. Marital agreements become important during polygamy where the status of property ownership becomes clear. If the husband decides to engage in polygamy without a separation of property, there will be a mixture of property. This often triggers disputes when divorce occurs.

A marriage agreement is a deviation from the arrangement of husband and wife's property based on

applicable law. With the implementation of marriage, there will be legal certainty for something that has been promised both from the husband and wife to carry out a legal action.

Problems in marriage agreements that often occur are problems with marriage registration which will have an impact on the property separation agreement of both parties. In Article 29 of Law Number 1 Year 1974 concerning Marriage (hereinafter referred to as the Marriage Law), a marriage agreement is formed before, or during marriage. Marriage is one of the ways to build a household life and to have a lineage. In marriage, of course, there is property and joint property. Property in marriage is a tangible manifestation of the results of hard work in the household as capital for family survival obtained by husband and wife, which is called joint property.

The enactment of Law No. 16 of 2019 Concerning the Amendment to Law No. 1 of 1974 Concerning Marriage aims to improve the regulation in the field of family law. Article 119 of the Civil Code formulates that since a marriage is entered into, the applicable law will form a perfect property between the two parties, as long as there is no other stipulation in the agreement. Article 35 paragraph (1) of the Marriage Law confirms that the wealth obtained during marriage will form joint property. Then continued in paragraph (2) which formulates the property brought by each party obtained as inheritance or otherwise, which is under the control of each party concerned. Property in marriage is divided into three types, namely joint property, inherited property and also acquired property. The Marriage Law which contains the legal status of marital property, states that the property that is the property of each party has the same legal status. The regulation of marital agreements in the Marriage Law usually in practice can cause problems if each party does not carry out their previous obligations.

Theoretical studies concerning the settlement of joint property seem very easy to implement, but in reality after the two parties divorce, in addition to the issue of the right to care for children, complicated and often unresolved problems are regarding the separation of joint property. Another thing that most often happens in the community when one of the parties dies and does not have children from their marriage, then marries a foreign national, often the heirs of one of the parties feel unfair and even disagree to give their share of inheritance even though there is strong evidence that shows the owner of the joint property during the marriage. Although there has been a decision from the Court regarding how the status of joint property to be divided to each party, in reality it is not immediately implemented.

Based on the legal facts that have been explained and have occurred in people's lives, there are various kinds of problems related to the division of joint property which are seen as very easy but in reality are

complicated to resolve so that conflicts often occur within the family. This paper tries to bring us to an understanding of joint property in the perspective of marriage law in Indonesia. The problems in this paper are How is the regulation of joint property in marriage in Indonesia? and How is the settlement of the problem of joint property in the marriage agreement?

2. RESEARCH METHOD.

The type of research used is normative legal research, where this legal research is conducted based on a statutory approach, which examines written law from various aspects and then can be used as a reference in the application of law and its implementation. This type of research is descriptive research. The data used is sourced from secondary data, namely: laws and regulations, and other library materials relevant to the research. Data collection techniques are carried out by means of document studies and after the data is collected, data analysis is then carried out.

3. RESULTS AND DISCUSSION.

A. Joint Property Arrangements under Indonesian Law

In the Indonesian legal system, the arrangement of joint property in marriage is a crucial aspect and often requires special attention. This joint property refers to property acquired during the marriage period and is generally considered as joint property between husband and wife.

The regulation of joint property in Indonesia is regulated in several laws and regulations, the main ones being the Civil Code (abbreviated as KUHPerdata) and Law Number 1 Year 1974 on Marriage. Under these laws, there are two main systems of property arrangements in marriage:

1) Joint Property

This is the property obtained during the marriage which is jointly owned by husband and wife.

2) Personal Property

Is property acquired by each party before marriage or acquired during marriage through inheritance or grants that are clearly declared as personal property.

1. Joint Property According to the Civil Code

According to Article 35 of the Civil Code, joint property includes all property obtained during the marriage period, except those declared as personal property. This includes income, goods, and property obtained from the labour or efforts of both parties. In other words, any goods or income obtained during the marriage become part of the joint property, unless there is a prenuptial agreement stating otherwise.

To further regulate joint property, married couples can make a marriage agreement. This agreement must be made in writing and before a notary. This agreement may include provisions regarding:

- Division of Property, regulating how property will be divided in the event of divorce or death.
- Separation of Assets, determining what types of assets remain private property and not joint property.
- Property Management, rules regarding how the joint property will be managed during the marriage period.

This marital agreement provides more flexibility for couples to organise and manage their assets according to their personal needs and agreements. In the event of divorce, the division of joint property is regulated in Article 37 of the Civil Code. Generally, joint property will be divided equally between husband and wife. However, if there is a marital agreement that provides for a different division of property, then the agreement will be followed. The court will decide how this division is done based on the facts at hand and the applicable legal provisions.

2. Joint Property in the Perspective of Islamic Law

For couples who adhere to Islamic law, the arrangement of joint property is also regulated in the applicable Islamic law. Under Islamic law, there are provisions regarding joint property and personal property that are regulated in the books of fiqh. Generally, in the context of Islamic law, property acquired during the marriage period is considered as joint property unless otherwise stated.

1) Regarding joint property in Islam, it should be noted that in classical Islamic fiqh there is no known joint property, even if there is a divorce, it must be seen who owns the property. Furthermore, this is different from the fiqh applicable in Indonesia, which is known as Islamic law resulting from the *ijtihad* of the Indonesian people, namely the Marriage Law and its amendments and the Compilation of Islamic Law (KHI).

2) In these two laws and regulations in force in Indonesia, the existence of joint property is known. The provisions of joint property in the Marriage Law are regulated in Article 35 of the Marriage Law. In this article, it is explained that property in marriage (household) is divided into:

1. Assets obtained during marriage which become "joint property"; and
2. The inherited assets of each husband and wife, whether the assets were obtained before marriage or during marriage which were obtained by each as personal assets, for example, gifts or inheritances. Personal property is fully under the control of each as long as the parties do not determine otherwise.

Then, joint property in the Compilation of Islamic Law or KHI is regulated in Article 85 to Article 97 KHI, which explains that marital property can be divided into:

- 1) Husband's inherited property, namely the property brought by the husband since before the marriage;
- 2) The wife's inherited property, which is the property that she has brought since before the marriage;
- 3) Joint assets of husband and wife, namely property obtained during marriage which becomes joint property of husband and wife;
- 4) Assets resulting from gifts, grants, inheritance, and charity of the husband, which is property obtained as a gift or inheritance;
- 5) Property resulting from gifts, grants, inheritance, and charity of the wife, namely property obtained as a gift or inheritance.

Property in a marriage is actually a capital in the family to support the development of the family. Joint assets and assets are the main capital in a family life that must be maintained. Property will be formed into joint property as long as the marriage is held, unless the parties determine to separate their property. Article 35 of Law No.1 of 1974 concerning Marriage formulates that property in any form obtained during marriage will be formed into joint property. In reality, sometimes the parties to the marriage do not think about the status of the assets and assets obtained by each party after the marriage, because no party wants their marriage to be interrupted and lead to divorce. Law No. 1 of 1974 concerning Marriage and the Civil Code only regulate the definition of property in a marriage, but do not provide a clear and detailed explanation of this matter. If the meaning of Article 35 is understood, which stipulates that property in marriage consists of joint property and inherited property, then the husband and wife in the marriage can manage their property and joint property separately after entering into a marriage bond. Then the consequence is that each husband or wife has the right to manage their own property.

In the separation of joint property, both parties sometimes have to give up some of their rights to reach a consensus agreement. Then to finance household or family needs is usually the obligation of the husband or both parties who bear together. The division of property and joint property is delegated in a marriage agreement specifically made to regulate the joint property. Based on these provisions, a marriage agreement can be drawn up so that any grouping of property or joint property according to the applicable law is eliminated.

The legal regulations applied in Indonesia which contain that any property obtained during the marriage can form joint property without excluding or separating the party who earns a living or gets the property and who is registered, and as long as the property is not an inherited property in the ownership of the joint property. When viewed from the Civil Code, as well as the Marriage Law, it does not seem to be discussed how joint property on behalf of a person, except for the management of

joint property formed during marriage. Article 164 of the Civil Code stipulates that if promised something from the income of both parties, then regarding the property as a whole and the unity of profit and loss will not be united.

Based on these provisions, the conclusion is that after the existence of an agreement in marriage, the property and joint property of the two parties will have permanent legal certainty when viewed from a legal perspective. Both parties must obey and respect all the contents of the marriage agreement because something regarding the separation of assets that are clearly separated, as well as other assets arising after the agreement remains separate from one another so that nothing has the status of joint property. If in the event of termination of the relationship or divorce, the separation of joint property can be resolved using family methods. In the separation of joint property based on applicable law is not an easy thing, because in principle in the separation of property and joint property is something that can be achieved by deliberation based on the principles of faith, justice, balance and others.

A. Settlement of Joint Property Issues in the Marriage Agreement.

In relation to the marriage agreement, Article 29 paragraph (1) of the Marriage Law in conjunction with the Constitutional Court Decision 69/2015 (p. 156) explains that at the time, before or during marriage, the two parties by mutual consent may enter into a written agreement legalised by a marriage registrar or notary, after which the contents shall also apply to third parties as long as the third party is involved. The Constitutional Court Decision 69/2015 has expanded the meaning of a marriage agreement so that a marriage agreement is no longer interpreted only as an agreement made before marriage (prenuptial agreement) or what is commonly known as a premarital agreement; but can also be made during the marriage bond (postnuptial agreement) or what is also known as a postnuptial agreement.

To further regulate joint property, married couples can make a marriage agreement. This agreement must be made in writing and before a notary. This agreement may include provisions regarding:

- Division of Property: Set out how the property will be divided in the event of divorce or death.
- Separation of Property: Determines what types of assets remain private property and not joint property.
- Property Management: Rules regarding how the joint property will be managed during the marriage.

Joint property is wealth that is obtained during a marriage. Against joint property both parties can act from each party. Joint property in marriage (gonogini) is regulated in positive law, both the Marriage Law and the Civil Code. Thus, all matters relating to joint property need to be based on these two positive legal

sources. For example, if a married couple turns out to be divorced, the division of their joint property must be clear and based on the applicable provisions in the positive law.

The legal protection of joint property in a marriage agreement is valid at the time of the marriage. Settlement of joint property is usually done by separating property. Sometimes the settlement of joint property raises several conflicts between the parties concerned. The implementation of the division of joint property is carried out because there are various factors, including the obligations between the two parties that are not implemented properly, causing problems and also the worst impact, namely the termination of marital relations.

The best settlement of cases regarding the division of joint property is carried out in a peaceful or familial manner, but sometimes in this way there is often a conflict between the parties in which one party objects to the division of his property. Then the process of resolving disputes regarding the separation of joint property in a marriage agreement due to divorce has two possibilities, with a lawsuit filed after a divorce verdict that has legal certainty or a lawsuit for joint property proposed by the parties with a divorce lawsuit. Both parties must file separate lawsuits when after the divorce judgement is finalised by the court. The petition for separation of joint property cannot be filed at the same time as the divorce petition.

Settlement of issues regarding the separation of joint property through the court, can also be proposed through the filing of a lawsuit by the litigants themselves or through the intermediation of legal counsel. The investigation of the separation of joint property can be carried out after examining the divorce lawsuit. If the divorce lawsuit is not accepted by the court, the separation of joint property will also not be accepted by the court. Because the separation of joint property refers to that. Except if it is for the separation of property, which between the parties is worried that it can eliminate existing evidence and harm the other party.

The legal provisions regarding joint property as a result of the two parties divorcing are using the law that applies in society. So that in the marriage agreement property is an object in the marriage agreement. And then in terms of the state of joint property after divorce, in the judge's decision that the amount of shares for each party widow or widower in the separation of property that has been broken up due to divorce is half of the joint property is the right of each party as long as there is no other agreement that has been determined. And in general, disputes regarding joint property often occur because one party does not want to give some of his property to the other party, so that the other party will consider very disadvantaged in this case. So it can be concluded that if there has been a separation of property or joint property, each party must obey the contents of

the agreement that has been made, because something related to the division of rights is clearly separated, then the status of property in the marriage agreement will no longer exist.

As quoted from Mesti Sinaga, Asih Kirana, and Ahmad Febrian There are six strategic tips regarding the division of joint property, as follows:

a. As a first step, all family assets need to be inventoried and separated which are joint assets (gono-gini), inherited assets, and acquired assets. To separate these assets, the issue of how the spouses keep their securities becomes very important. With official documents, such as asset sale and purchase letters, it will be easy to know when the assets were owned, whether before or after the marriage contract. Once it is known which assets are acquired and inherited assets, these two types of assets are sufficiently set aside because they are the property of each spouse. Only the joint assets will then be divided and calculated.

b. After it is known which assets are gono-gini assets, then all assets need to be recorded completely, which includes movable assets, such as cars, motorbikes, or other vehicles, to immovable assets, such as land, buildings, rice fields, gardens, business premises, or other property assets in the form of jewellery, paintings, antique collections, household furniture, and others.

c. Inventory your insurance and investment assets, especially those in the form of financial portfolios, which include savings, deposits, foreign currency accounts at banks, bonds, mutual funds, or other investments. Why is it important to pay attention to investments or bank accounts? Because this investment is very vulnerable to embezzlement by one of the spouses. A husband or wife can open an account or invest under their own identity without their partner knowing. Because the confidentiality guarantee is so high, the bank will find it difficult to trace the account. In this investment matter, it is also necessary to determine the time of disbursement and distribution because the value of the investment may increase or decrease. After all assets in the gono-gini property are determined, then perform the calculation steps.

d. After the assets are calculated, then register and calculate all family debts. In this registration process, do not rush to choose a house or car into the list that is expected to be part of the gono-gini property. This is because, if the house loan has not been paid off when the divorce process occurs, the post-divorce financial condition will become moribund. Do not let after the divorce, the existing income is not enough to pay the instalments and meet other living needs. Actually, the determination of the mortgage instalment is usually calculated based on the combined income of husband and wife (joint income).

e. If it turns out that one spouse insists on controlling the credit asset, the other spouse should approach the bank or company that provided the credit. This is because, in

general, before disbursing a loan, creditors ask the husband or wife to guarantee the credit given to the other spouse. Therefore, one of the aggrieved spouses may ask the bank to remove the personal guarantee on the loan. If this is not done, each spouse remains responsible for the loan.

f. After all the assets have been deducted from the debts, it is left to be divided in half, with the portion agreed by each party. That way, the gono-gini property has been calculated and divided.

This method helps us to determine and calculate which is each party's share in the joint property. This step will be easier to do if a married couple who is or has been divorced has proof of a marriage agreement that determines which property is joint, inherited property, and acquired property. It would be great if all written evidence of the sale and purchase of goods that they have done during the marriage is still neatly stored, so that when the property must be distributed it will be clear which part is for each spouse.

Conclusion.

Joint property is formed at the time of a marriage agreement. The Marriage Law and Civil Code only contain the definition of property in a marriage, but do not provide a detailed explanation. In the separation of joint property, both parties sometimes have to give up some of their rights to reach a consensual agreement. When viewed from the Civil Code, and/or the Marriage Law, it does not seem to be discussed how joint property in the name of a person, except for the management of joint property formed during marriage. Both parties must obey and respect all the contents of the marriage agreement because something regarding the separation of assets is clearly separated, so there is nothing that has the status of joint property. Settlement of joint assets is usually carried out by separating property. In the implementation of the division of joint property, it is carried out because there are various factors. The best settlement of cases regarding the division of joint property is done in a family manner, but sometimes it often causes conflict between the two parties. Settlement of problems regarding the separation of joint property through court channels, can also be proposed by filing a lawsuit by the litigants themselves or intermediaries through lawyers. An application regarding the separation of joint property cannot be filed at the same time as a divorce lawsuit.

Every prospective candidate and/or married couple in living a married life, should think long term about issues related to what is the status of the parties' inherited and joint assets and the position of the assets obtained by the parties after their marriage, in the event of a divorce or one of the parties dies so that there is no conflict in the future.

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