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Анотація

Боднарчук О. І. Ефективність нормативно-правових актів у сфері захисту прав дітей-сиріт та дітей, позбавлених батьківського піклування. – Стаття.

У статті проаналізовано забезпечення нормативно-правового захисту прав дітей-сиріт та дітей, позбавлених батьківського піклування, в Україні. Окреслено проблеми й напрями вдосконалення законодавства в цій сфері. Висвітлено пропозиції щодо підвищення ефективності застосування нормативно-правового забезпечення захисту прав дітей-сиріт та дітей, позбавлених батьківського піклування.

Ключові слова: діти-сироти та діти, позбавлені батьківського піклування, нормативно-правові акти, соціальний захист, права дитини.

Аннотация

Боднарчук О. И. Эффективность нормативно-правовых актов в сфере защиты прав детей-сирот и детей, лишенных родительской опеки. – Статья.

В статье проанализировано обеспечение нормативно-правовой защиты прав детей-сирот и детей, лишенных родительской опеки, в Украине. Определены проблемы и направления совершенствования законодательства в этой сфере. Освещены предложения по повышению эффективности применения нормативно-правового обеспечения защиты прав детей-сирот и детей, лишенных родительской опеки.

Ключевые слова: дети-сироты и дети, лишенные родительской опеки, нормативно-правовые акты, социальная защита, права ребенка.

Summary

Bodnarchuk O. I. Efficiency of legal acts in the field of protection of orphans and children deprived of parental care. – Article.

The article analyzes provide legal protection of orphans and children deprived of parental care in Ukraine. Outlines the problems and areas of improvement of legislation in this area. Deals with proposals to improve the application of the legal protection of rights of orphans and children deprived of parental care.

Key words: orphans and children deprived of parental care, regulations, social protection, children's rights.

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K. V. Moskalenko

CONTRACTING MINORS IN THE SPHERE OF MUSIC SHOW BUSINESS: WORLD EXPERINCE AND UKRAINIAN CHALLENGES

The number of minors, successfully performing in the sphere of music show business, is growing each year. Super stars, whose success has been recognized worldwide before they turned 18 years old, like Britney Spears, Justin Bieber, Usher etc., become the parties to various contracts, like production, recording, touring contracts etc. However, the legal capacity of minors to enter into such contracts, the risk of their further voidance etc. are not regulated in detail by the national legislation and international treaties.

Some aspects of legal status of minors engaged in the entertainment industry have been researched by Oleksandr Sergejev, Evgeniya Yakubova, Svetlana Kokina and

others, however, some peculiarities of the legal status of performers aged under 18 still have to be analyzed.

This paper is aimed to review the current status of international treaties as well as to analyze domestic regulation and legal framework of protection of minors engaged in music show business industry in Ukraine and other European countries.

Traditionally, children enjoy a special legal status, which is caused by the peculiarities of their psychological and physical status. Article 1 of the Convention on the Rights of the Child [1] defines the child as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”. Pursuant to Article 32 of the mentioned Convention and Principle 9 of Declaration of the Rights of the Child [2] “the child shall be protected against all forms of neglect, cruelty and exploitation... The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development”. Following paragraph 3 of Article 6 of the UNESCO Recommendation [3], Member States are invited to take account of the provisions of the United Nations Declaration of the Rights of the Child, with the object of giving specific consideration to the child artist.

However, it appears that every rule has exception. As in ensues from article 8 of Minimum Age Convention of ILO [4], “after consultation with the organizations of employers and workers concerned, where such exist, the competent authority may, by permits granted in individual cases, allow exceptions to the prohibition of employment or work provided for in article 2 of this Convention, for such purposes as participation in artistic performances. Permits so granted shall limit the number of hours during which and prescribe the conditions in which employment or work is allowed”. In the meantime, article 7 of the same Convention lays down that “national laws or regulations may permit the employment or work of persons of 13 to 15 years of age on light work which is (a) not likely to be harmful to their health or development; and (b) not such as to prejudice their attendance at school, their participation in vocational orientation or training programs approved by the competent authority or their capacity to benefit from the instruction received”. Thus, the children-artists may be employed as performers in case if such work meets the conditions, prescribed in the article 7 of the named Convention. The same provision is contained in the Article 5 of Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work [5].

International legal framework provides us only with general rules of involving minors into artistic performing. Thus, it is necessary to analyze national provisions of legislation. For instance, in accordance with the Civil Code of Ukraine (hereafter – CCU) [6], minors under 14 years old enjoy only partial legal capacity, meaning that they can only conclude petty daily transactions and administer personal non-proprietary intellectual property rights. Therefore, they can not be parties under contracts in the music show business. The contracts, that impose on minors the duties to perform as artists, shall be entered into by their parents or other legal representatives. Pursuant to paragraphs 2–3 of article 221 of the CCU, conclusion of other contracts by minor under 14 years entails mutual restitution. In case if minor under 14 years enters into

contract with the person with full legal capacity, the latter shall return everything gained under such contract to the parents or legal representatives of the legal person and vice versa. The contract signed in such way is recognized as invalid in accordance with the article 221 of the CCU.

Nevertheless, CCU contains the following two rules of legalization of contracts, entered into by minor under 14 years old, which are summarized as follows:

- such contract can be further approved by parents, or by one of them, with whom minor under 14 years old permanently lives, or by other legal representative. The contract is deemed to be approved in case if the named persons have not addressed any complaints to the other party of the contract. Thus, in case if minor under 14 years old has concluded the contract in the sphere of show business, which imposes on him/her the duty to perform as the artist and parents/other legal representatives have not addressed any complaint to the other party of the contract (producer under production contract, recording company under recording contract etc.), it is deemed to be valid;

- such contract can be recognized as valid by the court if any interested party files the court claim. In our opinion, the adverse party of the contract can act in such case as “other interested person”. Therefore, producer under production contract, recording company under recording contract etc. can file the claim to the court with the demand to recognize respective contract as valid.

The minors over 14 years old and under 18 years old enjoy incomplete legal capacity. In accordance with paragraph 1 of article 32 of the CCU, besides the competence of minors under 14, they additionally can dispose in their own discretion of their earnings, scholarship or other income, perform the rights to the results of creative, intellectual activity, protected by the law, be a participant or founder of the legal person, enter into bank deposit agreement. They can enter into other contract only in case of obtaining of prior consent of the parents or other legal representatives. In case of absence of parents or other legal representatives’ consent, such contract can be further approved by them (here the same rules, as approval of the contract, concluded by the minor under 14 years old shall apply). Such contract can be also recognized as invalid by the court, in case if the claim is filed by the interested person. In our opinion, here the parents or other legal representatives can act as “the other interested person”. In case if the court allows the claimed demands, the mutual restitution is applied.

A number of European national pieces of legislation contain provisions establishing a legal exception for minors engaged in the entertainment industry. For example, Austrian Child Labor Law prohibits minors under 15 from working and envisages that children can not be employed in amusement halls, cabarets, bars, sex shops, dance floors, discotheques and the like, or in circus performances. Finnish Child Labor Law provides that minors are entitled to work in artistic or cultural performances given that such performance or event does not endanger the children’s health, development or education and the special permit has been issued by the Labor Council. The French Law contains provisions with a number of detailed procedures for obtaining permits from the prefecture in order to employ children. A Commission of specialists is entitled to make an examination of the minor performer’s contract and can fix the part that can be used by the minor’s legal representatives, while the rest of the earnings is put aside

until minor attains the age of majority. In Ireland the minors can work as performers upon issuing of a specific license, that is given upon examination of the details of the minor's engagement – project, location, contract etc. [7, p. 19–20].

A thorough study of national legislative acts of various countries gives us grounds to conclude that the contractual capacity of minors in the area of music show business is regulated in the most detail in the USA.

In accordance with “the infancy law doctrine”, a minor can disaffirm any contract at any time and, once coming of age, entered into during minority [8, p. 430]. Contracts with minors contain a financial risk: the minor may disaffirm (i.e. repudiate or withdraw their consent to) their agreement. However, even if a minor fraudulently misrepresented his or her age – a common occurrence in the search of employment and a career – this is not sufficient legal ground to enforce a contract or collect damages from minor for breach of contract. The other party bears the entire risk of dealing with the minor. The mentioned has caused a great discourage on investments in training and promoting young artists [9, p. 30]. The minor's act to disaffirm or void an agreement does not have to follow any established form, as typically, written notice of disaffirmance basing on the grounds of minor status is sufficient. Other such acts include making contracts that are inconsistent with the agreement in question or pleading infancy as a defense in an action brought under the contract [9, p. 30–31].

The legislation of the USA contains provisions on ratification of the agreement by the minor after reaching the age of majority. Ratification shall not necessarily be completed in written form. Silence after reaching the age of maturity shall be considered to be sufficient ratification of a concluded contract. In addition, in case if the artist indicates the intent to continue with the agreement after reaching the age of majority – the contract can be also deemed legally ratified [9, p. 31].

The practice of court legalization of contracts, entered into by minor performers is also known in the United Kingdom. The courts may decide that a contract is void, but will not correct a “bad bargain”, nevertheless they may well look at undue restrictive terms and influence. For instance, if a minor wishing to get into the show business signed a long-term agreement, the provisions of which could later be interpreted as going against common sense, then that contract could be voidable. United Kingdom contract law defines “undue influence” as taking place when people in position of trust exert influence in their relationship purely to their own interest or to the detriment of the person whose trust they hold. This kind of formulation could be said by producers to introduce legal uncertainty into the relationship with the young performer, but it does, of course, represent a way of protecting the minor [7, p. 26].

The practice of legalization of agreements in the area of entertainment has found its widespread also in the USA. For instance, California and Tennessee were the first states having created laws aimed to make companies less reluctant to enter into business agreements with the artists who are minors, and at the same time, protect the earnings of the artists until they turn eighteen [10, p. 55]. The first law in the area of protection of minors-performers, has been Coogan's Law, adopted in California in 1939 after consideration of Jackie Coogan's case, child actor, whose mother has spent nearly all his earnings [8, p. 433]. After that in 2000 the California legislature amended

Coogan's law, with the new act resulting in a number of positive changes in managing of minor's finances [8, p. 437]. A minimum of 15% of the minor's gross earnings are to be set aside in a trust monitored by the court; the child is entitled to his own representation in the court proceedings; and since seeking court approval is mandatory all child starts will be covered by the new amendment [8, p. 437].

Tennessee's law is called the Tennessee Protection of Minor Performers Act, which comes from the Tennessee Code Annotated Books under Title 50, permits a minor artist to contract with an individual or company and be bound to the agreement. The law, however, requires the contract to be approved by the judge, who will then regularly monitor the effects of the agreement on the career of the minor. It also requires that contracts created under this law provide a creation of trust account, which holds a minimum of 15% of the earnings of the minor until he or she turns eighteen [10, p. 55]. Similarly, at present moment, in the State of California the trust withholding requirement is 25% [10, p. 55].

In comparison with the above, the State of New York has provided a statutory method of ensuring that the contracts in the area of entertainment cannot be void on the grounds of infancy. Record contracts as well as agreements for managerial and agency services are subject for court review and approval. There are three basic requirements taken into account by the court:

- the contract must be fair to the minor;
- the term may not extend beyond statutory limits;
- the minor's parents or guardians must consent.

A contract with a minor can not be approved by the court if its term, including any extension by option or otherwise, extends beyond three years from the date of the agreement. However, if the court finds that the minor is represented by qualified attorney experienced in entertainment law and practice, it may approve a term as long as seven years. Provisions other than contract term (for example, depositing and holding earnings in a trust account for the benefit of the minor) may be approved by the court if they are found to be reasonable [9, p. 31].

Profound analysis of national and international legislation regarding the legal capacity of minor performers can give us grounds to conclude on the following:

1. International treaties and EU Directives in particular on protection of minor performers lay down general rules of employing minor entertainers in the sphere of music show business. They can conclude the contracts in the sphere of show business, if such contracts do not contradict to the general provisions on children employment, envisaged in the international legal acts.

2. While considering the cases on legalization of the contracts, concluded with minors, it would be rational if Ukrainian courts take into attention the following criteria: consent of the parents or legal representatives of minor entertainer, employment should not prejudice minor's health or education, or interfere with minor's physical, mental or moral development and the fairness of the provision of the contract for the minor in a whole.

3. French and the USA's practice on keeping part of the minor's income in trust can be considered by Ukrainian national legislator, which will help to bring Ukrainian legislation in line with the European and other international standards. We think that

the Ukrainian legislation shall be subject to amendments. In particular, paragraphs 1 and 2 of Article 39 of the Law of Ukraine “On Copyright and Related Rights” should be amended as follows:

“25% of the reward, due to be paid to the minor under 14 years old shall be put in the bank deposit, opened in the bank in the name of such minor, by minor’s parents or legal representatives. The minor’s parents or other legal representatives are prohibited to dispose of the mentioned bank account. The minor will be entitled to use the mentioned sum in his/her own discretion after reaching 14 years”.

4. In accordance with the Ukrainian national legislation, when entering into a contract with minor under 14 years old it is necessary to assure that the parents or other legal representatives have given consent to such contract. In case of absence of such consent, the contract can be further legalized in the court by filing a claim in the name of the interested person.

5. In accordance with Ukrainian national legislation, when entering into a contract with minor over 14 years old and under 18 years old, it is necessary to assure that the parents or other legal representatives have given consent to such contract. In case of absence of such consent, the contract can be further deemed invalid in the name of interested persons.

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Summary

Moskalenko K. V. Contracting minors in the sphere of music show business: world experience and Ukrainian challenges. – Article.

The article provides general analysis of the legal status of minors engaged in the music show business industry. The author investigates international and national legal framework concerning protection of minor performers and suggests entering amendments into the Law of Ukraine “On copyright and related rights”.

Key words: music show business, minors, contracts.

Анотація

Москаленко К. В. Укладення договорів у сфері музичного шоу-бізнесу з особами, які не досягли повноліття: світовий досвід та проблеми українського законодавства. – Стаття.

У статті аналізується правовий статус осіб, які не досягли повноліття та провадять діяльність у сфері музичного шоу-бізнесу. Автор досліджує міжнародне й національне законодавство, присвячене охороні прав артистів-виконавців, які не досягли повноліття, та пропонує внесення змін до Закону України «Про авторське право і суміжні права».

Ключові слова: музичний шоу-бізнес, особи, які не досягли повноліття, договори.

Аннотация

Москаленко Е. В. Заключение договоров в сфере музыкального шоу-бизнеса с лицами, не достигшими совершеннолетия: мировой опыт и проблемы украинского законодательства. – Статья.

В статье анализируется правовое положение лиц, не достигших совершеннолетия и осуществляющих деятельность в сфере музыкального шоу-бизнеса. Автор исследует международное и национальное законодательство, посвященное охране прав артистов-исполнителей, не достигших совершеннолетия, и предлагает внести изменения в Закон Украины «Об авторском праве и смежных правах».

Ключевые слова: музыкальный шоу-бизнес, лица, не достигшие совершеннолетия, договоры.

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В. П. Мороз

НАЙМЕНУВАННЯ ПІДПРИЄМСТВА ЯК ОБ'ЄКТ ПРАВА ІНТЕЛЕКТУАЛЬНОЇ ВЛАСНОСТІ

За умов первісного ладу, коли ручна праця та досить примітивні технології призвели до необхідності міняти один товар на інший, найбільш кмітливі особистості здогадалися, що через створення дефіциту на певний вид товару можна суттєво підняти його вартість, зробивши його більш ліквідним. Так, власне, і зародилося підприємництво. Професія купця з'явилася ще за часів Київської Русі в IX столітті та зазнала значного зростання після скасування кріпосного права. З появою перших підприємств з'явилися й назви цих підприємств, що дозволяли індивідуалізувати окреме підприємство з метою набуття й захисту ним прав і виконання обов'язків. Зазвичай назви були пов'язані з особистістю власника підприємства та фахом його діяльності, наприклад «Книгодрукарська майстерня Івана Федорова». Однак, незважаючи на те, що такий об'єкт права, як найменування підприємства, відомий уже не одне століття й на сьогодні достатньо широко відображений у цивільному законодавстві різних держав, особливості його правового регулювання досі залишаються не цілком дослідженими та визначеними.

З розвитком права інтелектуальної власності найменування підприємства все частіше розглядається в якості об'єкта права інтелектуальної власності. Причиною цього є можливість отримання комерційної вигоди від використання найменування підприємства та, відповідно, необхідність отримання захисту прав на таке використання. Чинне законодавство України закріпило обов'язок юридичної особи мати своє найменування, яке містить інформацію про її організаційно-правову форму й характер діяльності та є індивідуальним, у ст. 90 Цивільного кодексу України (далі – ЦК України). У теорії цивільного права проблематика найменування юридичної особи завжди привертала увагу багатьох учених-цивілістів.