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## **DEBATABLE ISSUES OF THE CONTRACTUAL REGULATION OF PROPERTY RELATIONS UNDER THE MARRIAGE AGREEMENT**

The article focuses on the research of issues of contractual regulation of property relations under the marriage contract. The author criticizes the general comparative approach to the regulation of property status of individuals in the USSR, the simplified imperative regulation of property relations, when property acquired by spouses in marriage belonged to them only on the right of common property, and in case of divorce the property was subject to the division between the former spouses in equal shares.

The status and prospects of the development of the institution of marriage contract in Ukraine are reviewed separately. The article deals with the investigation of legal nature, the peculiarities of the subjects, the content of the marriage contract. Attention is focused on solving such controversial issue as the inability of the conclusion of marriage contract by a representative of spouses.

**Key words:** a marriage agreement, contractual regulation, marital relations, notarization, contractual regime, marital property, form of contract, invalidity of the contract.

Socio-economic development in Ukrainian society, evolution of family relationships and attitudes to marriage entirely objectively and naturally necessitate the existence of the institution of marriage contract in the family legislation of Ukraine. The vast majority of the countries have long recognized the expediency of the existence of the institution of marriage contract in their national laws. In different countries this institution is different, but the purpose of its existence is one - to give spouses enough opportunities for independent determination of property relations in marriage, so that they can, if necessary, change the mode of possessions established by law, which automatically becomes effective upon marriage. Fortunately the legal system of Ukraine is not an exception in solving this issue.

With the adoption of the Family Code of Ukraine scholars subjected to detailed analysis a number of relatively new institutions of family law, such as foster family institution, alimony, marriage contracts etc. We should immediately note that due to setting up such an institution as a marriage contract married couples have got an opportunity to establish the legal regime of their property both during the marriage and at its dissolution. Legal consolidation of a marriage contract is related primarily to the fact that the transition to a market economy caused a need for the development of property relations between spouses.

A marriage contract under the Code on Marriage and Family of USSR in 1969 was not possible because the rules of the Code were imperative and installed regime of joint ownership of marital property. In the Soviet period the need for the existence of a marriage contract as a tool for regulation of property relations between spouses was absent. Property component in marital relationships assigned a minor role and legislation, as it was stated in the comments of that time, "was to promote actively the final purification of family relationships of material payments and the creation of communist family in which the deepest personal feelings of people will find their full satisfaction"<sup>1</sup> Total egalitarian approach to the regulation of property of individuals provided simplified imperative regulation of property relations, when the property acquired by spouses in marriage belonged to them only on the right of common property, and in case of divorce property was subjected to division between the former spouses in equal shares. Thus any deviations from this egalitarian distribution of marital property were seen as an exception to the general rule and required court approval.

Instead of it in European countries the institution of marriage contract has become widespread at the beginning of the XIX century. It should be noted that the first marriage contract was enshrined in civil legislation of France in 1804, in which it was defined as notarized agreement defining the mode of property

<sup>1</sup> *Кодекс о браке и семье РСФСР 1982* (Министерство юстиции РСФСР). Москва: Юридическая лит., 4.

relations of spouses, and in its absence so-called “legal unity” of marital property was installed, the regime of which was applied to their premarital property and movable property acquired by them in marriage<sup>1</sup>.

A similar approach for consolidation of the institution of marriage contract was reflected in the German civil code in 1886, in which a common mode of the unity of property with the right of man to use and manage was fixed. Other systems of the organization of property relations weren't prohibited by the legislator at that time, but for that married couple had to conclude a special marriage contract (art. 1432, 1436 of the German Civil Code).

Civil legislation of Italy also contains provisions concerning a marriage contract. Thus the main peculiarity of a marriage contract in Italy is that the contract may stipulate rights and obligations of third parties. In this case, you must enter into a contract full personal data of third parties (such as a creditor of one spouse), otherwise the contract will be considered invalid in this part. In contradistinction to Italian legislation domestic family law excludes the possibility of establishing the rights and obligations of third parties in a marriage contract.

The peculiarity of contractual regulation of marriage relations in most states of the USA is the opportunity to regulate both property and personal immaterial relations (the choice of names of children, the fulfilling of parental duties regarding the upbringing of children, housework etc.). We should immediately note that provision of p. 3 of the art. 93 of the Family Code of Ukraine prohibits categorically such an opportunity; in our opinion it needs adjustment towards lifting the forbiddance on the possibility of a regulation personal relationships of spouses and relations between them and their children in a marriage agreement.

Despite the fact that a marriage contract has a long history, but only from 23rd of June 1992 the Code of marriage and family was supplemented by article 27-1. In other words only after the Soviet collapse this institution received its consolidation in the national legislation. However until now the attitude to this contract both in science and in practice is controversial. Unfortunately quite often even nowadays a marriage contract is considered as an instrument by which the richest segments of society protect themselves from the distribution of their property in case of dissolution of marriage. But in many European countries, USA a marriage contract is seen as a mandatory condition of marriage.

Despite the constant attention to a marriage contract of many domestic scientists a number of problems today remain unresolved. For example, the possibility of the conclusion of a marriage contract through representatives of spouses remains debatable even today; in legal literature there is no consensus regarding the branch identity of a marriage contract; residential relations of former spouses are unresolved; the attitude to the possibility of the conclusion of a marriage contract by persons living as one family, but not married to each other, by underage persons is ambiguous etc.

In the legal literature the question of the legal nature of a marriage agreement evokes a lively discussion. Most of scientists agree with the idea that although a marriage agreement has some specific features but refers to civil agreements and general rules on transactions are applied to it<sup>23</sup>. However in the domestic legal literature the position about family legal nature of a marriage agreement is equally widespread given that only married couples are its subjects. As Yu. Chervonyy has noticed entry into force of a marriage agreement that regulates property relations between spouses should precede a conclusion of marriage; in this case we can see derivative nature of the regulation of property family relations of the regulation of personal immaterial relations that is typical for the relations regulated by family law<sup>4</sup>.

To our mind a detailed analysis of forms of a marriage agreement, the conditions for its validity, the grounds for declaring it invalid, and the procedure for concluding the agreement allows us to make a conclusion that in this case general civil construction of contract law are used. Therefore it is necessary to agree with the opinion of the scientists who refer a marriage agreement of civil contracts.

However a marriage agreement can't be referred to classic civil law contracts at least because the specificity of the marriage contract is determined by its subjective component. Legal equality, free expression of will, property autonomy of the participants in relations regulated by civil legislation are applied to the parties of the marriage contract not to the degree to which they are applied to participants of

<sup>1</sup> Шевченко, О.О. (1998). *Історія держави і права зарубіжних країн*: навч. посібник. Київ: Атіка. <<http://ukrkniga.org.ua/ukrkniga-text/707>>.

<sup>2</sup> Жилинкова, И.В. (1995). *Брачный контракт*. Харьков, 33-34.

<sup>3</sup> Ульяненко, О.О. (2003). *Шлюбний договір у сімейному праві України*: автореф. дис. ... канд. юрид. наук: 12.00.03. Київ, 5.

<sup>4</sup> Червоний, Ю.С. (2002). Понятие и особенности семейных правоотношений. *Цивільне право, вип. 1*, 17.

civil turnover between which commodity-money relations are composed, because in the family relationships not only property but also domestic, psychological, emotional components are present. These components play an important role in the property relations of spouses; they differ from traditional civil relations between legally equal, materially independent participants of civil turnover.

However a marriage agreement is intended to regulate property relations between spouses. And from this point of view it is a kind of civil contracts, which are free of charge and may not provide payment or meeting material satisfaction. On the basis of it we can conclude about the possibility of subsidiary application of civil law to the property relations of the spouses regarding gratuitous contracts, by including civil law provisions in a marriage agreement. If spouses need to resolve some compensatory property relations with each other requiring immediate meeting granting they may use the following civil agreements as purchase and sale, gift, exchange etc. in which they will act not as a married couple but as individuals - members of civil relations.

A marriage contract is endowed with such a specific feature as subject composition clearly determined by law. According to Art. 92 of the Family Code of Ukraine subjects of a marriage contract can be two categories of people: 1) persons who submitted an application about registration of marriage; 2) persons who have already registered marriage (marriage). Immediately we want to notice farsightedness of developers of the Family Code of Ukraine that named engaged persons as “persons who submitted an application about registration of marriage”. Such a determination is much more correct than, for example, term “persons entering into a marriage” used in the Family Code of Russian Federation. It seems that the developers used in the domestic family legislation the term “person who submitted an application about registration of marriage (engaged persons)” to avoid such controversial issues as finding out from which date the parties shall enter into a marriage relationship. Moreover this period of time between the conclusion of a marriage contract and the conclusion of marriage can last long. Hence a need to clarify certain contractual requirements will appear. Instead according to family legislation of Ukraine (Art. 32 of the Family Code) marriage is registered after the expiry of one month from the date of application for registration of marriage. As an exception marriage can be registered on the day of submitting a corresponding application in case of bride’s pregnancy, birth of a child, as well as the existence of a threat to the life of someone of engaged persons. If there is information about the presence of impediments to of registration of marriage, the head of body of civil registration may postpone the marriage for a period of three months. Considering of the above we can state that by defining engaged persons as persons who submitted an application for marriage registration the developers of the Family Code of Ukraine thereby clearly defined time frame for enactment of a marriage contract.

European legislation also contains radically different approaches to the regulation of property and personal relations by a marriage contract. Thus, according to the French civil legislation agreement on property relations between spouses should be concluded before marriage registration, but it takes effect only from the date of the registration of marriage (Art. 1395 of the Civil Code of France). Instead, according to the German Civil Code the couple can regulate their property relations in marriage contract necessarily to of registration of marriage, but after marriage a married couple has the right to correct these contractual conditions or at all to cancel the marriage contract at their discretion.

It is interesting to study a legislative approach to these issues in Japan, where the marriage contract is valid only if it is concluded until the time of submitting the application for marriage (Art. 755 of the Civil Code of Japan). The agreement that was concluded after the of registration of marriage subjects to cancellation, and then the property relations between spouses are regulated by the Civil Code; it means legal regime comes into effect. Moreover, according to Japanese law after the submitting an application for marriage a marriage contract can not be changed. The change of it is allowed only if the agreement itself contains provision on the procedure of its change (Art. 759 of the Civil Code of Japan)<sup>1</sup>.

In our opinion, approach to the subject composition of the marriage contract reflected in the Family Code of Ukraine is the most reasonable, because, according to recent observations, in Ukraine a marriage agreement is used just by the persons entering into marriage (engaged persons), namely the young persons. It appears that it can be explained by the desire to identify and harmonize positions on the most significant issues of material nature. And this is fully justified considering the statistics of divorce within the first five years of marriage. After all if during the so-called “coordination” between those who plan to enter the

<sup>1</sup> Вагацума, Саказ, Ариидзуми, Тору (1983). *Гражданское право Японии: в двух книгах*. Москва: Прогресс, Кн. 2, 217.

marital relationship it will become apparent that the system of family values and views on common life is very different, it allows once again comprehending the decision on expediency of entry into marriage relationship. Judicial practice in such types of cases as divorce also shows that marital disagreement that led eventually to divorce usually occur precisely because of such aspects of family life as “children”, “money”, “career”, “family”, “belief”, “emotions”<sup>1</sup>.

Special attention should be paid to the possibility of the conclusion of a marriage contract by persons living as one family, but not married to each other, that is, when a man and a woman live together without registration of marriage. Answering this question it should be understood that the legislation does not recognize persons living as one family, but not married to each other, as the spouses regardless of the duration and stability of relationships that bind them. Considering it in case of the conclusion of a marriage agreement by such persons a general rule of pt. 1 the Art. 95 of the Family Code of Ukraine will be valid: if a marriage contract is concluded before marriage registration, it shall enter into force on the day of registration of marriage. So if two people do not intend to register the marriage, then a marriage contract is deprived of both practical and legal sense, because it will never comes into force, and the costs of drafting the agreement and its notarization will be paid in vain.

Family legislation defines the form of the marriage contract. Thus according to Art. 94 of the Family Code of Ukraine a marriage contract is concluded in writing and certified by a notary. Notarization of the contract is carried out by making on the document which is a contract a certifying notarial inscription. For receiving the certification of a marriage contract person may appeal to any notary that works as a notary in public and in private practice. A notary may also assist in the drafting the project of a marriage agreement.

However it is expedient to note that in practice many notaries relate to a marriage agreement with caution, often perceiving them as a protocol of intent, not as a transaction. As a result for the certification of appropriate legal relations these notaries require the conclusion of other agreements forcing individuals who wish to enter into a marriage contract bear considerable costs in its arrangement.

In addition we must admit that very small number of marriage contracts is concluded in Ukraine. The lack of such demand from the population leads to a lack of desires of notaries to develop and to improve fully the projects of such agreements. Unfortunately legal ignorance of citizens nowadays is frequent phenomenon in our society. And of course it can be used to the detriment of citizens. This is especially possible at the conclusion of a marriage contract, because you can not ignore its special legal nature and complex character.

To prevent such abuse notaries are obliged to assist citizens in the implementation of their rights and protection legitimate interests, clarify their rights and duties, to warn about the consequences of the exerted notarial acts for the purpose of that legal ignorance could not be used to their detriment (Art. 5 of the Law of Ukraine “On Notariat”). In particular during the certification of a marriage agreement a notary is obliged to clarify to the parties the content of certain conditions and check compliance of contents of the agreement to the law and to the real intentions of the parties.

At the same time we'll try to answer the question whether the powers of a notary are finished after the certification of such an agreement, inasmuch as it is consensual, and relations between the spouses are in constant dynamics. First of all we should notice about an urgent need for more detailed regulation of procedures of notarial proceedings concerning the certification of a marriage contract as several phases phenomenon - from the certification to its termination in p. 2 Ch. 5 Provision on the procedure of notarial acts by notaries of Ukraine. This, in our opinion, will allow couples in the future provide themselves with the guarantees of the realization of property rights and duties of the entire period of married life; it certainly will avoid litigation with this category of cases. This “unloading” of the courts in its turn will lead to better and faster considering other types of cases, as courts are now unable to make timely consideration of cases that result in violation of Art. 157 of Civil Procedural Code of Ukraine regarding the timing of consideration.

Secondly, in case of death of a spouse it will allow to move from the certification of a marriage contract to the proceedings for issuance of the certificate of inheritance with the documentary ensuring of property rights of a legator which will determine what share of personal property he owns<sup>2</sup>. Significant differences between the proposed approach of the modern notarial proceedings are seen in the fact that today one of the spouses who lived through the other during the issuance of a certificate of ownership to the

<sup>1</sup> Франтишек, Павек (1976). *Развод глазами судьи*. Москва: Изд-во «Прогресс», 90.

<sup>2</sup> Боднар, Т.В., Дзера, О.В., Кузнецова, Н.С. та ін. (2009). *Договірне право України. Особлива частина*: навч. посіб. Київ: Юрінком Інтер, 1156.

share of the marital property personally determines which property remains to him and which passes to the heirs of the deceased. This contractual approach allows not only make easier the notarial and judicial (in the case of a dispute between the heirs and those of spouses who lived through other) practices, but also significantly reduce the cost of notarial services.

Analyzing foreign practice concerning the procedure and form of the marriage contract it should be immediately noted that in most countries there are strict requirements failure of which may result in the recognition of the marriage contract invalid. As a rule the conclusion of a marriage contract must be made in a written form as a special act or the other document at organs authorized to commit such actions. Thus, in France the conclusion of a marriage contract is in the competence of notaries. Instead, the Italian legislation contains a provision on compulsory registration of researched agreement in local authorities, and if an agreement of people relates to real estate - also in organs, that register real estate transactions. In addition in the legislations of most of the European countries a special form of registration of marriage contracts is provided that allows any interested person to know the fact of signing an agreement. Moreover in France a marriage contract must be published if the spouse is an entrepreneur (Art. 1394 of the Civil Code of France).

The issue of the conclusion of a marriage contract through a representative is equally interesting and deserves a special attention. A marriage contract is a transaction signed by the parties, incidentally as any other agreement. Inasmuch as the vast majority of contracts are allowed to be concluded by the signatures of the representatives on the basis of a contract of agency or a power of attorney duly executed, the question arises: can a marriage contract be signed by representatives of the parties? In the Family Code of Ukraine there is no response to this question.

According to pt. 2, Art. 238 of the Civil Code of Ukraine representative cannot commit the transaction which according to its content can be committed only by the person he represents, but whether that provision refers to a marriage contract?

First of all it should be noted that a marriage contract is not an everyday transaction that is concluded quite often by the same people (as the sale, delivery etc.). It is concluded between persons connected with special personal and trusting relationship, and maybe - once in a lifetime (with further changes). Such features allowed I. Zhylinkova identify such an agreement as a personal or even intimate<sup>1</sup>.

However in the legal literature we can find the arguments on defense of the possibility of concluding a marriage contract by representatives of the parties. The representative's authority is the range of rights and responsibilities that are relied on him/her<sup>2</sup>. In our case these powers are strictly defined by the person represented. The representative is imputed into a clear framework and is entitled to exercise only those actions that are entrusted to him within his representation. Thus O. Ulyanenko notices that the ideal variant is when the parties develop the conditions of a marriage contract together with their lawyers; on the basis of it the researcher assumes the possibility of concluding a marriage contract by representatives of parties (or representative on the one hand and party on the other hand)<sup>3</sup>. However during the analyzing of the theoretical question the author does not include some aspects of notarization of contracts.

Firstly, there is no doubt that following the requirements of current legislation the lawyer is obliged to use all the permitted means of protection of the rights and legal interests of the represented person and cannot use his powers to the detriment of the person in whose interests he accepted the assignment. However, the vast majority of notaries elaborates the projects of marriage contracts, develops and improves their conditions. Secondly we should not forget about the responsibility of notaries for the certification of such agreements. So in any case (whether the project of an agreement is being developed by a notary or representative of parties) notary shall verify the perception and compliance of the parties with the terms and conditions. Therefore it seems more appropriate personal presence and coordination of all conditions exactly by the spouses (engaged persons) than the development and coordination of such issues with a representative. S. Fursa notes that even the process of drafting the terms of a marriage contract can be regarded as a test of characters and true intentions of the parties, that's why the possibility of drafting such a treaty is a positive thing<sup>4</sup>. Considering the above in our opinion a marriage contract is personal in its

<sup>1</sup> Жилинкова, И.В. (1995). *Брачный контракт*. Харьков, 39.

<sup>2</sup> *Цивільне право: підручник для студентів юрид. вузів та факультетів* (1997). Київ Вентурі, 177.

<sup>3</sup> Ульяненко, О.О. (2003). *Шлюбний договір у сімейному праві України: дис. ... канд. юрид. наук: 12.00.03*. Київ, 129.

<sup>4</sup> Боднар, Т.В., Дзера, О.В., Кузнецова, Н.С. та ін. (2009). *Договірне право України. Особлива частина: навч. посіб.* Київ: Юрінком Інтер, 1155.

nature, and therefore the possibility of the conclusion it through a representative seems inappropriate.

So a marriage contract occupies a special place among marital agreements. Firstly, this agreement has the most complex character and can contain a variety of conditions relating to marital property or providing maintenance of one of them. Secondly, a marriage contract unlike all other agreements may be concluded concerning future marital property. Thirdly, the subjects of the marriage contract can be not only the spouses but also persons who applied for marriage registration.

Proceeding from the above it can be concluded that the reasoning of benefits of a marriage contract compared to the legal regime of marital property and detailed elaboration of the procedure and conditions of the conclusion of it is essential for the development of the institution. Therefore, an important goal today is to develop skills for concluding such agreements in practice, applying different regulatory framework concerning them inasmuch as incorrect application of the legislation that regulates other contractual relationships can significantly violate the rights of the agreement.

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