

NOTARIAL REGULATION OF FAMILY LEGAL RELATIONS

ДОГОВІРНЕ РЕГУЛЮВАННЯ СІМЕЙНИХ ПРАВОВІДНОСИН ЗА УЧАСТЮ НОТАРІУСА

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The article is devoted to the legal nature of family agreements and the procedure of provision of legal reliability by notary's certification; working out proposals for improvement of agreement-based regulation of property and personal non-property relations of family law subjects of Ukraine. The types of family agreements that can be concluded by the participants of family legal relations in a complex written form by a notarial certificate are found out; The agreement-based regulation of personal non-property and property relations with the participation of notary is characterized and the procedure of notarization of family agreements is investigated.

The article identifies that family law of Ukraine proceeds from liberty of agreement doctrine, and therefore the participants of family relations can decide to conclude family agreement at their own discretion; the possibility of concluding mixed agreements that combine different types of agreements in their structure; the terms of the agreement and the list of their participants, etc. Nowadays in Family Law of Ukraine the radical changes are observed in approaches to regulation of de facto husband and wife property relations by means of the expansion of dispositive regulation. Significant role in the contractual family legal relationship ranks property provisions, the legal likelihood of which is certified by a notary.

When concluding family-legal agreements of property nature that require a notary's certification (including state registration), as well as agreements on valuable property, the consent of their participants must be notarized.

In order to eliminate legal conflicts, unification judicial and notarial practice it is advisable to detail the provisions of the Family Code of Ukraine, which will promote the popularization of concluding agreements between parents, children, relatives and other members of the family and let them independently to agree the most suitable provision regulation of family legal relations of non-property and property nature.

Key words: property legal relations, personal non-property legal relations, agreement, notary, notarial practice.

Стаття присвячена правовій природі сімейних договорів і порядку надання їм юридичної вірогідності шляхом посвідчення нотаріусом, здійснено розробку пропозицій із метою вдосконалення договірної регулювання майнових та особистих немайнових правовідносин суб'єктів сімейного права України. З'ясовано види сімейних договорів, які можуть укласти учасники сімейних правовідносин у складній письмовій формі шляхом нотаріального посвідчення, охарактеризовано договірне регулювання особистих немайнових та майнових правовідносин за участі нотаріуса та досліджено порядок нотаріального посвідчення сімейних договорів.

У статті визначено, що сімейне законодавство України виходить із принципу свободи договору, а тому учасники сімейних правовідносин можуть на свій розсуд вирішувати питання щодо укладення сімейних договорів, можливості укладення змішаних договорів, які поєднують у своїй структурі різні види договорів, умов договору та переліку їх учасників тощо. У сімейному законодавстві України простежуються зміни в підходах до регулювання майнових та особистих немайнових правовідносин його суб'єктів шляхом розширення сфери диспозитивного регулювання.

Значну роль у договірних сімейних правовідносинах відіграють положення майнового характеру, юридична вірогідність яких посвідчується нотаріусом.

У процесі укладення сімейно-правових договорів майнового характеру, які потребують нотаріального посвідчення (в тому числі і державної реєстрації), а також договорів щодо цінного майна, згода їх учасників має бути нотаріально засвідчена.

З метою усунення законодавчих колізій, уніфікації судової й нотаріальної практики доцільно деталізувати положення Сімейного кодексу України, що сприятиме популяризації укладання договорів між батьками, дітьми, родичами та іншими членами сім'ї та дасть змогу сторонам зобов'язання самостійно погоджувати найбільш прийнятні для них умови врегулювання сімейних правовідносин немайнового та майнового характеру.

Ключові слова: майнові правовідносини, особисті немайнові правовідносини, договір, нотаріус, нотаріальна практика.

Introduction. In the modern context of the European integration of Ukraine, the agreement-based regulation of property and non-property family relations expands the optional possibilities of their participants, the list of them are in Art. 2 of the Family Code of Ukraine (FC of Ukraine).

At the same time the provisions of the Civil Code of Ukraine apply to the agreement-based regulation of family legal relations, however, the question arises as to the development of the theoretical conception of the family agreement, as a separate type of agreements its content and form.

The issue of agreement-based regulation of family relations is the subject of research by M.V. Antokolska, V.K. Antoshkina, T.O. Oryvanyuk, L.M. Baranova, V.I. Borysova, E.M. Vorozhejkina, V.S. Gopanchuk, I.V. Zhylinkova, O.M. Kalitenko, Z.V. Romovska, M.M. Sibiliova, S.Ya. Fursa, Yu.S. Chervony, Ya.M. Shevchenko, G.F. Shershenevych, S.I. Shymon, O.A. Yavor, etc.

However despite a great number of scientific works deal with the problems of legal regulation agreement in the family law of Ukraine, the complex scientific investigation of the agreement-based regulation of the property and personal non-property relations wasn't performed with notary's participation.

It requires a theoretical analysis of the agreement-based regulation of family relations, providing scientifically grounded recommendations for the application of family law norms by notary's certification of family legal agreements for the purpose of provision of legal reliability.

Setting objectives. The purpose of the article is to determine the legal nature of the family agreements of the spouses and the procedure of provision of legal reliability by notary's certification; working out proposals for improvement of agreement-based regulation of property and personal non-property relations of family law subjects of Ukraine.

To achieve this goal it is necessary to do the following **tasks:**

- to analyze the legal nature of the agreement in the family law of Ukraine;
- to find out the types of family agreements that can be concluded by the participants of family legal relations in a complex written form by a notarial certificate;
- to characterize the agreement-based regulation of personal non-property and property relations with the participation of notary;
- to investigate the procedure of notarization of family agreements.

Research results. The agreement-based regulation of family relationships is the answer to the realities of present time. In the FC of Ukraine there is no definition of the concept of family-legal agreement, but it only indicates that family relations can be settled by understanding (agreement) between their participants.

On this point the use of the terms «agreement in family law», «family legal agreement», «agreement in family sphere» are not identical and require a common approach and understanding.

The concept “agreements in family law” is broader than “family legal agreements” but they include except family legal agreements other ones provided by family law (orphan and childcare arrangements family: agreement for patronage, agreement for placing children in foster care, agreement for organization of activities of a family-type orphanage, as well as civil legal nature agreements, but they are concluded by family relationships participants: purchase/sale, gifts, exchange, life maintenance (care), hereditary agreement etc).

We agree with A.O. Dutko that family legal agreements can be considered to conclude by subjects of family legal relations and aimed at establishing, changing or

ceasing family rights and obligations, and are required to perform if they aren't contradicted the requirements the FC of Ukraine, other laws of Ukraine and moral principles of society. Such agreements should depend on the family-legal status of the person, and when they conclude the facts of marriage, relationship, arrangement of orphan and child without parental care [1, p. 137].

We do not share the position of V.G. Olyukha, who proposes a structural system of civil-law agreements among them a number of agreements that are regulated family legal relations (marriage agreement, agreement about joint matrimonial property, about partition of property between them about participation of the parent in the children's education, about maintaining wife / husband or a child, about avoiding maintenance) [2, p. 6]. That's why we think that civil legal and family legal agreements are independent rather than interdependent agreements in Ukraine's private law system.

Taking into account the example above, the parties of agreement-based regulation of property and non-property family relations in the family-legal sphere are only physical persons who are attached by marriage, relation, adoption or other grounds and are not inconsistent with the provisions of the morals of the society.

In particular, according to FC of Ukraine Chpt. 1-3 Art.2, Chpt. 1 of Art. 9. family agreement could be concluded between spouses, a child's parents, parents and children, other family members and relatives whose relations are governed by the FC of Ukraine including persons living together as an unmarried couple [3].

On the other hand, the FC of Ukraine Chpt. 2 of Art. 9. provides for persons living together as unmarried couple to regulate their family (relatives) relations upon agreement, which should be concluded in a written form. Such an agreement is binding unless it contradicts the provisions of the present Code, other laws of Ukraine and morals of the society.

From the foregoing it follows de facto husband and wife can conclude an agreement in written form except marriage contract as the parties of this contractual relationship may be brides or spouses.

Z.V. Romovskaya points out correctly that there will be no obstacles for the recognition of a valid agreement between uncle and nephew by whom the uncle shall maintain nephew during studying and the nephew shall maintain his uncle material support upon his incapacity to work [4, p. 27].

Therefore, the participants of agreement-based family legal relation are only physical persons unlike civil agreement where the subjects of the agreement are not only physical but also legal ones.

It follows that agreement-based relations that arise between physical and legal persons even if they are governed by the norms of the FC cannot be considered as family agreements.

A family legal agreement consists of such elements as subject composition, right and responsibilities of the parties, its conditions (subject, term of limitation), form, etc.

Let us fix on the form of family legal agreement and the procedure of their certification by notary's

certification for the purpose of provision of legal reliability.

Family legal agreements may be concluded in oral, simple or complex written form. The complex written form of agreements in family law of Ukraine provides their notarization, in some cases state registration (for example, agreement of termination of the right to maintenance for the child in connection with the transfer of the ownership of a real estate - Art.190 of the FC of Ukraine) [3].

However where parties agreed on all essential conditions of agreement, as proved by documentary evidence, and the contract was fulfilled completely or partially, but one of the parties evaded its notarization, a court may find such contract valid. In that case, subsequent notarizations of the agreement shall not be required (Chpt. 2 of Art. 220 of the Civil Code of Ukraine) [5].

The legal doctrine lacks a unified approach to the system of family law agreements. Thus, there is a classification of family legal agreements regarding the regulation of property and non-property relations.

Family property agreements that require a written form and notarization, FC of Ukraine includes:

- marriage agreement (Art. 92–103 of the FC of Ukraine).
- agreement on the way in which the property belonging them (Art. 66 of the FC of Ukraine) [3].

An agreement on the way in which the house, apartment, another building or structure, land lot should be used if it is certified by a notary places, oblige on the wife's and husband's legal successor.

However, if a couple owns a property that they cannot use at the same time (for example, a car, a computer, a musical instrument), the wife and the husband may agree to use it. When conducting practice analysis of conclusion and fulfilment such agreements, it is established that the determination of the mode of use of property, essentially precedes the partition of property by spouses. The wife and the husband upon mutual consent and upon judicial decision certification by a notary, an agreement on the use of real estate may be changed.

- agreement of partition (separation) of property (Art. 69 of the FC of Ukraine) [3].

In concluding such agreement, the parties may derogate from the principles of spouses' shares equality. At the same time O.V. Dzera points out correctly that the family legislation of Ukraine should stipulate norms that would guarantee one of the members of a spouse a certain minimum share of the property acquired in marriage.

In the legal doctrine for that purpose it is suggested to supplement Chpt. 4 of Art. 70 FC of Ukraine the following content: "In case of partition of property that is the object of spouses' right to joint matrimonial property by the agreement (agreement), the husband / wife are guaranteed a minimum property share. The share amount as prescribed in agreement of property partition cannot place one of the spouses at an extraordinary material disadvantage".

In case of separation of property separated from the total mass of common things becomes the personal property of one of the spouses, reducing its share in the right to joint property as to property that has left.

According to p. 4.4. Chpt. 1. Section II procedure for making notarial action by notaries of Ukraine [6] legal action concerning disposition of property may be notarized without consent the other of spouse, with the exception of cases provided by the current legislation of Ukraine.

- Spouses' agreement of maintenance (Art. 78 of the FC of Ukraine) [3].

When concluding an agreement of maintenance you should pay attention to Art. 75 of the FC of Ukraine that outlines the number of persons who have the right to maintenance (alimony) of one the spouses. This norm does not agree with the settlement of alimony obligations, however, when notarizing the agreement of maintenance, the notary still checks the fact of the inability to work of the spouse in favor of which the contract is concluded. On establishing these circumstances, the notary makes a mark in the text of the agreement. The right to maintenance (alimony) has one of the spouse, who is incapable, needs financial help, for the reason that the other spouse can provide financial help;

- agreement for maintenance right termination in exchange of acquiring the property right to a house, apartment or any other real estate (or in exchange of receiving a lump-sum cash payment). (Art. 89 of the FC of Ukraine) [3].

Such agreement has to be notarized, and the agreed cash amount has to be put at the deposit account of the notarial office concerned before the certification of the agreement. Since the certification of the agreement on maintenance right termination in connection with receiving a lump-sum cash payment the notary verifies the fact of corresponding sum of money, and the proof is the receipt as it is indicated in the agreement.

The peculiarity of this regime lies in the execution may not be levied upon the property obtained under the agreement of maintenance right termination. This special legal regime for real estate is terminated upon its alienation by the new owner or in the case of his death.

- spouses' agreement on annulment of the marriage which specifies with whom of them children will be living, what kind of contribution the parent living without children will make in ensuring their living conditions (Chpt. 2 of Art. 109 of the FC of Ukraine) [3];

- agreement of termination of the right to maintenance for the child in connection with the transfer of the ownership of a real estate (Art. 109 of the FC of Ukraine) [3].

If the obligation of one parent to hold the child is terminated due to the conclusion of a transfer agreement, this circumstance must be reflected in the contract. If the contract specifies the amount of alimony to be paid for the child, the agreement must be notarized;

- agreement between the parents for maintenance of the child (Art. 189 of the FC of Ukraine) [3].

The legal force of agreement between the parents for maintenance of the child is in the possibility

of enforcement. According to Chpt. 2 of Art. 189 of the FC of Ukraine, if one of the parents is in default on his/her obligations, the maintenance may be levied on him/her based on the notarial special execution. When notarizing the agreement the contents of Chpt. 2 of Art. 189 of the FC of Ukraine is interpreted, at the same time stating this in the agreement, in part the possibility of indisputably based on the notarial special execution in case of failure of one of the parents due to the agreement obligation.

One of the disadvantages of agreement of maintenance payment for the child is that the FC of Ukraine is not provided sanctions for non-payment of maintenance under the agreement, unless there is no direct indication in the agreement. At the same time, such sanctions are provided if the maintenance is levied by court decision - the maintenance recipient has a right to a penalty.

We agree with A.M. Akhmach, on the expediency of supplementing the FC of Ukraine with the application of liability in the form of penalty for the delay in maintenance payments, as well as in the case if it is collected by agreement (even if there is no direct indication of payment of the penalty in the agreement) [7, p. 203].

Since the integrated nature of the marriage agreement is aimed at regulation of the property legal relations of the spouse, let us fix on its legal nature and the procedure of certification by a notary in order to give it legal credibility.

L.M. Doroshenko attributes to the signs of marriage agreement:

- 1) agreement aimed at changing relations between spouses;
- 2) special subject structure;
- 3) concluding into a complex written form by means of a notarial certificate;
- 4) regulation only property relations between spouses [8, p. 94–95].

In the legal literature, there is a debatable question regarding the possibility of concluding a marriage agreement through a representative. As regards this I.V. Zhilinkova states that a marriage agreement cannot be concluded either with the participation of a legal representative or by the power of attorney [9, p. 86].

However A. Slepakova considers it legitimate to apply the lawful, as well as representation agreement, when the power of attorney will determine all the conditions of the future agreement [10, p. 284].

Using the positive foreign experience of notarization of marriage agreement, it should be noted that the legislation of Belgium and France provides for the possibility of concluding it through a legal or representative agreements for a special deed of attorney, which contains of a person's intellectual property [11, p. 26].

For this reason, we consider it is expedient to implement the provisions of the European countries legislation into the FC of Ukraine as a possibility of concluding a marriage agreement through a representative of the power of attorney since in many cases it would be possible to make it easier for a spouse to conclude a marriage agreement in the absence of one of them.

Concerning the limits of the exercise of the right to conclude a marriage agreement by persons whose legal capacity is limited, the FC of Ukraine does not contain any special rules, however it does not deny such possibility. According to A.O. Dutka, the marriage agreement requires certification by a notary, so the trustees may give their consent to committing it only with the permission of the guardianship authority [1, p. 18].

At the same time, according to the Law of Ukraine "About notariate" a notary concluding a marriage agreement must certificate such legal action [12].

Concerning the peculiarities of concluding a marriage agreement by minors of the FC of Ukraine, it specifies only the requirement of the written consent of the parents or guardians, certified by a notary, in the case of making legal action before marriage registration. However, these provisions do not correspond with the general requirements for making legal actions of persons from 14 to 18 years old fixed in the Civil Code of Ukraine.

In particular, according to prg. 2, p. 2. Art. 32, p. 2 Art. 71 of the Civil Code of Ukraine for making legal actions by a minor that are subject to the notary witness, it also requires permission of a guardianship and trusteeship body [5].

Regardless of the amount of legal personality of the subjects who are the parties of the marriage agreement, it enters into three copies: one by one for each party and one remains in the notary.

As to personal legal relations of the spouse, unlike property relations, they are beyond legal influence.

The question of the possibility of regulating family-legal agreements for personal non-property relations remains debatable.

You should pay attention to the fact that under present-day conditions in the FC of Ukraine there are fixed contractual constructions aimed at settlement along with property and non-property relations. So, in accordance with Art. 109 of the FC of Ukraine the spouses having children may file with the court a marriage dissolution application accompanied with written agreement, which specifies with whom of them children will be living, what kind of contribution the parent living without children will make in ensuring their living conditions, as well as conditions for him/her to exercise the right for children's personal education.

Z.V. Romovska does not agree with such a point of view on agreement-based regulation of relations concerning the implementation by the parents of the child's upbringing. In her opinion, it is not a restriction on the parental rights of the determination in the agreement, that is an act of goodwill of the parties, days and hours, when the father who resides, in Lviv, for example, will have the opportunity to communicate with the child who lives with the mother in Kharkiv [13, p. 38].

Conclusions. Nowadays in Family Law of Ukraine, the radical changes are observed in approaches to regulation of de facto husband and wife property relations by means of the expansion of dispositive regulation.

Significant role in the contractual family legal relationship ranks property provisions, the legal likelihood of which is certified by a notary.

Family law of Ukraine proceeds from liberty of agreement doctrine, and therefore the participants of family relations can decide to conclude family agreement at their own discretion; the possibility of concluding mixed agreements that combine different types of agreements in their structure; the terms of the agreement and the list of their participants, etc.

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