

MARRIAGE CONTRACT AS A REGULATOR OF NON-PROPERTY RELATIONS COMPARATIVE CHARACTERISTICS OF UKRAINIAN AND EUROPEAN LEGISLATION

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Abstract: The article highlights the peculiarities of concluding marriage contracts with intangible objects. The problems of legal regulation of marriage contracts in international family law have been considered. The approaches of domestic and foreign scholars on the essential characteristics of marriage contracts have been studied. The paper acquaints with the requirements for the procedure for concluding a marriage contract abroad, which include the written form of the contract and the presence of both parties (spouses, brides). The paper traces the principles on which marriage contracts are based in different countries (for example, in Austria, Germany, France, Switzerland, the Netherlands, Italy, the United States, England, and Sweden). An important place is occupied by the study of non-property rights and obligations that may be spelled out in the marriage contract. An analysis of the procedure for concluding a marriage and marriage contract between citizens of Ukraine and Austria, Ukraine and France, Ukraine and Germany has been carried out. The peculiarities of marriage agreements (contracts) with foreign citizens in case of signing on the territory of Ukraine and the legal consequences of violating the requirements for marriage agreements (contracts) have been revealed. On the basis of the conducted research practical recommendations on the procedure of concluding and the content of marriage contracts have been suggested.

Keywords: transaction, marriage contract, non-property benefits, information.

1 Introduction

The dynamism of public life and the changes taking place in the economy, politics, social sphere, morality cannot but affect the law. It does not stay aside, but reacts to such changes, and in a very peculiar way.

Today, many countries around the world recognize the marriage contract as an important transaction that strengthens the marital relationship. In developed countries, it is believed that a marriage contract can prevent the possibility of conflict between ex-spouses and saves money that would have been spent in the event of litigation. Also, the main purpose of the marriage contract is to give the spouses the right to establish the legal regime of property and to determine the nature of property relations in marriage. There is an opinion among Ukrainians that the marriage contract is based on mercantile interest, which is not related to the feelings of love and respect on which the marriage should be based, that brides and spouses are already thinking about divorce. It should be noted that the legislation of other countries, which regulates the institution of marriage contract, has a number of features that differ from domestic legislation on the regulation of this institution. Therefore, we consider it appropriate to disclose some important aspects of this contract through the prism of a comparative analysis of the institution of a marriage contract under the laws of Ukraine and other European countries.

Problematic issues of the institute of marriage contract under the laws of Ukraine and other legal systems have been the subject of research in many scientific papers. In particular, the main problems of legal regulation of the marriage contract in family law of Ukraine were studied by V.S. Hopanchuk, Yu.V. Hofman, O.V. Danilchenko, I.V. Zhylinkova, O.M. Kalitenko, O.S. Oliynyk, A.V. Romanyshyn, Z.V. Romovska, L.O. Samilyk, O.O. Ulyanenko, Ye.I. Fursa,

S.Ya. Fursa, O.A. Yavor. Some aspects of the marriage contract in foreign law were covered in the scientific works by A.S. Dovgert, K.A. Kazaryan, V.Ya. Kalakur, V.I. Kysil, S.O. Korod, L.V. Lypets, O.M. Nizamieva, L.I. Radchenko, L.M. Sousse, H.S. Fedinyak.

However, despite the large amount of scientific research, there are still many questions about the legal regulation of marital relations through a marriage contract, resulting in the need for additional consideration of certain issues concerning such transactions with intangible rights, its features, including the legislation of different legal systems. It should be noted that among legal scholars there is no consensus on what can be the object of marriage contracts.

2 The initial presuppositions

Carrying out a comparative legal analysis of family law of foreign countries and Ukraine allows us to identify problematic issues, gaps and conflicts in domestic law, to establish unified rules. Legal relations arising in connection with non-property objects began to be actively studied. As a result, a certain perception, opinion about their nature, content, characteristics was strengthened. During the life of a number of generations, neither in the legal literature nor in the legal consciousness of people there was almost no doubt or disagreement that non-property rights cannot be considered as objects of civil circulation, as a commodity, and with which no transactions can be made. Scientific analysis of the specifics of transactions with non-property assets, outlining the theoretical foundations and methodologies of their study, determining the features and system of such transactions are important. Because, today, there is a certain group of transactions that generates the emergence, change and termination of rights and obligations not only property but also non-property rights or in the non-property sphere. Therefore, examining the marriage contract, we will find out whether it can regulate non-property relationships.

3 Methods

The following research methods were used in the work: theoretical (analysis of regulatory documents and scientific literature on the problem under study, comparison, generalization, modeling), empirical (diagnostics of the level of formation of managerial competencies of students of the system, questioning, observation, peer review, comparative qualitative and quantitative analysis of diagnostic results the level of formation of managerial competencies).

4 Results and discussion

The concept of marriage contract was introduced into the national legislation of Ukraine on June 23, 1992, and at that time it was called a "marriage agreement". According to the Law of Ukraine №2488 12 of June 23, 1992, the Marriage and Family Code of Ukraine amended Art. 271, according to which persons who marry have the right to enter into an agreement to resolve issues of family life (marriage contract), which provides for property rights and responsibilities of the spouses.

Later, with the introduction of the Family Code of Ukraine of January 10, 2002 №2947 III, the concept of "marriage contract" appeared in the legislation of Ukraine. The procedure for its conclusion, content, beginning and term of validity, change of conditions, as well as grounds for termination and invalidation have been comprehensively regulated. Prior to the adoption of the Family Code, the norms of the Marriage and Family Code of Ukraine rather concisely defined the right to conclude a marriage contract, other conditions remained outside the legal regulation of family law, and if necessary, refer to the general rules of civil law. Therefore, it can be assumed that the marriage contract has

undergone significant “modernization” compared to the marriage contract.

The Family Code of Ukraine is clearer and broader describes the category of persons who have decided to register a marriage. If earlier Part 1 of Art. 27-1 of the Marriage and Family Code of Ukraine stated: “Persons marrying”, the Family Code of Ukraine enshrined this formula more specifically: “Persons who have applied for registration of marriage”.

In case of concluding a marriage contract, the bride and groom must provide the notary with proof that they have submitted an application for registration of marriage to the registry office, as required by Art. 28 of the Family Code of Ukraine. And if the marriage contract is decided to be concluded by persons who are already married (spouses), they are obliged to provide the notary with a certificate of registration of marriage.

It should also be noted that the list of persons entitled to enter into a marriage contract does not include persons who are in a civil marriage, i.e. in actual marital relations Doroshenko L.M., Bystra A.O (2013).

However, Para 3 of Part 1 of Art. 3 The Civil Code of Ukraine provides for the principle of freedom of contract [3], according to which persons who are in a de facto marital relationship may draw up an agreement with each other to establish a regime of separate or partial ownership of property, as well as enter into any other transactions not prohibited by law. However, such transactions will not be considered a marriage contract in the literal sense of the word. After all, such persons, firstly, are not included in the circle of persons who can conclude a marriage contract, and secondly, then even the very name of the contract “marriage” loses its meaning. Such an agreement must comply with the general rules of civil law Doroshenko L.M., Bystra A.O (2013).

Therefore, for almost 30 years, the law provides for such a way of regulating the property relations of the spouses as a marriage contract. Despite this, many Ukrainians are still wary of concluding it, fearing that it will destroy trust between spouses and even destroy feelings. Women are especially afraid of concluding a marriage contract, as they believe that such a contract may limit their property rights and deprive them of ownership of property, both their own and what may be acquired in the future. Such fears have no legal basis and are in no way consistent with the provisions of family law. It is worth recalling that in Europe the marriage contract is quite common and widely used, and in Ukraine it has not acquired such a status yet, which is in vain, because in addition to the subjective disadvantages invented by our society, such a document contains many more advantages.

First of all, it can be argued that the marriage contract is a kind of insurance against the risk of property loss in the event of divorce, a reliable way to protect the property rights of spouses. By concluding such a contract, it is possible to fully and in as much detail as possible regulate the property relations of the spouses. Therefore, whether it is worth evaluating a marriage contract as a way of settling property relations or as an instrument of psychological influence on the other spouse, we will consider it on the basis of current norms of the Family Code of Ukraine.

Courts of all instances emphasize in this aspect that the contract, including marriage, is primarily a category of civil law, and in accordance with Art. 8 of the FC of Ukraine, in cases of contractual regulation of family relations, the general rules of Art. 3, 6 of the Civil Code of Ukraine on the freedom of contract, as well as Chapters 52, 53 of the Civil Code of Ukraine on the concept and terms of the contract, its conclusion, amendment and termination must be implemented.

Thus, the Supreme Court recognized the legitimacy and validity of the plaintiff's claims in this case, which once again confirms

the possibility, using the right to freedom of contract, to conclude a marriage contract on the most favorable terms.

In the theory of civil law there is a widespread view that personal non-property rights are so closely linked to their holder that the latter owns them for life, cannot give them up or be deprived, that the personal nature of personal non-property rights is characterized by the impossibility of concluding any agreements on their non-property objects Romovska, Z.V. (1986). Therefore, all administrative agreements with them are invalid Pushkin A.A, Samoilenko V.M., Shyshka R.B. (1996). Based on these prerequisites, a conclusion is made about the impossibility of participation in civil turnover of absolutely all personal non-property rights Slipchenko, S.O. (2008)

But nowadays, in connection with the establishment of civil law regulation of personal non-property rights in Ukraine and the acquisition of these rights of important social importance, there are many problematic issues regarding their implementation and protection in practice. Therefore, scholars and practitioners today question the categorical theory of contractual regulation of exclusively property rights Iasechko S., Ivanovska A., Gudz T., et al (2021).

For example, regulating the dissemination of information about personal life in a marriage contract. With the digitalization of life, almost everyone has their own page on some social network. When concluding a marriage contract, the spouses can regulate the posting of information about personal life on social networks Iasechko S., Kuryliuk Y., Nikiforenko V., et al (2021).

According to Art. 302 of the Civil Code of Ukraine, the right to information is a personal non-property right. And in accordance with Art. 269 of the Civil Code of Ukraine, personal non-property rights are inalienable, belong to individuals for life, and have no economic meaning. This characterization of the right to information called into question the possibility of concluding information contracts. The need, as stated by S.N. Berveno, referring to the works of G. Dernburg and K.F. Chillarge, arises also because many scholars justify only the property nature of legal relations arising from the contract, as the latter formalize the process of trade and therefore must relate to the means of regulating property relations Berveno, S.M (2006).

Therefore, we can see that information is a really complex object. Thus, some scholars and practitioners question the categorical theory of contractual regulation of property relations only. It has become common practice in contractual practice to include in traditional contracts (sales, contracts, etc.) the conditions of confidentiality or secrecy of certain information that is transmitted, arises or is created in accordance with such contracts. So, L.V. Fedyuk does not rule out the relationship between personal non-property rights and contractual obligations. She notes that individuals may enter into contracts that are not regulated by law, if they do not contradict it, so there may be a situation where the contract will be related to personal non-property rights.

As noted by O.M. Dotsenko, if we consider personal life as a social being as an “object of information”, we can conclude that the semantic value of information about the personal life of an individual is information about facts that are irreversible from the past to the present in the future occur and (or) occurred with a single person. The transference of the received information about an individual's personal life into a symbolic form allows us to say that they cease to be only a subjective reality and become an objective reality, i.e. such an object as information about personal life appears Dotsenko O.M (2014). Information about the personal life of an individual, as well as every phenomenon or object of reality, becoming an object of rights, acquires a certain legal form, legal characteristics as an object of rights. The value of the object may be, respectively, property or non-property nature, depending on whether the object serves as a means of satisfying property or non-property rights. The property value of the object is manifested in its economic value. The object in this case becomes in economic terms a commodity,

and property interest is provided with the opportunity to obtain from it the exchange value Dotsenko O.M (2014).

Therefore, the categorical opinion that information, as a personal non-property asset, cannot be the subject of a marriage contract, loses its essence. Such transactions may be made, contain as a subject information and change or terminate the rights to it. The conclusions drawn are important not only for law enforcement and law enforcement practice, but also for the theory of civil law.

Grishin I.P. and Myskin A.V. believe that it is quite an acceptable situation in which personal non-property relations turn into the property ones, as in these cases. However, they consider the opposite situation unacceptable, stating that in this case the regulation of property relations turns into the regulation of personal non-property relations. For example, if the marriage contract states that if the husband inherits the house, the wife is obliged to live in this house.

It should be noted that the legislation of other countries, which regulates the institution of marriage contract, has a number of features that differ from domestic legislation on the settlement of this institution. Therefore, we consider it appropriate to disclose some important aspects of this agreement through the prism of a comparative analysis of the institution of the marriage contract under the laws of Ukraine and other countries.

It is a mistake to think that the right of priority in the invention of a marriage contract belongs to modern Europe or America. In ancient Greece and Rome, before starting a family, a man and a woman drew up an agreement describing their property relations, immediately discussing the issue of inheritance of jointly acquired property in the future. Such arrangements were not considered shameful, and such "insurance" was very common until the advent of Christianity. In later times, the "sacred union" was concluded and regulated exclusively by the church. Restoration of the institution of marriage contract began again only in the late XVIII - early XIX centuries in France, England, Germany, and Austria. The contract takes legal effect from the moment when the church is replaced by the so-called secular marriage.

Yet, in fact the content of the marriage contract is often a transaction under civil law and a conditional transaction in which the emergence or termination of a relationship is dependent on the occurrence of a certain event in respect of which at the time of marriage is still unknown whether it will occur. Most often, these events are personal and non-property, but they are closely related to the property consequences for spouses who have entered into a marriage contract. For example, if one of the spouses abuses alcohol, some property is transferred owned by another person. If the third child is born, then a part of the husband's property becomes the property of the wife. Regarding the birth of a child in general and the status of "child-free", prohibition of work, etc., adultery, a certain part of the property also becomes the property of the deceived husband. Here personal non-property relations pass into property or are an integral part of the whole aggregate mass of both property and personal non-property relationships. Variants of such agreements can be very diverse, and foreign law enforcement practice has long been successful in this regard. For example, the marriage contract of J. Kennedy and A. Onassis, which provided for compensation of \$10 million in favor of the wife if the husband left her and \$18.7 million if he was abandoned, but provided that the marriage lasted not less than 5 years. Let us note the relative accuracy of the latter amount. This shows how in detail, such marital and commercial relations are calculated in developed countries.

Analyzing the French civil law, the following points should be noted. According to Art. 212 of the French Civil Code (Napoleon's Code), spouses must respect each other, remain faithful, help and support each other. Spouses also do not have the right to dispose of the rights to family housing without mutual consent, not so to the family items available in it. This

provision applies despite the property regime established by the spouses. However, in accordance with Art. 220 of the French Code, each spouse has the right to enter into contracts relating to the management of the household or the upbringing of children: any debt obligation assumed by one of the spouses is imposed on the other jointly and severally.

The French Civil Code enshrines the right of spouses to engage freely in their professional activities, to receive income and wages, and to dispose of them after payment of family expenses. Each spouse independently manages their personal property, creates obligations regarding it and alienates it.

It should be noted that the French Civil Code provides for the possibility of concluding a cohabitation agreement. According to Art. 515-1 of the Code, a cohabitation agreement is an agreement concluded between two adult individuals of different or the same gender for the purpose of living together. In this case, the partners who have concluded cohabitation agreement, make a commitment to each other to live together, provide each other with material assistance and mutual support (Articles 515-4).

In addition, the partners in the marriage contract may choose the regime of joint ownership of the property. However, as per the provisions of Art. 515-5-2 of the Code, the exclusive property of each partner is funds received by each of them, on any basis, after the conclusion of the contract and not used to purchase property; manufactured property and its accessories; personal property; property, or parts thereof, acquired at the expense of funds belonging to the partner before the registration of the initial or subsequent agreement, in accordance with which this regime was chosen; property or its part acquired at the expense of funds received under gift agreements or inheritance; part of the indivisible property acquired at public auction at the sale of all or part of the property owned by, among others, one of the partners by inheritance or gift.

Also, unless otherwise provided by the agreement, each of the partners retains the right to manage, use, and freely dispose of their personal property; bears individual responsibility for their personal obligations that arose before or during the contract (except for obligations related to the needs of everyday life).

Thus, the French civil law includes the following items to the objects of marital relations: material goods such as property, maintenance rights; non-property benefits in the form of respect for each other, loyalty, the right to freely engage in professional activities; the right to conclude a cohabitation agreement.

The main provisions governing marital and family relations are contained in the General Civil Code of Austria of 01.06.1811. According to §44, family relations are established by means of a marriage contract, according to which two different persons, in accordance with the law, declare their will to live in an inseparable community, to have children, to raise and promote them.

The spouses are obliged in relation to each other to a comprehensive married life, especially to cohabitation, as well as to fidelity, proper conversion, and assistance.

The obligation of the spouses to live together is enshrined in §92 of the Austrian Code, according to which, if one of the spouses requires a change of residence for good reasons, the other spouse must comply with this requirement, unless they have good reasons not to change it (residence). However, the law allows temporary residence of a husband separately, as long as cohabitation with another man, especially due to physical threat, is unacceptable or justified by significant personal reasons.

Let us note that the Austrian Code gives one spouse the right to claim against the other spouse in the following cases:

- if one person is engaged in running a general household;

- if one person has the right to dispose of housing that meets the urgent needs of another person in housing, the other person has the right to demand that their spouse take all measures and prevent actions that will result in the loss of a housing by a person who needs it;
- if one person assists another person in carrying out their professional activity, they are entitled to a proportional reward for their assistance.

The legal regime of property relations of spouses is regulated by Section 28 of the General Civil Code of Austria. The provisions of this section stipulate the conclusion of a marriage contract, the subject of which is the right of joint ownership and inheritance agreement. Marriage is not a ground for establishing a regime of joint property between spouses. According to §1237, if the spouses have not reached a special agreement on the use of their property, then each spouse retains their former ownership, and the spouse is not entitled to claim what was acquired by each of them during the marriage, regardless of how it passed to them, during the continuation of the marriage.

Austrian law also provides for the conclusion of an inheritance agreement between the spouses, by virtue of which an obligation is given in respect of the future inheritance or part thereof, and this obligation is accepted (§1249).

Thus, Austrian law classifies material goods as property as objects of marital relations; the right to claim maintenance; the right to proportional remuneration for assistance in the performance of another person's professional activity; non-property benefits as responsibilities of cohabitation; non-property benefits such as loyalty, proper treatment, and assistance.

Both the family legislation of Ukraine and the legislation of continental Europe enshrine in sufficient detail the legal regime of property as an object of marital relations. For example, the laws of all countries establish the property regime of the spouses, regulate the division of property, provide for the obligation to maintain the spouses.

However, in the regulation of non-property assets as objects of marital relations, these states take different positions.

Thus, German legislation provides for only non-property benefits such as the right to live together, mutual responsibility; French law provides for non-property benefits such as respect for each other, loyalty, the right to freely engage in professional activities; Austrian law provides for non-property benefits as the joint residence of spouses; non-property benefits such as loyalty, proper treatment, and assistance.

5 Conclusion

The study of the possibility of concluding marriage contracts with non-property benefits arose from the presence of contradictions between the realm of the proper, the existing and the knowledge of the proper and the existing. Regulation of information rights in the marriage contract can be provided or transferred only on the basis of transactions. The transfer of information rights means the denial of rights to the acquirer for further usage, subject to restrictions set in accordance with the law and the terms of the contract. The categorical opinion that information, as a personal non-property good, cannot be the subject of a marriage contract in Ukraine, loses its essence. Such transactions may be made, contain information as their subject and change or terminate the rights to it. The conclusions drawn are important not only for law enforcement practice but also for the theory of civil law.

Our research allows us to draw the following conclusions. The establishment of the institution of a marriage contract in our country continues. Given the dynamic development of the private law sphere, the complexity of the nature of property relations between spouses, issues related to the possibility of brides or spouses through a marriage contract to determine the

legal regulation of certain non-property rights are updated. The institution of a marriage contract generally embodies the experience of the institutions of progressive democracies in Europe, but there are also differences related to the restriction of freedom of marriage contract.

The lack of research, despite the coverage by some scholars of some aspects of concluding marriage contracts with personal non-property rights, leads to uncertainty of the theoretical and methodological basis, contradictory law enforcement practice regarding such transactions. From the aforementioned points it can be stated that in the realm of existing, the transactions with personal non-property rights are committed, such personal non-property good is not alienated, and the owner only gives the right to use it both during life and after death.

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