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REGIME OF JOINT COMMUNITY PROPERTY OF SPOUSES IN UKRAINE: NEED TO IMPLEMENT FOREIGN EXPERIENCE

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Fursa S.Ya., Fursa Ye.I. Regime of joint community property of spouses in Ukraine: need to implement foreign experience.

This article is dedicated to historical aspects of the emergence of joint property of spouses and its contractual settlement (paragraph 1), the norms of the Marriage and Family Code (hereinafter - the Code of Marriage and Family) may also be applied to certain legal relationships. Yes, the Code of Marriage and Family lost its validity on 01.01.2004 and the Family Code entered into force, but those material marital relations that arose before 2004 must be regulated according to the norms of legislation that were in force at that time. Therefore, to the relations of spouses who acquired property before 2004 and continued to acquire it after 2004, both the Code of Marriage and Family the Family Code should be applied accordingly.

Other normative acts may be applied to regulate family relations, which may specify specific features of the regulation of spouses' rights to certain objects. In particular, such acts are: the Land Code of Ukraine, Laws of Ukraine «On Privatization of the State Housing Fund», «On Farming», etc. The formulated concept «spousal property regime» means the legal position that property occupies in relation to the rights and interests in it of each of the spouses. In Ukraine, the following regimes of property ownership of spouses are distinguished: personal private ownership of property by each of the spouses; - joint joint ownership of property by spouses; - joint partial ownership of property by spouses.

The essence of the regime of joint joint ownership of spouses (item 2), ways of division and disposing of joint joint property to the spouses (paragraph 3), marriage contract: grounds for conclusion (paragraph 4), marriage and family agreement in Ukraine and the need to borrow foreign experience (paragraph 4.1.).

Key words: family relations, regime of property of the spouses, personal private property of each of the spouses, joint community property ownership of spouses, joint partial property ownership of spouses, ways of dividing marital property, court, contract, marriage contract, family contract, partnership contract.

Фурса С.Я., Фурса Є.І. Режим спільної сумісної власності подружжя на майно в Україні: необхідність запозичення іноземного досвіду.

Ця стаття присвячена історичним аспекти появи спільної сумісної власності подружжя та її договірного врегулювання (п.1), До певних правовідносин можуть застосовуватися й норми Кодексу про шлюб та сім'ю (надалі - КПШС). Так, КПШС втратив свою чинність 01.01.2004 року і вступив в дію СК, але ті матеріальні подружні відносини, що виникли до 2004 року, мають врегульовуватися за нормами законодавства, які діяли на той час. Тому до відносин подружжя, що набувало майно до 2004 року і продовжувало його набувати після 2004 року має застосовуватися відповідно і КПШС, і СК.

Для врегулювання сімейних відносин можуть застосовуватися й інші нормативні акти, які можуть уточнювати специфічні риси регламентації прав подружжя на певні об'єкти. Зокрема, такими актами є: Земельний кодекс України, Закони України «Про приватизацію державного житлового фонду», «Про фермерське господарство» тощо. Сформульовано поняття «режим майна подружжя» під яким слід розуміти те правове становище, яке займає власність по відношенню до прав та інтересів на неї кожного з подружжя. В Україні розрізняють такі режими права власності подружжя на майно: особиста приватна власність кожного із подружжя на майно; спільна сумісна власність подружжя на майно;

спільна часткова власність подружжя на майно Проаналізовані особливості змішаного режиму права власності на майно, коли частина майна або окремі речі підпорядковані одному режиму власності, а інша частина майна або окремі речі -іншому (п.2), розкрита сутність правового режиму спільної сумісної власності подружжя, яка полягає в тому, що: обидва з подружжя перебувають в рівних правах щодо користування, володіння і розпорядження таким майном або окремими речами, якщо інше не встановлено договором про порядок користування речами; рівність прав обох з подружжя обумовлює і спеціальний порядок розпорядження спільною сумісною власністю, коли це має відбуватися за взаємною згодою;для посвідчення договорів, що підлягають нотаріальному посвідченню і державній реєстрації, має надаватися письмова і нотаріально посвідчена згода іншого із подружжя, а у всіх інших випадках презюмується, що договір укладається за такою згодою, розкриті способи поділу і розпорядження подружжям спільною сумісною власністю, зокрема, договірний та судовий (п. 3), особливості правового режиму майна подружжя у шлюбному договорі: підстави його укладення (п. 4), необхідність запозичення іноземного досвіду для вдосконалення законодавства, яке регламентує шлюбний і сімейний договір в Україні (п. 4.1.).

Ключові слова: сімейні відносини, режим майна подружжя, особиста приватна власність кожного із подружжя на майно; спільна сумісна власність подружжя на майно; спільна часткова власність подружжя на майно, способи поділу майна подружжя, суд, договір, шлюбний договір, сімейний договір, договір про партнерство.

Formulation of the problem

Before proceeding to the analysis of the marital property regime and

to formulate its definition, types and methods of its regulation, the authors consider it expedient to analyze the historical aspects of the emergence of joint property of spouses and its contractual settlement. Pay attention to the contractual regulation of the joint joint property of the spouses in the marriage and family contract, analyze the judicial practice and justify the need to borrow foreign experience and pay attention to the regulation of property rights and obligations of civil partners.

Processing status

Scholars such as M.M. Dyakovych, G.M. Garo, Lypets L.V., Nikityuk O.M., Fursa Ye.Ye. and others devoted their works to the property regime of spouses, in particular, to joint property, as well as to persons living in the same family without marriage registration and civil partners. but the topic has not exhausted itself and needs further research.

Presenting main material

1. Historical aspects of the emergence of joint property of spouses and its contractual settlement

At a certain time of the origin and development of family relations in Ukraine, it was difficult to establish which regime of ownership was subject to this or that property or individual belongings of the spouses. This was due to various stages of the development of Ukrainian legislation and certain legal situations.

Thus, the regime of ownership of property is regulated by the norms of the Civil Code of Ukraine (hereinafter – CC)[1], and the regime of ownership of property of spouses is also regulated by the norms of the Family Code of Ukraine [2] (hereinafter – FC).

The norms of the Marriage and Family Code (hereinafter – MFC)[3] may also be applied to certain legal relationships. Yes, MFC lost its validity on 01.01.2004 and the FC entered into force, but those material marital relations that arose before 2004 must be regulated according to the norms of legislation that were in force at that time. Therefore, to the relations of spouses who acquired property before 2004 and continued to do so after 2004, both MFC and the FC should be applied accordingly.

Other normative acts may be applied to regulate family relations, which may specify specific features of the regulation of spouses' rights to certain objects. In particular, such acts are the Land Code of Ukraine, the Laws of Ukraine "On Privatization of the State Housing Fund", "On Farming", etc.

At the same time, it should be noted that the contractual procedure for the settlement of marital material relations appeared in Ukrainian legislation and practice only in 1993 and with certain restrictions since it was allowed to conclude a marriage contract only before the marriage was registered[4] and on the condition that it did not worsen the situation of any of the spouses compared to the legislation of Ukraine (Article 27-1 of MFC). At the same time, the size of the shares of each of the spouses during the division of joint property should be equal, except for cases when the court deems it necessary to deviate from the equality of shares only in the interests of the children, as well as the other spouse (Article 28 of MFC). Along with the above, it should be noted that at that time the number of wealthy citizens in Ukraine was insignificant, the standard of living of the vast majority of citizens was low, and the process of privatization of housing and premises of the non-housing fund was just beginning. With such regulation of contractual relations, it made no sense to enter into a marriage contract.

We do not take into account the experience of the pre-revolutionary (before 1917) contractual settlement of family relations, although we ana-

lyzed it in one of our research[5], this legal institution was not studied during the period of the Soviet government.

So, lawyers formulated a conditional state of the jointly acquired property of the spouses and called it joint property, so that in the event of the termination of family relations it could be distributed, but according to the communist ideology, which was still dominant in 1992, the division of property had to take place at the level of shares. In fact, in that period, there was no question of joint co-ownership, but only joint partial ownership, since the shares were considered equal.

In that tumultuous period, a movement was chaotic not only in politics but also in science, as scientists did not have time to follow the emergence of new and new normative acts, not to mention the development of concepts of contract law. Amendments were made to the legislation, and the institution of the marriage contract began to actively develop in Ukraine, approximately thirty years ago, compared to other developed countries that have been polishing the drafts of marriage contracts for centuries and have a long experience of their application, thorough judicial practice on this issue, we consider it to be an insignificant term.

In this regard, the transformation of outdated norms and the development of new ones can be recognized as a "legal revolution" carried out in the family law of Ukraine by the outstanding Ukrainian scientist Z.V. Romovska[6], who managed to create a balanced structure of the FC and to bring the norms of the law in line with the real relations in society and the family at that time and to introduce a marriage contract to replace the marriage contract with significant changes in its regulations. Together with the Family Code of Ukraine in 2004, the Civil Code of Ukraine entered into force in a new edition, which still regulates the concept of "joint property".

The conventionality of the concept of "joint property of spouses" is due to the fact that the vast majority of families live one common life and acquire things in case of need for the family, especially without thinking about who is the owner and how law will qualify such property in the future. The attempt to regulate these relations is associated with certain difficulties, which in Ukraine are caused by mentality and traditions, as well as the Soviet period when ideology dominated family relations. For this purpose, we cite Art. 1 of MFC, which was supposed to educate society and regulate marital relations,

"The tasks of the Code on Marriage and Family of Ukraine are: building family relations based on the voluntary marriage union of a woman and a man, on the feelings of mutual love, friendship and respect of all family members free from material calculations"[3].

That is, it was proposed to reject the material component of the relationship between a man and a woman.

In this regard, the development of family relations from the norms of the MFC to the adoption of the FC can be evaluated as a break with the communist ideology, since spouses were allowed to regulate their property relations as they wish based on the marriage contract, and other novelties were also introduced in FC, in particular, an agreement on the division of marital property, a family agreement, which could regulate the issue of dividing the property of a spouse, which belonged to him by the right of joint co-ownership etc.

2. Regime of joint property of spouses

Thus, in the modern doctrine of the FC of Ukraine, two types of families recognized by the state are distinguished and regulated: a registered marriage between a woman and a man (together they are referred to as a spouse) (Chapter 4 of the FC) and the residence of a woman and a man in the same family without registration of marriage and with by other persons who create joint co-ownership of the property acquired by them during the period of cohabitation, unless otherwise stipulated by the contract (Part 1 of Article 74 of the FC).

This provision of family law is important because some families live together for a considerable period before registering a marriage, and also reconcile after registering a divorce and continue to live together without registering a marriage again. This property relationship is now equated to a registered marriage and presupposes the emergence and existence of joint co-ownership.

The positions of Ukrainian scientists have also been formulated regarding the cohabitation of two persons of the same sex, who are also entitled to regulate their relations based on a contract[7], but according to the norms of the FC, they are not considered marital and family. Such couples may determine in the cohabitation agreement that the property purchased by them is joint property, since the principle of freedom of contract prevails in Ukraine and everything that is not expressly prohibited in civil law and similar relations are permitted.

Therefore, three stages are important for the perception of joint property of spouses in the law of Ukraine:

- the creation of a family and joining efforts of family members to ensure their material well-being, that is, the material foundation on which family relations will be built, as well as the birth and upbringing of children;

- relationships in the family regarding the use, possession and disposal of joint funds and things, therefore in real family relations planning and implementation of plans into reality regarding the material interests of both the family and each family member and children;

- the stage of dividing the joint property of spouses is not mandatory for many families, but the potential possibility of such a stage quite often stops quarrels in the family and stimulates better thinking than separating and dividing property. But in judicial practice, there are also a significant number of cases in which the joint property of spouses is divided, as well as not the best features of family relationships are manifested.

Before moving on to the analysis of the regime of joint ownership of property by spouses, in particular, and the contractual procedure for certification of transactions regarding such property, we consider it appropriate to formulate the concept of "property rights regime". This regime should be understood as the legal position that the property occupies concerning the rights and interests in it of each of the spouses.

In Ukraine, the following modes of property ownership of spouses are distinguished:

- personal private property of each of the spouses;
- joint community property ownership of spouses;
- joint partial property ownership of spouses;
- a mixed property ownership regime, when part of the property or individual things are subject to one ownership regime, and another part of the property or individual things is subject to another.

In the context of the subject of this research, let's focus on the analysis of one of the modes of property ownership of spouses, in particular, joint community ownership.

The emergence of joint community ownership of spouses is associated with the moment when the spouses begin to purchase non-consumable things that gradually accumulate in the family with joint funds or the funds of one of the spouses. As for the acquisition of property at the expense of one of the spouses, this refers to cases when the other spouse may not have independent earnings (income) for a serious reason (education, housekeeping, childcare, illness, etc.). Yes, in Part 2 of Art. 60 of the FC there is such a presumption,

"It is considered that everything acquired during the marriage, except for things of individual use, is the object of the right of joint property of the spouses"[2].

But such a presumption, in our opinion, should be accepted and reconciled with Articles 57 and 58 of the FC of Ukraine, which regulates a completely different approach to understanding the regime of property ownership. Yes, Clause 3, Part 1, Art. 57 of the FC of Ukraine establishes that the personal private property of a wife or husband is: the property acquired by her, by him during the marriage, but with the funds that belonged to her, to him personally, hence the corresponding income from the use of a such property.

Therefore, such a conflict needs its conceptual solution at the scientific level, and after the development of the final version of the regulation of the right of joint property of spouses in the legislation.

At the same time, in Ukraine, there are absolutely different approaches to the regulation of material aspects of family relations. Yes, in Art. 62 of the FC, property belonging to one of the spouses may be recognized by the court as joint community property of the spouses if during the marriage it has significantly increased in value as a result of joint labour or monetary expenses or expenses of the other spouse. In addition, if one of the spouses, with his/her labour and (or) funds, participated in the maintenance of property belonging to the other spouse, in the management of this property or its care, then the income (offspring, dividends) received from this property, in the event of a dispute, according to a court decision can be recognized as an object of the right of joint property of spouses.

In this norm, the emphasis is on the evaluative term "significantly increased", but the question arises regarding the limits of a significant increase in the value of the property, i.e. compared to which property and which contribution should be considered substantial. For example, quite often the question of recognition of the right of joint co-ownership of an apartment or a house, if it has undergone major repairs, is raised in this way. But in this case, we take the original object and add to it a share that increases the value of the object itself, so the other spouse has the right to claim such a share, and not the entire object. Moreover, in such a situation, it should be taken into account what funds were used for the repair: joint or personal funds of the other spouse. In the first case, the additional value of the object, which arose due to repairs, should be divided in half, and not lead to the recognition of the object as joint community ownership.

When considering the essence of joint property of spouses, in comparison with joint partial property, we must take into account that in joint property there is not always such a concept as equality of shares, since both parties can agree to depart from equality of shares in the right of ownership, and the court can divide joint property, not in equal shares, but taking into account the interests of children and (or) the other spouse. At the same time, the size of the real shares to which the parties have the right to claim in such a case depends on the justification provided to the court by the lawyers, unless otherwise established in the contract between the spouses.

The essence of the legal regime of joint property of spouses is that:

- both spouses have equal rights regarding the use, possession and disposal of such property or individual things unless otherwise estab-

lished by the agreement on the order of use of things;

- the equality of the rights of both spouses also determines the special procedure for disposing of joint community property, when it must be done by mutual consent;

- for certification of contracts subject to notarization and state registration, the written and notarized consent of the other spouse must be provided, and in all other cases, it is presumed that the contract is concluded based on such consent. At the same time, the other spouse may declare the contract invalid in court as one concluded by the other spouse without her (his) consent (Article 65 of the FC).

In the legal practice of the authors, there was a case when a legally knowledgeable spouse drafted a power of attorney for the right to represent the wife's interests when concluding contracts. In the power of attorney, there was a provision that he has the right to acquire property both in joint community ownership and in personal private property, and such power of attorney was subsequently notarized. When their relationship reached the point of divorce and division of the joint property of the spouses, he claimed that all the property he acquired was his personal private property, since he acquired it in his name and with the permission of his wife. In such a case, it was difficult to explain to the court that the power of attorney does not establish the right to personal private property or joint community property, since in this case it should be taken into account that he used the joint funds of the spouses.

At the same time, sometimes there are cases when one of the spouses borrows funds from the bank to buy an apartment, the other spouse moves in there and the children are registered there, and then there is a lack of funds due to objective or subjective reasons, and the bank is trying to take the apartment. In such cases, Part 4 of Art. 65 of the FC of Ukraine is applicable, where it is stated,

"A contract concluded by one of the spouses in the interests of the family creates obligations for the other spouse if the property received under the contract is used in the interests of the family"[2].

This applies to cases when the loan agreement is signed by only one of the spouses, and the other is not involved in certifying such an agreement. At the same time, in Ukraine, banks traditionally involve the other spouse as a property guarantor to simplify the subsequent process of foreclosure on the joint community property of the spouses.

Unfortunately, there are also common cases in Ukraine when one of the spouses buys things not even in his/her name, but in the name of close relatives, in order, firstly, to hide the fact of the existence of such property from tax and other state authorities, because he is a public officer, etc.; secondly, this option of purchasing property is a real way to avoid assigning this property to joint community ownership. The reverse side of the widespread abuse of marital rights and obligations is the designation of the property as a gift from the parents of one of the spouses since in this case the property is considered personal private property. It is equally difficult to prove in court that the parents did not gift the property, but the funds, and not to the family, but to their son or daughter, since to avoid "extra expenses" the funds are transferred without a notarization of the contract.

As for the possibility of disposing of one's share in the joint property of the spouses without the consent of the other spouse, only when one of the spouses makes a testament, he has the right to dispose of his share without allocating it in kind, and in all other cases, the consent of the other spouse is required. At the same time, it is difficult to agree with the formula specified in Art. 67 of the FC, since in this norm one of the spouses is allowed to obtain the right to dispose of the property in order to conclude a contract with another person, in particular, a contract of sale, lease, donation, lifelong maintenance (care), a pledge regarding his share in the right of joint property of the spouses after its determination and allocation in kind or determination of the order of property use.

That is, having determined in the contract the procedure for using the apartment, for example, in a two-room apartment, the husband has the right to use one of the rooms, while the wife and two children will live in the other room, it is also provided for the possibility for the husband-father to sell his share in the right of joint co-ownership of the spouses, for example, in the apartment. Therefore, the provisions of Art. 67 of the FC does not agree with the right of ownership, nor with the principle of reasonableness and justice, since it is necessary to determine which of the spouses and what share of the living space should belong to the right of ownership. Only after finding out such shares, it will be possible to talk about whether the room occupied by the husband or wife corresponds to the size of his share. If the size of the real living space of the husband or wife does not correspond to the size of the determined share, then the difference must be compensated with money or other property. In this case, it is worth "transferring" the joint community ownership into joint partial ownership by certification of the contract, and only then it will be possible to talk about the possibility and methods of alienating the share belonging to one of the spouses, and on the condition that it corresponds to the occupied living space.

3. Ways of dividing and disposing of jointly owned property by spouses

The most optimal and most civilized way of dividing the joint community property of the spouses

is by contract when both spouses can reach a compromise and mutually concede, so as not to waste time, effort, nerves and money to resolve their property claims in court. In this case, they have the right to deviate from the equality of shares, that is, to divide the property at their discretion by concluding a contract.

But let's emphasize that for the contract to be stable and none of the parties will be tempted to annul it in court, it must be reasonable and fair not only in relation to the property interests of the spouses but also in relation to the interests of their children. From our own experience as an attorney, we can note that quite often one of the spouses tries to hide part of the property or get a larger share of the joint property, but in the presence of professional lawyers and a competently drafted contract, it is possible to agree on the material rights of the parties (spouses), if the relationship between them has not reached open conflict.

In addition, it is difficult to divide property in kind if it consists of one item, say a one-room apartment, or several items, the value of which does not allow for mutual compensation. For example, in the judicial practice of Ukraine, there was a case when a couple could not share a Pomeranian Spitz dog named Lucky and two puppies between them and turned to the court on this issue, which made a decision – to leave the dog and puppies in the joint property of the spouses and to determine the procedure for using a dog and two puppies for a week at their place of residence[8]. That is, not all things can be divided in kind and you should come to terms with this, as well as not expect that the court will be able to divide all property or things.

In Ukraine, there are several ways of dividing joint community property:

– contractual, which is quite often associated with notarial, which provides for the certification of an agreement on the division of property or obtaining a certificate of ownership of a share in the joint property of the spouses based on their joint application;

– judicial procedure for resolving a dispute about the division of property, when the parties are unable to agree on such a division amicably.

It is quite obvious that such methods are used when the common property of the spouses includes real estate and other objects that are subject to state registration. Movable things can be divided according to a verbal or written agreement, but in Ukraine, there is a general rule that recommends making transactions in writing for an amount that exceeds twenty or more times the size of the tax-free minimum income of citizens (Paragraph 3 of Part 1 of Article 208 of the Civil Code), i.e. 340 hryvnias or 9 euros. Therefore, when dividing common joint property, it is advisable to conclude an agreement in writing, otherwise, such a division of individual things in the future may cause disputes between spouses, and also use a notarial procedure for recording such an agreement. The latter differs in that it concerns the property subject to registration, and the notary can, at the request of the applicants, draw up a draft contract, explain its essence and consequences, and will be responsible for the legality of such an agreement.

In Ukraine, the division of joint property of spouses is possible both during marriage and after the divorce or death of one of the spouses. But it should be taken into account that an exception to the general rule may be the case when the spouses certify a joint testament – the will of the spouses (Article 1243 of the Civil Code) and in this case, according to the general rule, the property is not subject to division, unless the interested parties declare otherwise in courts, in particular, heirs who have the right to a mandatory share in the inheritance after the death of one of the spouses.

In general, the ways of dividing the common joint property of spouses are defined in the legislation and provide for:

– a division of property in kind, if possible without prejudice to its economic purpose;

– distribution of things between spouses, taking into account their value and the share of each spouse in joint property;

– allocation of property in kind to one of the spouses, with the obligation to compensate the other spouse for his share of the money;

– the mixed method consists in the fact that a thing claimed by one of the spouses is separated from the jointly acquired property and it is allocated to him in kind, and the other property is transferred to joint ownership and the share of the other spouse increases due to the separated thing. This division of property is used when the spouses continue to live together as one family and do not terminate their family relationship. In the event of the termination of marital relations, the transformation of joint community ownership into joint partial ownership will only lead to postponing the final resolution of the problem with property rights to a later date or other complications.

According to Art. 361 of the Civil Code, a co-owner of joint partial ownership has the right to alienate his share, i.e. to gift it, mortgage it, enter into a lifelong maintenance (care) contract, etc. But only in the event of the sale of such a share, the other co-owner receives the prerogative right to purchase a share in the right of joint partial ownership. In such cases, it is very difficult to protect the rights of the other spouse, if such a person is low-income, because he/she is not able to buy such a share, and in the case of joint partial ownership of an apartment, a private apartment turns into a communal one. In Ukraine, there are sometimes cases when such an apartment is sold under

a sham agreement and specially trained "neighbours" move into it, creating unbearable living conditions to buy the share of one of the spouses for nothing. Therefore, it is difficult to recommend this method of property division.

Regarding the allocation of property in kind to one of the spouses, with the obligation to compensate the other spouse for his share in money, this method can be regulated in the contract both with interest for the use of funds, which are paid in instalments or with deferred payment, and without such, but according to the principle of good relations or in the interests of children. But this method cannot be used by the court when one of the spouses objects to the payment of compensation to him or his opponent is unable to make such payment.

In the lawyers' practice of the authors, there was a case when it was necessary to divide the apartment, and its other co-owners did not agree to any compromises, they were offered various options for exchanging the apartment, but none of the options suited them. All these options were stated in writing, notarized as statements and given to the other co-owners, but there was no reaction from them, so an application was filed with the court for the forced sale of the apartment and the distribution of the received funds. Such a variant of the division of joint property is not provided for by the legislation of Ukraine, but it remained the only possible variant and the claim was justified by the principle of the rule of law. That is, quite often the spouse who lives in the apartment uses such a situation to his advantage and does not want to make compromises, because he is satisfied with everything: he occupies not only the part of the apartment that belongs to him by the right of joint ownership but also the entire apartment when one of the spouses is forced to rent another apartment. Therefore, in such situations, a claim for the payment of rent for the second half of the apartment is also fair, in order to stimulate the opponent to take action and at least partially compensate for the costs of his/her rent. That is, stimulating the other party to a mutual compromise is fully justified, and in the case considered by the authors' situation, one of the parties took a loan from the bank and bought out the share belonging to our client.

There is also another method of "exiting" the regime of joint community ownership of the real estate, when one of the spouses compensates for his alimony obligations to the other spouse and children for the future period, often before the child reaches the full age, at the expense of his share in the joint community property. In this case, for example, the apartment becomes the property of the child or the child and the other spouse (Article 190 of the FC). The peculiarity of such a contract is that it is notarized, but with the permission of the guardianship authority (Article 190 of the FC).

4. Marriage contract: grounds for the conclusion

The issue of property division is possible for both future spouses and spouses by concluding a marriage contract in accordance with Articles 92-103 of the FC.

The very first reason, which is the basis for concluding a marriage contract before marriage registration, is the need to record, at the time of entering into a marriage, the presence of premarital property of the future spouses or one of them, so that in the future there would be problems with determining the status of the property as joint community property or private property for separate things or property in general. This applies to such things that are not subject to state registration, in particular, funds, and furniture, because according to Art. 93 of the FC, under the marriage contract, property subject to registration cannot be transferred to one of the spouses.

Formally, family relations in Ukraine quite often arise after the registration of marriage and joint living in a rented apartment, when each of the spouses takes only personal belongings for living together. In this case, all property acquired during their cohabitation will be considered joint community property of the spouses according to the norms of the FC. Therefore, the moment of emergence of the right of joint community ownership of property is obvious, and in such a case, only the intentions of each of the spouses, which they have regarding the regime of such property for the future, should be recorded.

Therefore, it is difficult to agree with the position of other authors who believe,

"A marriage contract is, first of all, an agreement to resolve controversial issues of family life, concluded between persons entering into marriage, or spouses"[9].

In this context, the question arises, what are the controversial issues of family life, when people only intend to get married and create a family? As a rule, they do not yet have the experience of cohabitation and relevant disputes over property, so they either follow traditions or the advice of relatives who consider it appropriate to warn them against mistakes, or they have mercantile interests that they wish to realize in marriage.

Therefore, the marriage contract in such a situation resembles a contract on the intentions of the parties, and the family quite often begins to live from a clean slate, so it is difficult to agree that the parties to the contract will establish special conditions for the distribution of joint property that they do not yet have.

If we consider at this stage the options for regulating the rights and obligations of each spouse, which can become an alternative to the emergence

of joint community ownership, then it is worth noting that they, as parties to the marriage contract, can agree on:

– determination of the regime of property as joint partial ownership with unequal or even equal shares, but in this case, it is not joint community ownership;

– establishment of personal private property for the spouse in whose name the property will be purchased, but in its essence, such a condition can be considered as a way of postponing problematic issues for the future, when the property will be purchased only in the name of one of the spouses.

Indeed, it does not make sense to certify a marriage contract, which will record the right to joint community ownership of the property of the spouses, since this is how the rights are regulated in the FC. At the same time, it is difficult to recognize in advance the departure from the equality of shares in the right of joint community ownership, since such an approach will violate Articles 21 and 51 of the Constitution of Ukraine regarding the equality of rights of men and women. However, regardless of the requirements of the Constitution of Ukraine, spouses certify marriage contracts where the share of one of the spouses significantly exceeds the share of the other and this happens without any stipulation of the relevant grounds. Nevertheless, such agreements are valid until the question of divorce or the division of joint partial property arises, when the spouse who put up with such a violation of his rights for the sake of the existence of the family realizes that he is losing not only the family, but the property as well, so he/she applies to the court to declare the marriage contract invalid, since it violates his rights and interests, and sometimes the interests of children.

At the same time, it will not contradict the constitutional principles if the parties agree that the departure from equality of shares will take place and the share of the spouse with whom the children will remain will be subject to increase. In addition, if the income of one of the spouses is greater than that of the other at the time of the marriage contract certification, this fact can be recognized as a basis for increasing the share in the shared property. That is, in such a case, the departure from equality of shares will be objective, and not perceived as gender-based.

But another variant of the development of family relations also takes place in the Ukrainian legal system, when either one of the spouses is insured, or both of the spouses have substantial assets, for example, a developed business, apartments, expensive and rare cars, etc., the use of which provides substantial income. In this case, it would be worthwhile to conclude a marriage contract to record personal private ownership of such property. However, in this case, and in many similar marriage contracts in Ukraine, marriage contracts are not concluded, which gives rise to clear advantages in family relations of a material nature on the part of the spouse who had significant wealth before entering into family relations. This is explained by a simple fixation on the material situation of the future spouse, that is, at the time of marriage, when he (she) is the founder of the enterprise, then the accounting department of this enterprise and the tax authorities will keep information about the income that the enterprise gave at the beginning of the marital relationship and during their life together. The capital movement of such a person can be confirmed according to the information of the bank where the account is opened. In this case, according to Art. 58 FC of Ukraine, if a thing belonging to one of the spouses bears fruit, gives offspring or income (dividends), he/she is the owner of these fruits, offspring or income (dividends). Therefore, all subsequent expensive purchases can be considered as private property, and not joint property, when the income of another family member is significantly lower and they do not keep family accounting. In such a case, de facto, there is no need to talk about the emergence of joint community ownership. But these issues are still not regulated in the legislation of Ukraine, which is explained by the same post-Soviet syndrome that everyone is equal, but the possible inequality of material rights of spouses before entering into family relations is not taken into account and is not regulated.

Therefore, the question of how the property is distributed, if it was acquired before the marriage and the other spouse did not influence its increase in any way, seems difficult. The loudest in this context was the case of divorce and division of property of R. Abramovich, who had a fortune of 20 billion US dollars, but according to information in the mass media, he left his wife only two billion[10], and not half of the joint property. Based on the lawyer's position, it is possible to assume with a high degree of probability that such an unequal division of property was justified precisely by the fact that the main part of the property was received by R. Abramovich before the marriage, and all subsequent property was acquired as income from the original capital, and not as jointly acquired property.

At the same time, in Part 2 of Art. 60 of the FC, an attempt is made to level the provisions of Art. 58 of the FC, since it provides the following general presumption,

The object of the right to joint co-ownership is the salary, pension, stipend, and other income received by one of the spouses [2].

That is, this norm does not contain any reservations regarding any incomes that are not included in the joint property of the spouses. But accord-

ing to part 3 of Art. 57 of the FC, it is established that the personal private property of the wife and husband also includes the prizes and awards that she or he received for personal merits, therefore, such types of income should not be included in joint community property, unless otherwise established by a contract or court. That is, the norms of the FC have a conflicting nature, which will give rise to different approaches to solving cases in courts.

For example, in Spain, there are three different economic regimes: matrimonial property regime, divided property regime and participation regime.

1. The economic regime of matrimonial property establishes that the benefits or profits received by one of the spouses during the marriage are shared by both. In the event of termination of this regime (for example, divorce), the property of the spouses acquired under this regime is divided equally between both spouses.

2. The economic regime of asset division is characterized by the fact that each of the spouses separately retains ownership of all their assets before and after marriage.

3. The regime of participation consists of the fact that each of the spouses has the right to participate in the profits received by the other during the period of validity of this mode[11].

Of the listed, the provisions of the Spanish legal system regarding the removal of personal private property from family legal relations are interesting. The very principle of stipulating in advance that the personal income from the premarital property of the spouses is divided equally or in a certain proportion or remains personal private property, we consider correct and such that it can be implemented by the Ukrainian legislation in order to resolve the conflict we mentioned earlier. At the same time, until the resolution of this conflict in Ukraine, these issues can be resolved in contracts, regulating the position of premarital assets and the corresponding income from their use in the marriage contract.

We will not moralize such situations and talk about the fact that there are a significant number of men and women who should be classified as "hunters" for fortunes that arise from marriages with wealthy businessmen. There are many cases in Ukraine when one of the spouses leaves all his/her property and goes to a "new" life without any material value. However, there are also many examples when such calculations did not come true and after marriage, the "hunter" does not receive any significant preferences, but one rule should still be taken into account, in case of significant inequality of rights to property in the family and in case of unsettled in the marriage contract, there will be an imbalance in the relationship, which can lead to violence in the family and other negative moments.

4.1. Marriage and family contracts in Ukraine and the need to implement foreign experience

The contractual procedure for regulating family relations in Ukraine can change a significant part of the issues that concern not only the joint residence of a man and a woman but also the issue of engagement, the distribution of joint property, etc. The authors even proposed a model of transition from one relationship to another, and the contractual order is considered not as a stable order of relationship settlement, but as a dynamic one, when all the most important family issues are resolved on a contractual basis and, in the case of a mutual will, changes can be made to the contract. Therefore, in this context, the marriage contract is considered only as one of the subtypes of contracts that are included in the broader concept of "family contract". Such a theoretical concept may be necessary to regulate relations not only for people with a pedantic character but also for various life situations when it is necessary to expand the circle of subjects who will participate in it, as well as for cases when the spouses want to expand the scope of issues, which are regulated in Chapter 10 of the FC, those conditions that are considered unacceptable in the rules of the Civil Code.

For example, in Part 4 of Art. 97 of the FC allows the marriage contract to determine the terms of use of the property belonging to the spouses or one of them not only to provide for the needs of their children but also other persons. Quite often in Ukraine, spouses live together with the parents of the husband or wife and certain disputes arise between them, so they should establish the rules by which the two families will live, as well as specify the set of rights and responsibilities of each family member. Therefore, in such cases, it is worth concluding a family contract, not a marriage contract.

In particular, in Art. 93 of the FC defines the range of issues that can and cannot be regulated by a marriage contract, namely:

– it is proposed to regulate property relations between spouses, as well as their relations as parents;

– personal relations of spouses, as well as personal relations between them and children, cannot be regulated;

– the scope of the child's rights established by law cannot be reduced;

– one of the spouses cannot put other of the spouses in an extremely unfavourable financial situation;

– immovable property and other property, the right to which is subject to state registration, cannot be transferred to the ownership of one of the spouses.

As we can see, some provisions regarding the content of the marriage contract are not always

justified, as they limit the freedom of the contract and the right of the parties to the contract to determine and regulate those issues that they consider appropriate to resolve during the period of joint life as one family.

If we proceed from the general presumption that the marriage contract regulates only property relations between spouses, then it is not difficult to connect these relations with non-property ones. For example, is it possible to limit the right of the other spouse to engage in sports, practice a certain religion, etc.? Yes, to engage in a certain sport or pay tithes to the church, the funds will be taken from the family budget, but, as a general rule, the right to use common property must be agreed upon by both spouses. Therefore, non-property relations can be connected with property ones. Therefore, it is worth recognizing that freedom of contract dominates in the marriage contract as well, and highly professional notaries can recommend not including in the content of such contract issues that should not be regulated in the contract for the entire period of cohabitation by one family. For example, such clauses as who will clean the apartment, or hiring a cleaning lady as a mandatory condition of cohabitation and life, should not be included in a marriage contract, because in difficult moments, when there is no money, it is worth performing such a function yourself to save money.

The legislation of countries such as Italy and others provides for liability for breach of fidelity to spouses[12]. So, in our opinion, the consequences of marital infidelity can be quite justifiably determined in marriage contracts – compensation for moral damage from adultery, by establishing a certain amount of such compensation in the contract.

At the same time, it can be assumed that the marriage contract is temporary and its individual conditions can be calculated with respect to rights and obligations for a certain time (Article 96 of the FC). We believe that the specificity of such an agreement is to regulate the joint residence of spouses. Therefore, it should start its effect from the moment of marriage registration. If the marriage contract is concluded by persons who are already married, then the contract becomes legally binding from the moment of its notarization and ends from the moment of dissolution of marriage or death of one of the spouses. We do not allow fixed-term marriage, therefore, the marriage contract should not be considered as a fixed-term as well. Indeed, spouses can terminate such an agreement, make changes to it, and live separately for a certain period, but a general rule should be established – the marriage contract should not be concluded for a certain time.

The marriage contract must be notarized, so it can be certified by Ukrainian public and private notaries, as well as Ukrainian consuls in foreign countries[13]. Citizens of Ukraine have the right to have marriage contracts certified by foreign specialists when it comes to marriage with foreign citizens, but such contracts are subject to legalization.

Specific features of international marriage contracts are already being studied in Ukraine, but there is a lack of information that could be a synthesis of the best examples of foreign marriage contracts with prototypes of Ukrainian origin. Thus, in Ukraine, both notaries and consuls have the right to apply foreign legislation when drawing up marriage contracts, in particular, Articles 5 and 59 of the Law of Ukraine "On International Private Law"[14] allow for the possibility of drawing up contracts taking into account the autonomy of the will and applying the norms of foreign law, the main thing in such a case that the choice of law regarding individual parts of the deed is clearly expressed. Therefore, when choosing a foreign law to be applied in a marriage contract, it is possible to bypass the restrictions that take place in Art. 93 of the FC and significantly expand the scope of regulation of family relations, but under the condition that there is a foreign element.

In general, Ukrainian scientists have begun to investigate[15] the issue of international marriage contracts and, in particular, when one of the subjects of such contracts is a citizen of Ukraine, but they should become the object of research by specialists from different countries, for example, Ukrainian and Polish, Swiss and Ukrainian scientists, etc. This is important and painstaking work, which should become a guarantee against offences in the field of family relations in the case of international marriages and corresponding marriage contracts. This is also a necessary element of Ukraine's harmonious entry into the European Union, as it is possible to predict with a high degree of probability that the number of inter-ethnic marriages will increase. Therefore, Ukrainian specialists: notaries, lawyers, and judges should deeply analyze the foreign experience.

Conclusions: We believe that foreign experience should be borrowed, but also taking into account the implementation of the relevant institutions. Thus, a significant problem for a marriage contract in Ukraine is the lack of a single electronic registry of marriage contracts, since these issues remain outside the attention of specialists, and a change in the legal regime of property in marital relations can negatively affect, for example, in the case of inheritance – the rights of creditors, children, etc. Therefore, in some developed countries, amendments to the marriage contract are not allowed without clarifying objections from representatives of guardianship institutions of a child, who reached the full age, or a minor child who is under guardianship, creditors, and children, who reached the full age. This emphasizes once again the need to implement foreign experience in Ukraine in the light of its obtaining the status of a member of the European Union.

It is obvious that it is impossible to cover all the materials that the authors have already published[16] in a short research, so the attention was focused only on the most complex, original and debatable issues regarding the joint property of spouses in Ukraine and the contractual procedure for the settlement of the such property.

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