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NOTARIAL FORM OF HUSBAND AND WIFE PROPERTY AGREEMENTS, WHO ARE NOT IN CIVIL MARRIAGE

The article is devoted to the legal nature of de facto husband and wife property agreements and the procedure for granting legal certainty by means of a notary's certification. Types of property agreements have been outlined. The agreement could be concluded by husband and wife living together as an unmarried couple and their notarization certificate procedure is characterized. A special attention is paid to the necessity of Family Code of Ukraine in order to eliminate legislative conflicts, unify judicial and notarial practice and to define clearly the legal regime of property acquired in de facto relations.

Key words: *de facto relations between husband and wife, concubinage, unregistered marriage, property relations, common joint property, agreement.*

Стаття присвячена правовій природі майнових договорів фактичних чоловіка та жінки й порядку надання їм юридичної вірогідності шляхом посвідчення нотаріусом. Виокремлено види майнових договорів, які можуть укласти чоловік та жінка, які проживають однією сім'єю без реєстрації шлюбу, та охарактеризовано процедуру їхнього нотаріального посвідчення. Акцентовано увагу на необхідності в Сімейному кодексі України з метою усунення законодавчих колізій, уніфікації судової й нотаріальної практики чітко визначити правовий режим майна, набутого у фактичних відносинах.

Ключові слова: *фактичні відносини чоловіка та жінки, конкубінат, незареєстрований шлюб, майнові відносини, спільне майно, договір.*

Статья посвящена правовой природе имущественных договоров фактического мужчины и женщины и порядку предоставления им юридической достоверности путем удостоверения нотариусом. Выделены виды имущественных договоров, которые могут заключать супруги, которые проживают одной семьей без регистрации брака, и охарактеризована процедура их нотариального удостоверения. Акцентируется внимание на необходимости в Семейном кодексе Украины с целью устранения законодательных конфликтов, унификации судебной и нотариальной практики четко определить правовой режим собственности, приобретенной в фактических отношениях.

Ключевые слова: *фактические отношения мужчины и женщины, конкубинат, незарегистрированный брак, имущественные отношения, совместное имущество, договор.*



Presentation of the scientific problem. Nowadays de facto husband and wife relationships are more widespread in Ukraine. Not least popularity due to the Family Code of Ukraine gave legal significance to the property consequences to be husband and wife in concubinage.

However, the lack of legislative consolidation of the de facto relations leads to the fact of wife and husband living together as an unmarried couple give rise to difficulties because courts of general jurisdiction in each case concepts of de facto relationships and the moment of occurrence could be defined in different way.

The question of the contractual regime of the property of de facto husband and wife since the Family Code of Ukraine come into force is not only briskly debated in the scientific circles, but also raises discussions among practitioners. The growth of the number of de facto relations, according to statistics of judicial practice and its contradiction keeps unresolved issue of property consequences in concubinage.

Setting objectives. The purpose of the article is to determine the legal nature of property contracts of husband and wife living together as an unmarried couple and the procedure for granting them legal certainty by means of a notary's certification; development of proposals for improvement legal regulation of property in concubinage.

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

- characterize the property relations of de facto husband and wife living together as an unmarried couple;
- to find out the moment of formation of the common joint property regime in de facto relations;
- characterize the contractual regime of the property of de facto husband and wife;
- to find out types of property agreements that can be concluded by de facto husband and wife;
- to investigate the procedure of notarization of property agreement in concubinage.

Analysis of research and publications. De facto husband and wife property relations are the subject of discussion in the modern legal doctrine on the family law of Ukraine. Some aspects of this problem are the scientific work of M.M. Vybornova, A.B. Hrynjak, O.V. Dzer, M.M. Dyakovych, L.Yu. Drahnevich, I.V. Zhilinkova, T.O. Ivashkova, T.S. Kyrychenko, G.A. Myronova, Z.V. Romovskaya, O.I. Safonchyk, Slipchenko, M.M. Tarusina, O. Isupova, S.Ya. Fursa and others.

An important innovation of the Family Code of Ukraine is the extending of the provisions on property which is jointly owned by husband and wife who are in de facto relations.

We agree with T.S. Kyrychenko, who observes that the institution of actual residence generates a number of problems, such as: criteria for the fact of cohabitation, the determination of the valid moment [1, p. 221].

Judicial practice significates that in Ukraine there is no well-established legal mechanism for real protection of the persons' rights to property who are in de facto relations. Thus, the position of the Supreme Court of Ukraine and the High Specialized Court of Ukraine on Civil and Criminal cases is extremely controversial as to the moment of de facto relations can be considered as indicating the formation of a common joint property regime in concubinage.

In the information letter of the Highest Specialized Court of Ukraine on of Civil and Criminal cases "On the application of certain norms of civil law" December 5, 2011. It is stated that the establishment of the fact of husband and wife living together as an unmarried couple and establishing their property on right of property which is jointly owned according to Art. 74 of the FC of Ukraine is connected with the coming into force of a court decision in which such legal facts are established [2].

In fact, the High Specialized Court of Ukraine on Civil and Criminal cases in its information letter stated that husband and wife property which is jointly owned and living together as an unmarried couple occurs only after the legal validity of the court decision and established the relevant fact.

So it is doubtful that husband and wife before living together as an unmarried couple will apply to the court to establish the relevant fact [3, p. 77].



In order to solve this situation in legal doctrine the scientists suggest to create appropriate conditions for the application of norms at the legislative level that determine the property consequences of the concubinage or to settle the property relations of de facto husband and wife on contractual arrangement.

Contractual forms of regulation of property relations can be applied only by mutual agreement of the parties, in the case when de facto husband and wife agree on the terms of the contract, their rights and obligations, otherwise judicial decision dispute on violated rights protection.

Let's characterize the contractual regime of the property of de facto husband and wife and the procedure for providing them with legal certainty by means of a notary's certification.

Participants of property rights legal regulation in the family-legal sphere are only physical persons that are related to marriage, relative, adoption, or other grounds that are not forbidden by the law and do not conflict with the moral principles of society.

In particular, according to Family Code of Ukraine Chpt.1-3 Art.2, Chpt.1 of Art. 9 spouses, a child's parents, parents and children, other family members and relatives whose relations are governed by the present Code may regulate relations between them upon agreement including persons living together as an unmarried couple.

On the other hand, the Family Code of Ukraine Chpt. 2 Art. 9 provides for persons living together as an unmarried couple to regulate their family (relatives) relations upon an agreement, which should be drawn 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 [4].

Consequently, in accordance to the abovementioned norm, de facto husband and wife can draw an agreement in written form except marriage agreement, as the parties of this contractual relationship may be brides or spouses.

Analyzing the legal nature of family property agreements that could be concluded between de facto husband and wife.

Art. 64 of the Family Code of Ukraine states the general rules for spouses. They may conclude any lawful agreement between them. In addition, according to Art. 7 of the FC of Ukraine, Chpt.1 Art. 6 of the CC of Ukraine, husband and wife, like any other physical persons, may conclude an agreement that not provided for law but they correspond to civil law general principles [4; 5].

Since the property of the actual husband and wife is subject to the provisions of Chpt.8 of the FC of Ukraine, family and civil law rules concerning the contractual regime of property of the spouses apply to de facto husband and wife.

Under the property legal regime of de facto husband and wife have the right to self-actualize the extent of mutual rights and obligations in property field.

In Chpt.1, Art. 74 of the Family Code of Ukraine provides for the right of husband and wife living together as an unmarried couple, or any other marriage to conclude a written agreements to joint property acquired during concubinage.

From the contents of Chap. 8 of the FC of Ukraine follows de facto husband and wife may conclude agreements in notarial form with the obligatory state registration of the property acquired in actual relations, as well as any agreements that do not contradict the law [4].

This confirms that the norms of the family law governing the contractual property relations of the spouses apply to the property acquired during living husband and wife together as an unmarried couple.

We agree with A.B. Gryniak that the norm of Art. 74 of the FC of Ukraine, although it is a progressive step, a kind of response to standby time, but at the same time it is extremely controversial [6, p. 31].

The question of the contractual regime of the property of de facto husband and wife since the Family Code of Ukraine come into force is not only briskly debated in the scientific circles, but also raises discussions among practitioners. The growth of the number of de facto relations, according to statistics of judicial practice and its contradiction keeps unresolved issue of property consequences in concubinage.



Consequently, concubinage creates similar legal consequences of property nature so as registered marriage, but the lack of state registration of a marriage may lead to a violation of the rights and legitimate interests of de facto husband and wife.

We share the position of T.O. Aryvanyuk that the lack of a single legislator's approach to the legal status of de facto husband and wife who have formed a family acquired property, it will raise many questions from practitioners, in particular notaries when require a notarial certificate [7].

Therefore, in the legal doctrine for solving legal regime of de facto husband and wife property is proposed to provide by Art. 74 of the FC of Ukraine proper conditions for its practical application; or to consolidate the right to joint matrimonial property, except cases specified in the agreement.

In accordance with the Resolution of the Plenary Session of the Supreme Court of Ukraine “On the Practice of the Application by the Courts of Legislation in Considering Matters on the Right to Marriage, Divorce, Recognition as a Nullity and the Sharing of Mutual Property of the Spouses” December 21, 2007 № 11 [8] provides that applying Art. 74 of the Family Code of Ukraine, courts must take into account that the rule of the specified norm spreads to cases when husband and wife are not in any other marriage.

Analysis of court cases shows that the content of Art. 74 The FC of Ukraine does not observe the courts, but it is realized by identifying the actual relations with marital ones.

Since to the property of the persons who are in de facto relations, the legislator applies the provisions of the FC of Ukraine on spouses' common joint property in fact he equalized the legal status of civil marriage property relations and de facto relations.

In particular, T.O. Ivashkova observes that the reasons for acquiring common joint property could be attributed to them; the formation of the right to property owned to “husband” or “wife”; the right to dispose of the property; the right to division of the property, etc. [9, p. 113–114].

But, besides, being married, spouses are not obliged to prove the distribution of acquired property of the common joint property regime, in contrast to husband and wife de facto relations. Persons living together as an unmarried couple are obliged to prove in court the fact of living as one family and are not in any other marriage, as well as the fact of living their child with them.

Therefore, in order to eliminate conflicts in court decisions, first of all, it is necessary to consolidate legally the conclusion of agreement between de facto husband and wife and their life as a couple in complex written form by means of a notary's certification just as so: firstly, it is an important factor in the protection de facto husband and wife property rights in case of termination of such relationships in the future; and secondly, it is an undisputed proof of the fact of living as one family and property acquisition during this period on the right of common joint property [10].

It is reasonable to conclude a concubinage agreement between de facto husband and wife in a complex written form in order to determine joint property regime acquired living together and indicating the formation of the family, if this does not contradict the moral principles of society [3, p. 80].

The property agreements of de facto husband and wife who have found their consolidation in the FC of Ukraine include:

- 1) agreements of de facto husband and wife regarding their property:
 - an agreement of alienation by one of the de facto husband and wife in favor of the other, of his/her share in spouses' right to common joint property may be concluded without separation the share (Chpt.2, Art.64 of the FC of Ukraine);
 - an agreement on the way in which the property belonging them as common joint property should be used (Art. 66 of the FC of Ukraine);
 - an agreement on partition of common joint property of de facto husband and wife (Art. 69, 70 of the FC of Ukraine);
 - an agreement on separation of real estate from all property their entire property (Chpt. 2, Art. 69 of the FC of Ukraine).
- 2) the agreements of de facto husband and wife on the provision of mutual maintenance:
 - an agreement on maintenance with the definition of conditions, amount and time limits for paying alimony (Art.78 of the FC of Ukraine);



– an agreement for maintenance right termination in exchange of acquiring the property right to real estate or receiving a lump-sum cash payment. The agreement, which transfers the ownership to a real estate should be certified by a notary and is a subject to public registration. (Art. 89 of the FC of Ukraine).

Having analyzed the provisions of the above norms, which determine the legal nature of family agreements of the property character of de facto husband and wife, it is worth mentioning that they are concluded in a complex written form by means of a notary's certification and in some cases it also requires state registration.

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

Certifying the property agreements of de facto husband and wife, the notary must establish the fact of their stay in de facto relationship and the formation of common joint property regime.

When entering into family-legal agreements of property character, requiring a notarial certificate (including state registration), as well as agreement of valuable property, common joint property consent must be notarized.

In addition, if a person has addressed to a notary and does not have a passport marriage mark, a notary must require proof of the alienated legal regime property as well as information about the marital status.

Summary. 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 sphere. Property relations play a significant role in family law of de facto husband and wife.

In order to eliminate legislative conflicts, unify judicial and notarial practice, it is necessary to define clearly the legal regime of property acquired in de facto relations in the Family Code of Ukraine. Namely, when husband and wife are in de facto relation will conclude a concubinage agreement in a complex written form, the notary's certificate will be considered the moment of formation of common joint property regime.

With a view to inconsistency of Family Law and Jurisprudence regarding the property legal regime of de facto husband and wife, it is efficient to resolve their property relations in contract agreement. That's why in the Family Law of Ukraine, there are fixed agreements that could be concluded by de facto husband and wife as to the property acquired in concubinage.

Thus, in the Family Code of Ukraine provides possibility concluding family-law agreements namely: the agreements of de facto husband and wife regarding their property, and agreements on the granting of mutual maintenance that require a notary's certification (in some cases, a state registration).

Certifying property agreements of de facto husband and wife the notary must:

- 1) to find out the fact that de facto husband and wife are in concubinage and the formation of the family;
- 2) to establish the time when the common joint property regime is established;
- 3) to obtain the approval of de facto husband and wife to conclude an agreement to the property acquired in concubinage.

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