MARRIAGE CONTRACT AND AGREEMENT ON DIVISION OF JOINT PROPERTY OF SPOUSES: COMPARATIVE LEGAL ANALYSIS

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ABSTRACT

Marriage contracts are becoming more common in the system of regulators of family relations. The need for such agreements arises at all stages of the development of marital relationships – the creation, existence and termination of the marriage. The urgency of the analysis of contractual relations of spouses is caused by the expansion of contractual initiative between husband and wife or persons seeking to settle their property rights before marriage registration because the exercise of joint ownership rights by spouses often raises problematic issues for practitioners, which often leads to litigation. The authors shift the question of differences and similarities of features, theoretical and practical basis of the most popular family property contracts.

Key words: Agreement on Division, Common Joint Ownership, Joint Property, Marriage Contract, Spouses


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1. INTRODUCTION

In modern realities, the need to conclude an agreement on the division of the joint property of spouses and the marriage contract is becoming increasingly important. Practitioners and academic theorists are faced with the difficult task of resolving legislative gaps as much as possible when applying the norms of the Family Code of Ukraine in the field of settling property relations between spouses / former spouses or persons planning to marry.

With the entry into force of the new Family Code of Ukraine in 2004, such scientists as Anokhina V. [1], Antoshkina V. [2-3], Babkin S. [4], Mironova G. [5], Polozov V., Ionova K. [6], Romanyuk Y. [7], Rozgon O. [8], Velikanova M., Gorbulya G. [9], Zhilinkova I. [10-13] and others studied this issue.
These issues had gained more relevance since 2013 when the State Register of Property Rights in Real Estate and their Encumbrances began to operate in Ukraine.

There were many practical issues related to the registration of property rights based on agreements on the division of common marital property, both when changing the title owner and while maintaining the title owner of his right, limiting himself only to improving the legal regime of such property.

Due to the relevance of the topic and the unprecedented demand of the company for concluding a marriage contract and an agreement on the division of common marital property, this article examined the legal nature of these agreements, their subject composition, legal consequences of the conclusion, taxation and registration of rights.


The institute of the marriage contract is a relatively new acquisition of private legal practice. It seems essential to allow individuals to create micro-norms for themselves, which determine the property relations of the spouses and take into account the specific situation in the family.

Based on the analysis of the Family Code of Ukraine, the marriage contract can be considered as the consent of persons who marry or are married, which establishes the property rights and obligations of the spouses in marriage and case of divorce [17]. Although the marriage contract has significant specifics, it corresponds to the general features inherent in civil law transactions in general. The form of this agreement, the conditions of its validity, the grounds for invalidation, the procedure of conclusion and enforcement, many other points clearly show that in this case the general civil law constructions of contract law and general conditions of validity of transactions are used.

The Family Code of Ukraine stipulates that the marriage contract regulates property relations between spouses, defines their property rights and obligations, as well as leaves unchanged the concept of the subject of the marriage contract. The marriage contract cannot regulate the personal relations of the spouses, as well as the personal relationships between parents and children (paragraph 2.3 of Article 93 of the Criminal Code of Ukraine). It is seen that this rule clearly outlines the boundaries of the marriage contract in this sense. Therefore, it is difficult to agree with the opinion expressed in the literature that "such a wording of the rule of law requires appropriate interpretation because its incorrectness makes it impossible to apply." On the contrary, such a rule indicates the impossibility of including in the marriage contract any conditions of a personal nature. Therefore, the terms of the marriage contract proposed in the literature regarding the establishment of the right of each spouse to religion or to bring up their religion in children will not comply with the law. According to I. Zhilinkova [13], the prohibition of the Family Code of Ukraine to include in marriage contracts conditions relating to personal relations of the spouses can be explained by two main points. First, by the fact that the personal rights and responsibilities of the spouses are established directly by law, due to which they are inseparable from the subject – their carrier. Secondly, the marriage contract (as well as other civil - legal transactions) should be able to be executed compulsorily if it arises. In the theory of law, there is no doubt that the legal nature is acquired only by those social relations, the behaviour of the participants of which is fixed and, if necessary, the real provided with measures of state protection. The inclusion in the contract of provisions that are not legal simply does not make sense.

The Family Code of Ukraine outlines the main types of property relations that can be regulated by a marriage contract (Fig. 1).
The main types of property relations governed by a marriage contract

**Figure 1** The main types of property relations that can be regulated by a marriage contract

It is noteworthy that the novelty of the concept of the marriage contract is the introduction of such concepts as the rejection of the marriage contract and its termination. Both the first and the second terms refer to the situation when the marriage contract terminates for the future while maintaining the legal consequences that arose during its validity (this is the difference between them and the recognition of the marriage contract invalid). However, the waiver of the marriage contract is carried out at the request of the parties (Article 101 of the Family Code of Ukraine), while its termination requires a court decision (Article 102 of the Family Code of Ukraine). I. Zhilinkova [10] believes that such a distinction of terms is hardly a valuable contribution to the theory of civil law. In science and practice, for many years there has been a single established term – the termination of the contract, which applies both to the voluntary termination of contractual relations, and for them, termination by the court decision. It is hardly necessary to split this term into two new ones.

The specificity of family legal relations is based on the presumption of joint property and the exercise by spouses of the right of common joint ownership. The power of common joint ownership is characterized by two features: the unity of the object and the plurality of subjects.

Thus, the family law of Ukraine enshrines the regime of joint property of spouses: property acquired during the marriage belongs to the wife and husband on the right of common joint ownership, even though one of them had no valid reasons for self-employment (Article 60 of the Family Code of Ukraine), the division of such property is possible between the parties to the contract, first of all, the division of property of the spouses can be done voluntarily in the absence of a dispute. If they are unable to reach an agreement on this issue, they have the right to go to court to resolve such a discussion. By its legal nature, the agreement on the division of joint property of the spouses can be described as bilateral and consensual. Such an arrangement may not always be repayable.

Scholars have been debating the regime of the property of the spouses after the conclusion of an agreement on the division of property, which is the object of the right of common joint ownership.
Thus, K. Grave [14] emphasizes that, in essence, such a transaction is joint disposal of the spouses with their joint property.

V. Maslov notes that the division of joint property of the spouses is one of the ways to terminate the right of common joint ownership of the spouses at the request of one or both spouses. The essence of the division is that the joint property is distributed between the spouses, as a result of which the joint ownership is terminated and each of the spouses becomes the owner of the share that is allocated. It is difficult to agree with this statement, according to the author, this characteristic of the contract is quite narrow, as a result of the division of joint property of the spouses may arise personal private property or joint partial ownership [15].

I. Zhilinkova’s [12] point of view is more substantiated, according to which in the specified situation the lawful mode of common property ceases to operate and in its place, there is a contractual mode of separation. Accordingly, one of the spouses is endowed with a set of rights to own, use and dispose of their property, and the other is obliged not to interfere with it.

It should be noted that there is no definition of the concept of property division agreement in the legislation. The doctrine of family law provides such descriptions, but they reveal various aspects of the contract.

3. FUNDAMENTAL DIFFERENCES AND GENERAL FEATURES OF THE MARRIAGE CONTRACT AND THE AGREEMENT ON THE DIVISION OF JOINT PROPERTY OF THE SPOUSES

By their legal nature, the marriage contract and the agreement on the division of joint property of the spouses are entirely dispositive agreements that have an individual – one-time nature of the application and yet have strict distinctions and differences.

It is proposed to consider the subjective composition of the marriage contract and the agreement on the division of joint property of the spouses, to establish similarities and differences.

Article 92 of the Family Code of Ukraine stipulates that a marriage contract may be concluded by persons who have applied for registration of marriage, i.e., the parties to the marriage contract may be persons who are going to marry in the future, as well as the spouses. Also, the parties to the marriage contract may be persons who registered their marriage to adulthood age (Part 2 of Article 34 of the Civil Code of Ukraine), as well as persons who have acquired the full civil capacity to reach adulthood under Article 35 of the Civil Code of Ukraine; still, again, they must apply for marriage registration. If the party to the marriage contract is a minor, the marriage contract requires a statement of consent of his parents or guardian to such a transaction, where the authenticity of the signature must be notarized.

The subject of the agreement on the division of joint property of the spouses is different. The parties to this type of contract may be a husband and wife (spouse), the marriage between which is registered in the state body for the registration of civil status or a person between whom the marriage is dissolved in the manner prescribed by law. The right to divide joint property exists as long as the property exists and does not depend on being in a registered or divorced marriage (Article 69 of the Family Code of Ukraine).

The object (subject) of legal relations arising from the conclusion of both the marriage contract and the agreement on the division of joint property of the spouses can be only material benefits (Fig. 2).
This specificity of the marriage contract has already been mentioned in Section 2 of this article.

The subject of the Marriage Agreement is the determination of the legal status (personal private property, common joint property or joint partial property) given by the spouse in connection with the registration of marriage or property acquired during the marriage (Article 97 of the FC of Ukraine). If the spouses conclude the marriage contract, the parties may determine in it the regime of property acquired exclusively after the registration of the marriage, but before the conclusion of the marriage contract. The marriage contract establishes rules that are designed for the future; it changes in the future at least one property right or one obligation of the spouses, which fall under the legal regime of the property of the spouses. This is another difference, according to which a marriage contract should be distinguished from a contract on the division of joint property of the spouses, which is always directed to the past, i.e. retrospectively.

However, some practising scholars argue that a marriage contract can change the legal status of property already acquired in the common joint ownership of the spouses to personal private property. We believe that this statement is false because to change the legal regime of the property already acquired into common joint ownership of the spouses into personal private property is possible only through its division.

Thus, the difference between a marriage contract and a contract on the division of joint property of the spouses is that the subject of its division is the property that already belongs to the spouses on the right of common joint ownership. In contrast, the terms of the marriage contract...
contract may apply to property acquired by the spouses in future and which is absent at the time of the contract.

In practice, the question arises if the spouses have entered into a marriage contract that changes the legal regime of the spouses' property, whether the spouses can then agree on the division of such property. We believe not. From the content of the family legislation of Ukraine on the marriage contract, it follows that all property rights and obligations of the spouses should be determined in accordance with the terms of the marriage contract. If it is necessary to divide the property for which the marriage contract establishes the legal regime of personal private property, you must first make changes to the terms of the marriage contract, and then divide it by agreement of the parties.

Under the Marriage Contract, real estate and other property, the right to which is subject to state registration, may not be transferred to the ownership of one of the spouses. (Article 93 of the FC of Ukraine), i.e. the legislation of Ukraine does not provide for the status of a marriage contract as a title document to real estate, it can only affect the legal status of the property.

In this context, the Agreement on the division of joint property of the spouses has a significant difference: it can be concluded by the parties only in relation to a specific feature that is jointly owned by the spouses and as a result of its division, the legal regime changes: joint partial ownership or personal private ownership. Common joint property of the spouses subject to division (Article 60.69 of the Civil Code of Ukraine, Part 3 of Article 368 of the Civil Code of Ukraine, following parts 2.3 of Article 325 of the Civil Code may be any type of property, except those by law they may not belong to them (excluded from civil circulation), regardless of which of the spouses they were acquired or deposited in cash unless otherwise provided by the marriage contract. The division of property also takes into account the debts of the spouses and legal relations, arising in the interests of the family.

Spouses who have agreed to acquire joint partial ownership of the property may use and dispose of their share in the right of ownership at their own discretion, subject to the restrictions established by civil law on the exercise of the right of joint partial ownership. (Articles 361, 362 of the Civil Code of Ukraine), consent to the alienation of such property as a "spouse" is no longer required.

According to Art. 95 of the Family Code of Ukraine, the marriage contract, if it was concluded before the registration of marriage, begins from the moment of registration of marriage. If the spouses have not married, the marriage contract does not enter into force and does not entail any legal consequences. It is considered not to have arisen. If the marriage contract is concluded by the spouses, i.e. after the registration of the marriage, it enters into force on the day of its notarization. The compelling character of this norm draws attention.

Regarding the form of the agreement on the division of joint property of spouses, the Family Code of Ukraine is limited to the following instruction: if such agreement concerns issues of division of a house, apartment, another real estate, it must be notarized (Part 2 of Article 69 of the Family Code of Ukraine). Lack of notarization entails its invalidity. Thus, the Family Code of Ukraine does not contain special rules on the form of the contract, the subject of which is not real estate. It is quite logical to apply in this case the general rules on the type of the transaction, which are specified in Articles 205 - 208 of the Civil Code of Ukraine. However. In any case, at the request of the parties, the contract may be notarized.

As already mentioned, in contrast to the marriage contract, the contract on the division of joint property of the spouses can be a title document to real estate. The emergence of a new owner necessitates the state registration of such a right. Thus, paragraph 1 of Part 1 of Art. 27 of the Law of Ukraine "On state registration of real rights to immovable property and their encumbrances" № 1952-IV from 01.07.2004 with changes and additions provides that state
registration of property rights and other real rights is carried out based on a contract concluded by law, the subject of which is real estate, property rights to which are subject to state registration.

In this case, the notary carries out the necessary registration actions for the transfer of ownership in the State Register of Real Property Rights at the same time with the notarization of the Agreement on the division of joint property of the spouses.

Regarding the legal content and structure of the agreement on the division of joint property of the spouses and the marriage contract, the particular legislation does not directly define the essential (mandatory) conditions of such agreements. Thus, all the terms of such agreements can be considered as determined at the discretion of the parties and agreed by them.

However, when certifying the Agreement on the division of joint property of the spouses, according to which the legal regime of real estate changes from typical joint to joint partial ownership, it would be appropriate to determine the range of rights and obligations of the parties in the alienation of real estate.

It should be noted that the Law of Ukraine "On Private International Law" regulates the rules of conduct of subjects in concluding a Marriage Contract, one of the parties to which is a foreign citizen. So, following Part 1 of Art. 62 of the above Law, the parties may choose to regulate the marriage contract (Fig. 3).

REGULATE A MARRIAGE CONTRACT WITH A FOREIGN CITIZEN

1. The law of the country, which is the personal law of one of the spouses
2. The law of the country in which one of them has his habitual residence
3. The law of the country where the property that is the subject of the regulation (in respect of immovable property).

*The choice of such a right must be made in writing or explicitly follow from the terms of the marriage contract.*

**Figure 3** Regulation of the rules of conduct of subjects after the Marriage contract, one of the parties to which is a foreign citizen according to the Law of Ukraine "On Private International Law"

Several theses on the order of taxation. The agreement on the division of joint property of the spouses is not subject to evaluation. According to Art. 165 of the Tax Code of Ukraine funds or value of the property (intangible assets) received by the taxpayer by court decision as a result of the division of common joint property of spouses in connection with divorce or invalidation or voluntary decision of the parties subject to the Family Code of Ukraine is not being included in the calculation of the total monthly (annual) taxable income.

Thus, paragraph 22 of the Plenum of the Supreme Court of Ukraine of 21.12.2007 № 11 "On the practice of application by courts of legislation in cases of the right to marry, divorce, annulment and division of joint property" states that the value of property subject to division, is determined by agreement between the spouses, and in case of disagreement – based on the actual value at the time of the case. The notary may invite the parties to assess the joint
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property of the spouses on the basis of the principles of fairness and avoidance of the second spouse in an extremely disadvantaged financial situation.

4. RESULTS AND DISCUSSION

Analyzing the legal nature of the marriage contract and the agreement on the division of joint property of the spouses, the specifics of their certificates by the range of subjects, content, legal consequences of the conclusion, we can conclude that the marriage contract and the agreement on the division of joint property of spouses – independent institutions of family law. However, the former may have broader goals than the latter: the marriage contract is complex, may establish a contractual regime of marital property instead of legal, both during the marriage and in case of divorce, provide for the division of jointly acquired property; the provisions of the marriage contract may specify which property will be transferred to each of the spouses in the event of divorce or compensation paid.

The agreement on the division of joint property of the spouses may not have provisions that change the legal regime of the property of the spouses. Still, it can be an independent legal document, according to which the right of ownership is subject to state registration.

Despite the legal enshrinement of relatively progressive rules in family law on the marriage contract and the agreement on the division of joint property of the spouses, in practice, there are problems in implementing these rules that need to be addressed through interpretation and amendment of the law.

5. CONCLUSION

The radical socio-economic transformations that have taken place in our country in recent years, the proclamation of Ukraine as an open democratic welfare state a few decades ago have increased the relevance of a detailed analysis of legislation in various regulatory aspects, including the division of marital property. The issues of legal regulation of property relations in the family have always been the object of close attention of both legislators and scholars, so their regulation is reflected in a number of legislative acts and an array of case law.

The common property, as a rule, fully ensures the interests of the spouses. However, in life there may be situations when the spouses come to the conclusion of the termination of the regime of community and the division of property belonging to him. The spouses may be the subject of property relations, including property relations, both on a general civil basis and on the basis of special conditions caused by the fact of their marriage. In this case, the most significant features of the property relations of the spouses, which are formed between them (internal relations). these features are determined mainly by the rules of family law, and external (marital relations with third parties) - mainly by the rules of civil law. Thus, the legal regulation of the division of property between spouses is complicated and burdened by the nature of the personal relationship between husband and wife, which, in turn, requires a separate in-depth study.

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