

LEGAL REGIME OF MATRIMONIAL ASSETS

The article deals with the difference between the categories of "common property" and "community property (assets)", its practical importance in the division of matrimonial assets, maintenance of law and order through the mechanism of the legal regulation in general and as a part of the mechanism - the legal regime of property, and – the components of the legal regime of matrimonial assets.

Key words: common property, community property, mechanism of the legal regulation, legal regime of property, matrimonial assets.

Problem statement and its relevance. One of the elements of the legal regulation of social relations is the category "legal regime" that is connected with the objects of civil rights, the peculiarities of their acquisition, execution and termination. The law of the state or marital agreement (contract) (legal and contractual property regime) may be the legal basis of the application of the category «regime of marital assets». The legal regime of community property is provided in Spain, France and some U.S. states. The legal regime of separate assets exists in the majority of states of «common law family», including in the UK; the mixed legal regime of property - in Denmark, Germany, Norway, Finland, Sweden and other countries.

The purpose of the article – to make clear the content and value of the legal regime of assets and the general legal regime of matrimonial assets through the mechanism of legal regulation, determination of the components of the legal regime of the matrimonial assets and to cover their peculiarities.

The object of the article is the legal regulation of property relations of spouses, and the subject - acts of applicable law, legal practice, and scientific doctrine.

The main material. Community property emerges with marriage. U.U. Tsal-Tsalko gave the definition: «community of property – a complex of items belonging to the spouses on the right of joint ownership and binding complex of property rights and property obligations that are acquired by the spouses during the registered marriage» [14, p. 8]. However, one can hardly speak about a complex of items in general, it sounds archaic. It doesn't worth to determine it

like a complex, even because the conflicts in the family are caused by the same assets mess.

And now there is quite a popular concept of optimization of matrimonial assets, which includes their harmonisation. In addition, the matrimonial assets has derived from the broader term – assets (in general) provided in Art. 190 of the Civil Code of Ukraine, and is not limited to property (Art. 60 Part 1 of the Family Code of Ukraine). The provisions of the Act Amending the Accrued Gains Equalisation Law and the Guardianship Law, that came into force 01.09.2009, confirm the solidarity with it.

According to this law the assets should be given to both of the spouses in equal shares upon the termination of matrimonial property regime. One of the spouses, dealing with the bringing up of children, keeping common household provides another one with the possibility to take full part in the professional life and thus generate the assets. Firstly, this complex of assets should be considered as the result of the joint activity. Secondly, the division of matrimonial assets by the equalization of accrued gains can also be justified as the compensation for giving up the right to paid employment of another spouse [20, p. 136].

The provisions of the Family Code of Ukraine and the Civil Code of Ukraine conclude that there are the terms «the legal regime of common property of the spouses» and «the legal regime of community property». The last term evolved in Germany by legislative changes in the expanded term of «accrued gains», «Zugewinn-gemeinschaft», which includes not only the assets of the spouses, but also taking part of one or both of them in family life.

Gains - (pl) a type of community property that reflects the increase in value of property brought about by the spouses' labour skill [21, p. 258]. Community property - assets owned in common by husband and wife as a result of its having been acquired during the marriage by means of other than inheritance or gift [21, p. 136].

This participation may be in different activities: child care, housekeeping, work at the farm, and so on. This Act and Art. 60 of the Family Code of Ukraine are the result of the trend towards optimization of community property in Ukraine and Europe. The hypothesis about its further development is not excluded. Now it is possible to talk about the legal regime of not only certain types of assets, but also some kind of spouses' participation in the life of family. The rules of the Civil Code of Ukraine on services can be applied to the legal regime of spouses' participation in the life of family.

The difference between the item and the service is that «A product is a product of labour, which has some expression of a thing, and a service - an activity which doesn't result in the new thing, but has a positive (beneficial effect). The result of such non-material production is the perfect product that should be considered as an ordinary product» [12, p. 237]. It is stated in the WTO General Agreement on Trade in Services: «in the sectors that make up the National Schedule, ... each Member shall accord to services and service suppliers of any other Member ... the regime no less favourable than that which it provides to the same services or service providers» (Art. XVII). The schedule of particular commitments shall determine the rules, limitations and conditions on market access ... (Art. XX). That is, there is the regulation of services at the national level, the establishment of a legal regime of service as a separate institution of law.

Regarding the subject of a legal relationship, which is not just a participation of spouses in the family life, but although its result, the V.V. Lutz notes «the result of service delivery is the provision of the services itself» [8, p. 572]. The participation of a spouse in family life is a comprehensive activity of providence of various services. Each type of activity (parenting, housekeeping, etc.) has the features of a service. Namely, they are «useful effect, inseparability from the source, intangibility, immateriality, quality, exclusivity, failure to store, inexhaustibility» [8, p. 240].

Article 60 of the Family Code of Ukraine is the legal basis of the usage of the term «legal regime of accrued gains» in the scientific doctrine.

Thus, the division of community property includes a wider range of civil relations' objects than the division of common property. According to the Art. 190 of the Civil Code of Ukraine the property rights and obligations are considered to be the special object of the property. Hence, the term «community property», that means not only items, but the property rights and obligations. This syllogism has not only a theoretical value. But it acquires the practical value (in the process of division of property): each of the components has its own legal regime and requires even the qualified management and execution of civil rights.

Debts create legal relations of obligation, the party in which is a debtor spouse. Debts are property obligations of spouses. In this case there is a conflict between the division of the common property itself and community property.

The Art. 69 of the Family Code of Ukraine is problematic. It could be presented as follows: «The wife and husband have the right to the division of accrued gains, regardless of divorce».

It is generally recognized that the legal regulation of the civil relations is performed through their impact on the regulatory elements of the relations (the rules of law). They affect the legal relations of participants and encourage them to exercise their civil rights and fulfil obligations in the right direction. The mechanism of transformation of the provisions of the law in practice is called the mechanism of the legal regulation.

The legal regime of property is established regulatory requirements for the property in the event of the acquisition, usage in certain activities or cease.

It should be noted that this category is relatively recently evolved and prof. A.A. Krasavchykov in 1983 said: «... the common concept of the legal regime of objects in the civil rights has not been formed and moreover it doesn't exist in general» [7, p.14-41]. Furthermore items are understood under the legal regime of a variety of objects. Therefore, the legal regime is installed directly to the objects of the civil law and first of all to things and their particular kinds.

On the contrary to this idea prof. O.S. Ioffy said: «There is such an expression in the literature and legislation as «the legal regime of the items».

It is clear, that there is no legal regime of things actually. In reality the legal regime is established not for the things, but for the behaviour of people. As things are material and the behaviour is the object of the regulation, there is such expression as «the legal regime of the items» [6, p.78]». Thus, the legal regime acts as a modulator of the behaviour of the participants in the relationships.

Regarding the mechanism of the legal regulation in the legal science there were certain general theoretical approaches such as: 1) taken as unity set of legal tools which guarantee legal impact on social relations [1, p.30], and consisting of legal norms, relationships, acts of the implementation of subjective execution of the legal rights and obligations, legal awareness and legal culture [1, pp.34-35]; 2) a set of elements, relationships and dynamic laws necessary and sufficient for the regulation of one elementary act of conduct [11, p. 71]; 3) a consecutive chain of change of the particular legal phenomena: the rule of law governing civil relationships; - the legal fact – the rights and obligations of parties in civil relations – the realization of rights and performance of duties - and, if necessary; the protection of rights or legally protected interests, [10, p. 43]. Obviously, all these and other elements are links of the same legal phenomena of a higher order - the rules of positive law; they are interrelated and influence on each other and thus constitute a systematic category that balances the rights and obligations of participants in the legal relationships.

So T.I. Tarahonych defined it as «a particular set of legal means, methods used in a particular field of public relations and provide the operation of the mechanism of the regulation». Furthermore its features has been found: 1) it is set by the state and provided by its compulsion; 2) specially regulates certain areas of public relations, highlighting the subjects and objects of law; 3) is a specific procedure of the legal regulation, which consists of a set of legal means to achieve a certain goal, and is characterized their coordination; 4) it is based on the method of regulation - prohibitions, permissions or positive obligations [13, p. 692].

There is a huge experience of prof. I.V.Zhylinkova on the legal regime of marital property, the meaning of the term «legal regime» (concerning family property) identifies its three elements: 1) the regulation of the relations arising from the complex of the interrelated legal means;

2) the procedure for regulation of property rights based on a single conceptual core that defines its general direction; 3) procedures for the regulation of relations that include an appropriate set of legal means and capabilities; 4) the legal form constantly developing and improving according to the needs of social practice. [5, p. 56].

Prof. R.B. Shyshka added another one on copyrights. He mentioned: «The legal regime is found in the current legislation establishing certain predefined condition of the object of relations. The legal status of most subjects is defined through this category. We ... must not come from the legal regime of the object but the legal condition of the subjects» [15, p.233; p.185]. Later he constantly improved his position on the regulation of the civil relations and the way in which the legal regime of the object determines the behaviour of the civil relations in general.

A.G. Diduk understands taking into account by the legislator the natural properties and characteristics peculiar to the information under the legal regime of the information as confidential objects of the civil rights. Objectively it is also true because the current civil legislation binds certain legal consequences through these characteristics and properties [4, p.16]. Later it results in that ultimately the legal regime affects the behaviour of the participants of the relationships.

The category «the legal regime of things or property» is the basis for modelling solutions to urgent problems and challenges of the civil regulation. At least a significant part of modern researches of the objects of civil rights just emerge from this postulate. The concept of the legal regime of property include: legal rules establish epy structure of the property, the order of formation and use, acquisition and disposal, treatment of creditors collecting it [9, p. 287]; the forms of property rights, which provide activities of the subjects of the civil rights and defines the form of the legal regime: ownership and limited rights on someone else's property [2, p. 3 - 6].

In principle, the mechanism of the legal regulation is considered as the system of legal means taken in the unity, methods and forms, transfer rights in organized relationships to meet the interests of their participants and society as a whole. That ensures the rule of law and «appropriate» become «existent».

The legal mechanisms are: 1) a component of the mechanism of social regulation in general; 2) a challenging category, which covers the

phenomenon of legal validity: means (law, subjective rights and legal responsibilities, court decisions, etc., in the acts); methods (allow, compel, forbid); 3) a system of legal means, methods, forms that are in the relationship and interaction; 4) a dynamic part of the legal system of society, which manifests itself in areas of the legal influence, ensures that the behaviour of the participants of social relations precepts the law; 5) a part of the legal order in society in general and in the specific regulation of relations in particular.

As pointed out by R.B. Shyshka its subsystems are: the mechanism of the realisation of rights - measures that create conditions for the realization of human rights; mechanism of security - crime prevention measures for the establishment of lawful conduct of an individual; the remedies - actions and methods that lead to renewal of some broken right by wrongful act and the responsibility of a person who committed an offense. Each of them has its own objectives, means, methods and even forms [16, p. 86].

The mechanism of the legal regulation, the element of which is the legal regime of the object, is the direction of legal influence on the behaviour of individuals in relationships in particular. This is achieved through the legal means including the legal regime of an object of law. That provides the transaction of legal capacity' content of individuals, competence of public entities in specific subjective rights and legal responsibilities for a particular object of law. However, the main element of the regulation is the rule of law. Through it the legal regime of property as a civil matter determines the specificity of the acquisition, implementation and termination of rights therein.

Conclusions. In view of the covered information it is possible to conclude that, since the category of «property» is a collective term that covers both the thing and the other objects of civil rights listed in Art. 190 of the Civil Code of Ukraine, its legal regime is the sum of its legal regimes components. However, only the legal regimes of that object of civil rights in respect of which certain rights are carried out and transactions are committed are taken into account during the exercise of civil rights on the individual components of the legal regime.

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О. В. Мельниченко

Правовий режим спільного майна подружжя

В статті йдеться про різницю між категоріями «спільне майно» та «спільна сумісна власність», її практичне значення при поділі майна подружжя, забезпечення правопорядку через механізм правового регулювання в цілому та як елемент цього механізму – правовий режим майна, а також – складові правового режиму майна подружжя.

З положень СК України та ЦК України робимо висновок про те, що існують на разі в Україні поняття «правовий режим власності подружжя» та «правовий режим майна подружжя».

Ключові слова: спільна сумісна власність, спільне майно, механізм правового регулювання, правовий режим майна, майно подружжя.

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Правовой режим общего имущества супругов

В статье речь идет о разнице между категориями « общее имущество» и «общая совместная собственность» , ее практическое значение при разделе имущества супругов , обеспечения правопорядка через механизм правового регулирования в целом и как элемент этого механизма - правовой режим имущества , а также – составляющие правового режима имущества супругов .

Из СК Украины и ГК Украины делаем вывод о том , что существуют сейчас в Украине понятие «правовой режим собственности супругов» и «правовой режим имущества супругов».

Ключевые слова: общая совместная собственность, общее имущество, механизм правового регулирования, правовой режим имущества, имущество супругов.