
АЗАМАТТЫҚ ҚҰҚЫҚ ЖӘНЕ АЗАМАТТЫҚ ПРОЦЕСС ГРАЖДАНСКОЕ ПРАВО И ГРАЖДАНСКИЙ ПРОЦЕСС

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The responsibility of spouses for personal and common obligations

In the article, the author considers the personal and general obligations of the spouses of property character, determines the characteristics of the legal regime of jointly acquired property and personal property of the spouses, investigates the mechanism of execution of personal and general obligations of the spouses, reveals the sequence and priority of execution of obligations of spouses including the share of the joint property, and concludes imperfection of family law that provides the guarantees for the rights of creditors in relation to the marriage contract.

Key words: spouses, obligations, marriage, property, the legal regime of marital property, contractual regime of the spouses, marriage and family law, creditor, marriage contract, liability, divorce.

Spouses, being married, try to provide the well-being of their children and the family through the conduct of commonly joint property, and the formation of a common budget, etc. As the owners of different types of property, spouses often enter into various civil transactions, acquire shares in the capital of companies and etc. As a result, between spouses and between them (or one of them) and third parties there are special obligations — legal ties, the specifics of which are identified by existing laws and contract regime of marital property. These obligations of the spouses can be common or personal.

The property, acquired by spouses during marriage, is their commonly joint property. Commonly joint property is the property of two or more people which cannot be divided without changing its purpose (indivisible thing), or cannot be divided by law (4 of art. 209 of the Civil Code of the Republic of Kazakhstan).

The shares cannot be determined, because the relationship between husband and wife, as a rule, have the nature of personal trust. As E.M.Vorozheikin wrote, «family relationships that do not have the personal trust are artificial» [1; 25]. Y.I.Funk. in his work clarifies, that «joint marital property indicates that for certain property «stands» more than one person, but two, between which there is a personally-legal relationship, based on trust relationships prevail, rather than legal regulation» [2; 48]. The size of the share, introduced by each spouse to the acquisition of the property funds, does not matter, even if there is a difference in income. It should be noted that the right to commonly joint property also belongs to the spouse who did not take part in the formation of the property due to legitimate reasons, for example, housekeeping, childcare, and so on. To determine the legal regime of marital property in literature, they use the term «acquired property». Apparently, the marriage itself is not enough for the occurrence of commonly joint property. The couple should have common household by making the input in the form of labor or other activities.

The most important point here is that the marital property can become commonly joint only when the spouses live together.

It would be illogical to recognize the things that the couple purchase individually at a time when they live apart from each other to be «commonly joint property». Here we talk about the time when they are not formally divorced, but stop the marriage by living apart from each other, do not have common economy and do not intend to keep the family in the future.

Domestic matrimonial law identifies the following items as the property, acquired by the spouses during the marriage:

1) the income of each spouse from employment and business activities. In academic circles, there are still several opinions about the moment from which the income, earned by spouses, can be considered common or joint property. This issue is still not resolved in the current legislation. There are different opinions. Some scientists believe that the ownership for the income, received by the spouses, occurs when they have the right to receive them. The income is included in total assets from the moment when the spouse has a right to demand the payment. But there is an argument against this view that the requirement of obligation can not be owned, otherwise not only the worker, but also his or her spouse would be entitled to demand payment of salary or debt from the third parties.

Other scholars argue that the ownership of the income arises only after the real (physical) receipt of the income and its inclusion into the family budget. As the proponents of this opinion believe, the spouse, who receives the income, has the right to spend a part of it before it will be included into the family budget, as the joint property can consist from the money that has not been spent yet. This approach is arguable, as the proponents of this view assume that all the funds that are not included into the family budget by spouses are treated as the personal property of each spouse, which is contrary to law. For example, if the spouse sold the car, which had been acquired before the marriage or had been received as a gift, and he or she spent the income from the sale on a cottage, without transferring the proceeds from the sale into the commonly joint property, the cottage would be recognized as the property of the spouse, the former owner of the car.

There is an opinion, we think, the most correct and informed one, that the resources, received by one spouse, become common joint property from the moment of the real direct receipt of the resources by one of the spouses.

2) The income from the intellectual activity. A.M.Nechayeva notes that the royalties for intellectual work in all respects equivalent to the wages and salaries. It is considered that the award issued during the marriage, even if the creative work began and was completed prior to the marriage, is a common property of the spouses. Conversely, the income for intellectual activity, created during the marriage, received after the divorce, is not included into commonly joint property. Works of art, the author of which is one of the spouses do not become joint property. However, the money, raised from the sale, is a material source of the family, and is joint property [3; 131].

3) The income from commonly joint property and personal property of each spouse.

4) Received pensions, social payoffs of the spouses.

Received payments that do not have a special purpose (material aid, a compensation for disability due to injury or other damage to health, and others).

5) Movable and immovable property, acquired from the common income of the spouses. In this case, it does not matter who is an official owner of the property.

6) Securities, shares, deposits, shares in the capital, made to the credit institutions or other commercial organizations, and any others, acquired by the spouses during the marriage property, regardless the ownership or money input.

7) The property of each spouse that obtains a significant increase in value during the marriage due to the input, made by one or both spouses in the form of money or labor. For instance, repairs, reconstructions, alteration, and so on (Article 36 of the Code of RK). This condition is applied not only to immovable property, but also to cars, expensive tools and equipment, to business institutions and companies in general. Unfortunately, the legislator does not give an explanation of «a significant increase in value of the property» and how you can determine this criterion.

There is an exception from the rule, according to which, the property of each spouse, or personal property contains the following:

- Property, owned by each spouse before the marriage, and property, acquired through the marriage, on personal money of one of the spouses;

- Property, received by one spouse, before and during the marriage, as a donation, or inheritance or other gratuitous transactions. The gifts given to each other by spouses are considered separate property too. The concept of «gift» should be considered as a concept that includes any gratuitous transfer of property to the ownership of the spouse, if the transition is associated with a special purpose. There must be a direct indication that the gift is made in favor of only one of the spouses. This property also includes bonuses and other payments of an incentive nature.

- Things for personal use (clothes, shoes, etc.). Under the law, the things for personal use does not imply any thing that one of the spouses personally enjoys, but only those things that aim to satisfy household

needs, excluding jewelry and other luxury items, even if they are acquired during the marriage on common funds of the spouses.

By jewelry, as a rule, we mean articles of precious and semi-precious metals and stones. By luxury items — valuable things, works of art, antiques and unique things, that are not necessary to fulfill basic needs of the members of the family. It is not always easy to determine what items are luxury items, so the court determines each case individually, basing on the general conditions of life of the spouses and other circumstances. Certificates, checks, receipts and others may be the proof of the ownership of the property by one of the spouses.

- Items, purchased only to meet the needs of minor children (clothing, shoes, school and sports equipment, musical instruments, children's library, etc.) are transferred without compensation to the spouse with whom the children live.

- Deposits, made by spouses for their common minor children, considered as belonging to these children and are not included in the division of marital property.

- Property, acquired by each of the spouses during the period of separation due to the actual termination of the marriage (marriage).

- Objects for professional activity of the spouses [4; 15].

Joint marital property can be divided during the marriage and after the divorce by concluding an agreement on the division of property. In accordance with the family law, the shares of the spouses are considered equal. However, the court may retreat the equality of shares of spouses in two cases. Firstly, it is allowed to increase the share of the spouse with whom the minor children stay. Secondly, the share of the spouse can be reduced if throughout the marriage, the spouse did not participate in the accumulation of the common property without a good reason, expended the property of the family recklessly, and led an immoral life. Thus, the common opinion that the division of property between spouses (former spouses) is «equal», is only partly true.

Let's get back to responsibility of spouses for obligations. Property owned by the spouses during the marriage (commonly joint property, personal property), includes not only things and property rights, but also obligations.

As individual or personal obligations of the spouses we may consider those which have arisen independently at each of them before the marriage, or during the marriage, but in order to meet the personal needs of a spouse, as well as due to the debt on property, by inheritance the property during the marriage by one spouse (debt of the testator). In this case «the spouse undertakes the obligation as a regular subject of civil rights» [5; 312], and should act in accordance with the rule contained in article 20 of Civil Code of the Republic of Kazakhstan, — «a citizen is responsible for its obligations with all its property, except property which, in accordance with the legislative acts, can not be levied» [6].

Legislation regulates that the property might be levied only from the spouse who has obligations with this property. If the value of the levied property is not high enough, the creditor has a right to demand the share of the spouse, which would be given to him or her in the process of the division of the joint property in order to cover the debt. This process must be strictly followed.

Thus, the obligations occurred in business activities by one spouse shall be treated as personal obligations. If one of the spouses uses the commonly joint property of the family in the process of business activity, which leads to debts that occurred when the spouse-entrepreneur tries to satisfy personal needs, these obligations will be considered as his or her personal. However, if it is proven that the income was used for the needs of the family, the obligations may be turned to the second spouse in the commonly joint property. Family Code does not disclose the concept of «family needs.» Because of their diversity, it is impossible to do. Presumably, the expenses on the family needs are the following: food, clothing, housing and medical care, acquisition of property for living together (in the contract of sale, rent), repair of the home, school fees of children, and so on. In other words, these expenses include the costs to maintain the necessary level of living of the family as a whole and of each of its members.

In cases, when one of the spouses uses joint property to proceed personal business activities, he or she must have a permission from the second spouse [7]. This permission may be considered in the marriage contract, or by making a written agreement, preferably notarized.

The obligations both spouses entered into can be considered as common obligations. Civil and family law regulates that the possession, use and disposal of commonly joint property is carried out by mutual agreement of the spouses. For example, debts on rent, debts arising from the harm, caused by them together.

Whenever one of the spouses processes any transactions with the property, it is assumed that he or she is acting with the consent of the other spouse. This presumption is based on the ordinary order of family affairs.

The spouse is not obligated to prove his or her right to proceed the transaction by demonstrating the consent every time it happens in the daily life. However, when transferring or pledging the property, it is required to have the consent of all adult family members, which must be expressed in writing and notarized. Moreover, a consent for minor family members is given by the state the guardianship authority in order to protect their property interests.

The obligations entered into by both spouses based on transactions, committed by them jointly, can also be considered as common obligations. Thus, both of the spouses are responsible for them. In case of the exaction based on common obligations, executives take into consideration the joint property of the spouses at first. If the value of the property is not high enough, they start considering personal property of each spouse.

The exaction of the joint property or a part of it is possible if it was acquired or increased at the expense of funds received by one spouse in a crime (Article 4 of the Code of RK 44) [4].

The requirement to establish facts of unlawful receipt of these funds only by a court verdict is a guarantee against illegal withdrawal of marital property in such cases. The court applies this rule in cases of compensation for damages (material and moral) caused by the crime of one of the spouses.

The exaction of the joint property of the spouses may happen as a claim for compensation for damage caused by their minor children to life, health and property of other people.

Thus, on the basis of the above, the following legal norms are applied to a married person in relation to transactions with other people:

- If one spouse enters into an obligation at the expense of his personal property, the one commits only oneself and his or her responsibility for the obligations can only be at the expense of their personal property, as well as the share in the joint property (Sec. 3 of Art. 223 of the Civil Code of the Republic of Kazakhstan).
- If one spouse enters into a personal obligation for the personal benefit, but at the expense of the joint property, the spouse, who made a deal, remains responsible, and the liability is possible only at the expense of his personal property and share in the joint property;
- If one spouse enters into a commitment at the expense of personal property, but in the interests of the whole family (if there is no disapproval of the transaction by the other spouse), the party of the transaction remains the spouse, who makes a deal, but the responsibility for the obligations can be partially charged on the second spouse, which means, the exaction may be taken from the share in the common property.
- If one spouse enters into a commitment at the expense of the common property in the interests of the whole family, then the party of a spouse, who makes a deal, is considered responsible for the obligations, but the second spouse becomes «the actual party» of the transaction too. The responsibility for the obligations comes at the expense of commonly joint property. If the value of the property is not high enough, the spouse who enters the transaction, fulfills the obligations at the expenses of the personal property.
- If both spouses are parties of the transaction, both spouses are responsible to deal with all their personal and commonly joint property.

In continuation about the responsibility for the overall debts, it should be noted that if a court in criminal case finds out that the couple's property was acquired or increased at the expense of funds received by one of the spouses by criminal means, the execution may be levied on all property or that part of it, which was acquired in this manner (Article 44 § 2 of the Code of RK).

Nowadays property legal regimes of marital property are divided into two main groups: the contract regime and the legal regime of marital property, which we have discussed.

The contract regime of marital property is set by agreement between the spouses on the question of order of ownership, use and (or) disposal of all or individual movable and (or) immovable property, property rights and obligations acquired during their registered marriage [5; 434].

The marriage contract can be concluded in relation of existing marital property, as well as the property, which is planned to be acquired in the future.

In the marriage contract, the spouses can determine their rights and obligations, ways of participation in income of each other, the responsibilities for family expenses by each of them; determine the property that will be transferred to each of the spouses in case of divorce, and include in the marriage contract any other issues relating to matrimonial property regimes. A special feature of the marriage contract is that spouses may establish a joint, shared or separate property regime to all the couple's property, on its part or on the property of each spouse.

The regime of joint ownership means that any property, including acquired before marriage together becomes common and the right to joint matrimonial property is established. However, how A.A.Ivanov specifies, the regime of joint ownership can be established for one or a few things. Within the legal regime of marital property, this makes sense only for those things that do not enter the joint property (personal property). If in the marriage contract there is the regime, described above, set in relation to things, the couple owned individually before the marriage, legal regime is retained in relation to the rest of the property [5; 435].

The regime of share ownership means that the couple's property goes into their common ownership. In the marriage contract, under this regime, the shares' size should be reflected, while usually taken into account property investments or labor costs of each spouse. The main feature of the separate property is that all the property, regardless of the time and manner of its acquisition, as well as all the income derived from it, is generally considered separate property of the spouse.

The contract regime of common or separate property is rarely found in its pure form. In most cases, the couple prefers to create a mixed regime that combines some elements of separateness and unity. For example, a spouse may provide that their joint housing will be the joint property, but income and other property will be separate property.

The appearance of the marriage contract in Kazakhstani marriage and family law institute has prompted the development of special rules that protect the interests of creditors of the debtor-spouse in transactions. Lenders, if enter into a deal with one of the spouses, should be aware of the existence of the marriage contract and be aware of the contents of this contract, as stated by Article 45 of the Code of RK. Within the meaning of this norm, the lenders should have information on how to spread the couple's property, because it affects the amount of property on which they can rely, if the obligations of the spouse-debtor will not be fulfilled in the necessary volume. Creditors must be notified about any changes or cancellation of the marriage contract. If these changes have worsened the financial situation of the debtor (property of the debtor-spouse became the property of the other spouse, or became the joint property of the spouses, or the share of the spouse in the common property reduced), the creditor must be able to take all necessary measures to protect their interests.

If the lenders know about changes in the marriage contract, according to which the insolvency of the debtor became apparent, they have the right to demand changes in the terms or termination of contract between the spouses (Art. 45 of the Code of RK).

A failure to comply with this requirement makes it impossible for the spouse-debtor in the future (in the case of a property dispute with creditors) to invoke the provisions of the marriage contract as to the circumstances that prevent the fulfillment of his or her obligations. Therefore, the property of the spouse-debtor may be levied regardless of the content of the marriage contract.

Setting the guarantees of the rights of creditors in relation to the marriage contract, the law does not provide the conclusion of an agreement on the spouses division of common property. It is obviously, that this agreement may infringe upon the interests of the creditors not less than the conclusion of the marriage contract. Because of the agreement on the division of joint property of the spouses, we get the right of individual property of each spouse and terminate the right of joint property. According to A.A.Ivanov, «The subsequent termination of the agreement on the division of property does not automatically restore the right of commonly joint property on subjected to the division of property. To do this, they need the marriage contract».

In this context, it makes sense to make an addition to marriage and family law (Article 45 of the Code of RK) and identify the guarantees of the rights of creditors at the conclusion, amendment or termination of the marriage contract as well as the agreement on the division of marital property.

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Ерлі-зайыптылардың жеке және жалпы міндеттемелері бойынша жауапкершіліктері

Мақалада автор ерлі-зайыптылардың жеке және мүлкітік сипаттағы жалпы міндеттемелерін қарастырды, олардың жеке және бірге жинаған мүліктерінің құқықтық тәртібінің ерекшеліктерін анықтап, ерлі-зайыптылардың жеке және жалпы міндеттемелерінің орындалу тетігін зерттеді. Бірлескен мүліктегі үлестерін ескере отырып, ерлі-зайыптылардың өз міндеттемелерін орындауының бірізділігі мен кезектілігін ашты, сондай-ақ неке шартына қатысты несие берушілердің құқықтарына кепілдік беретін отбасы заңнамасының ақаулықтары туралы тұжырым жасады.

Ж.Т.Кумысбекова

Ответственность супругов по личным и общим обязательствам

Автор в статье рассматривает личные и общие обязательства имущественного характера супругов, определяет особенности правового режима совместно нажитого и личного имущества супругов. Исследуется механизм исполнения личных и общих обязательств супругов, раскрываются последовательность и очередность исполнения обязательств супругов с учетом доли в совместном имуществе. Сделан вывод о несовершенстве семейного законодательства, предоставляющего гарантии прав кредиторам применительно к брачному договору.

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