

AN AGREEMENT AS A LEGAL MECHANISM REGULATING PROPERTY AND NON-PROPERTY RELATIONS WITHIN A FAMILY

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ABSTRACT

This paper discusses matters concerning an agreement regulating property and non-property relations within the scope of the family law. The problem and reason for the low use of marital agreements in this country is lack of explanatory work concerning the necessity of signing a marital agreement, absence of training, which is commonly practiced in civilized countries, and lack of information on TV, radio and billboards about spouses' rights as it is required by the law. Once the state solves this legal issue, we will move a step closer to the civilized world. It is believed that in today's Kazakhstan, given the increasing income following the transition from the command Soviet-style economy to broader civil transactions, drafting a marital contract is a necessity, because in the civilized world marital agreements ensure spouses' responsibility for each other.

Keywords: Agreement, Family, Family Law, Property, Property Relations, Surrogacy.

INTRODUCTION

The Legal Nature of Property and Non-Property Family Relations

Of all history and ethnography studies deserve a special mention. These studies focus on the history of the formation and development of the Kazakh family. It presents the author's multifaceted and deep ethnographic analysis of the Kazakh family and marriage at different stages of history. Particularly, it concerns matters relating to marriage registration forms, wedding and wedding ceremonies (Sergeyev, 2016).

The legal nature of property relations between spouses (as well as personal non-property relations) is a subject of scholarly dispute between civil lawyers. There is a group of scientists, who believe that property relations between spouses, who are regulated by the rules of the family law, are part of family rights. However, most experts believe that property relations between spouses are civil by nature.

“These are the very same property relations conditioned by the practicing of goods/money relations... they constitute the subject of regulation... civil rights. Ownership relations occurring between spouses do not have any specifics distinguishing them from housing, ancestral, and property relations between them, which are regulated by the civil law and bind spouses, who are members of a collective household.”

Only maintenance obligations refer to the family law, because they bind family members only, and no other factors except marriage, kinship and some types of relations equaling family relations, entail a maintenance obligation. The two factors—a close family relationship and impossibility of the emergence of subjective rights and obligations outside of this relationship—do put maintenance relations into a category of “*family relations*.” Largely, figuring out the legal nature of property relations between spouses goes hand in hand with figuring out the proportion between the civil and family right, the civil and family legislation.

The System of Contract Obligations within the Family Law

Contract obligations within the family law have long been a matter of disputes. The complex legal nature of agreements signed between family members has divided the scientific community into several science camps. Some lawyers regard family contracts as a civil right matter, some term them as part of the family right, and others categorize them as a civil family right regulation tool (Chashkova, 2014; Chefranova, 2016; Grivko, 2017).

According to the current civil and family law, spouses and other family members can sign any legal agreements regarding shared and separate property. For example, they can sign regular civil contracts (transfer by gift, buying and selling, exchange, etc.) It is believed that when signing such contracts, the legislator disregards the specifics of the legal status of participants of family law relations, so deals are regulated by general rules, which are equally applicable to all other parties of the deal. However, it should be noted that the specifics of the subject of these contracts and the sphere of their application also determine some of these contracts’ characteristics.

As it is commonly accepted, regulation of property relations is dominated by the principle of the free exercise of maternal and procedural rights by the parties to legal proceedings. However, in case with family law relations, this principle does not work for maintenance obligations (primarily those involving parents and children, where parents are maintenance creditors). The limited freedom-of-contract doctrine in the family law is explained by the public interest in the regulation of family relations. First, the family law clearly defines contract parties, as it is related to each subject’s role in family relations; second, the impossibility of signing untitled contracts; third, parties’ have a very limited discretion in setting the terms and conditions of a contract.

Therefore, both the family and civil law stipulate contracts, which are explicitly stated by the rules of the family law, or not stated explicitly yet complying with its imperative norms.

Contract Obligations in the Family Law of the Republic of Turkey

Apart from the general rule, according to the Code of 2011, contract obligations are regulated by ten articles referring to specific types of contracts (concerning estate property, consumer contracts, personal employment contracts, intellectual property contracts, goods

transfer contracts, intermediary contracts), and many other institutions (legal consequences of silence, prevailing imperative norms). Conceptual changes refer to a general rule (Article 24), which concerns contract obligations. Therefore, obligations, which stem from the signing of agreements, should be regulated by legal rules, which have been chosen by the parties. The parties can determine the chosen legal norms as applicable to the entire agreement or part of it. Should the parties fail to choose legal norms for a contractual relation stemming from the agreement, norms should be applied, which are more closely related to the agreement (according to the place of residence of a person, place where the act of entrepreneurship is being performed by the person accepting the contractual obligations...) If there are legal rules that are closely related to the contract under any and all circumstances, contractual relations should be regulated by these rules.

However, it should be noted that not all concepts of the 1980 Rome Convention were reflected in the MES of the Republic of Turkey. When developing the 2007 Code, the Committee tried to avoid translation of the 1980 Rome Convention into Turkish; instead, it tried to figure out its conceptual content based on the progress of the domestic law. It was the only rational way for Turkey to eliminate potential difficulties tailoring its law to the EU law.

Unlike many nations, respective articles of the Civil Code of Turkey do regulate engagement matters. For example, the laws of the former Soviet Union, including Azerbaijan, do not stipulate the tradition of regulating engagement, although they do practice it.

The Turkish law interprets engagement as a marriage promise. According to Article 118 of the Civil Code of Turkey, an engagement between underage boys and girls or those who have limited rights, without the consent of legal representatives, does not entail any legal consequences.

The law has an important provision that engagement is no reason to force someone to marry. In other words, freedom of marriage works for the engaged. However, in case of refusal, compensations are not subject to litigation, and payments (expenses) made thus far cannot be returned (Article 119).

The consequences of refusal are specially mentioned in the Civil Code of Turkey. The general idea is that there must be plausible reasons for refusal, or the responsible party shall pay compensation and reimburse. According to Article 120 of the Civil Code of Turkey, in case one party breaks off the engagement without any reason or without specifying the other party's blame, the withdrawing party shall reimburse all losses faithfully sustained by the other party for the good of marriage. These may include wedding expenses. The rule also applies to engagement expenses.

Awards can be claimed by the parents (or persons acting as parents) of the party entitled to it in case whereby they have faced expenses mentioned above (engagement, wedding expenses, etc.)

Along with material compensation, parties can claim a compensation for moral harm. A party, whose human dignity has been undermined, can request a sum of money from the guilty party to compensate for the moral harm (Article 121 of the Civil Code of Turkey).

A Marital Agreement as an Institution of Family Law; Form and Signing Procedure

Reasons for and specifics of changing, termination or cancellation of a marital agreement: Marital agreements are not widely practiced in this country, although a percentage of

couples (7%) do choose to secure themselves against financial losses, which may occur in case of divorce. According to the Family Code of the Republic of Kazakhstan (RoK), a marital agreement is a written agreement between newlyweds or spouses, which stipulates each party's material rights and obligations, particularly determining the share of the community property in case of a divorce. It does not concern issues other than material ones.

Because a marital agreement is actually a deal, all norms of the civil right concerning nullity of contracts, with regard to the provisions of the Family Code of the RoK, are applied to it.

Besides, in case a marriage is nullified by a court, the marital agreement will be nullified too. It is one of the legal consequences of nullifying a marriage. Conditions, which prompt parties to change and modify a marital agreement, also may be a reason for termination of the agreement. In case there is a plausible reason, and the wife and husband have consented, the agreement can be immediately terminated notarially; otherwise, it can be terminated by a court order only. A marriage can be terminated for the following reasons: registration of the termination procedure, but only in cases whereby the agreement does not contain provisions, which impose obligations on either party after the termination; having a document, which confirms both parties' consent to the termination, or a document confirming a court's decision to terminate the marriage; death of one or both spouses.

Nature of a Surrogacy Contract and its Legal Specifics

Traditionally, the civil right recognizes as contract parties any and all subjects with rights and capacity (citizens, legal entities, public-law entities). As applied to a surrogacy agreement, there is the Client and the Contractor. Intended parents are just one party to the agreement. As clients, they are to sign it. A specific feature of the agreement is that intended parents are carriers of genetic material. There are several ways for intended parents to participate:

1. Both parents (the mother and the father) donate cells, which are to be transferred to the surrogate mother;
2. One of the parents (the mother or the father) is a cell donor;
3. None of the parents is genetically related to the child (eggs and sperm are submitted).

In addition, intended parents should meet some requirements:

They should have a certain social and marital status. Spouses are the most prioritized type of clients. A family can provide a more stable environment and ascertain that the child will develop and get education. It has been stated by the law and proved by psychological research that a child should grow and develop in a family. Unmarried couples are likely to become intended parents, because any parents can be recognized as unmarried. Also, a single woman can have a child through surrogacy in keeping with Clause 9 of Article 55 of the Population's Health Care Act. There have been cases when single fathers were intended parents. However, their constitutional right for fatherhood should be legally confirmed.

Intended parents suffer health issues preventing them from gestation and delivery (absence of uterus (due to congenital abnormalities or hysterectomy); uterus or cervical deformities resulting from congenital underdevelopment or diseases; endometrial abnormalities (uterine synechiae, uterine obliteration, endometrial atrophy); conditions (disorders) listed as contraindications; repeated IVF failures (three or more) with repeated production of good

embryos, the transfer of which does not lead to pregnancy; recurrent abortion (three or more spontaneous miscarriages in the medical history).

These conditions indicate that the man or a woman is infertile. The diagnosis raises the subject of surrogacy. The surrogate mother is the other party to the contract. Its legal status is the subject of scientific research.

Conception should take place in a specialized medical institution (not through a sexual intercourse) with the use of eggs and sperm from infertile couples or donors (Kalabekov, 2016). The law has a number of requirements, which can play an important role in the fulfillment of the terms and conditions of the contract.

These include:

1. The surrogate mother should be 20 to 35 years old;
2. She should have at least one healthy child;
3. She should have a medical assessment report on hand confirming her good health;
4. The potential surrogate mother should sign a written informed consent to medical interference;
5. A written consent from the husband-for married women;
6. She is not allowed to simultaneously donate an egg (Knyazeva, 2013).

When considering parties to a contract, some controversial points must be taken into account. Particularly-the number of parties. Surrogacy itself is not related to the medical institution (Lushnikov et al., 2015). Other scientists suggest that surrogacy should be a multilateral contract. Apart from that, clients' and surrogate mothers' husbands should be mentioned in the obstetrician's agreement, so that the infertile wife can get first-hand information about the surrogate mother's state during pregnancy (Markosyan, 2016). Several agreements should be signed to mediate the birth of a child: between the medical institution and the surrogate mother, between the intended parents and the healthcare organization (Tarusina, 2016).

We believe that this approach complicates relations beyond reason, produces controversial obligations and lifts responsibility from failure to fulfill them. A surrogacy agreement should apply to the physician, obstetrician, psychiatrist, psychologist, and the surrogate mother's husband, who should authorize the contract and participate in dispute resolution along with governmental authorities and local self-government bodies (Titarenko, 2015). This number of parties, who are not actually related to the gestation process, should be deemed excessive. We think that the agreement should apply only to subjects, who play a crucial role in the fulfillment of the obligation of the birth of a child. Particularly, this applies to the healthcare organization. Neither the surrogate mother, nor the intended parents are directly involved in the handling of the gestation process. All activities related to caring for the embryo and pregnancy should be performed by the healthcare organization. The surrogate mother should be obliged to follow the doctor's requirements. As long as the delivery of the service is deemed the subject of the contract, and the service is provided by the healthcare organization, it should be recognized as a party to the contract.

The surrogate mother should be deemed a party to the contract too, because she is a sentient being. She plays a vital role in this agreement. The child's health and development process depend on her behavior. It is she who is fully responsible for the gestation process. A female is not just an intermediary in a legal relation, but a person, who helps the intended parents

exercise their family values. The family values imply the birth of a child to infertile intended parents. Therefore, its exclusion from the contract process is against the standards of morality.

The suggested main parties to a signed surrogacy contract are:

1. The Client-the intended parents seeking medical assistance during gestation and birth of a child;
2. The Contractor-a healthcare organization licensed to provide respective services and ensuring the provision of the service, which consists in gestation and the birth of a child;
3. The surrogate mother, who gestates the child for the Client.

The Client's participation is important in terms of contract fulfilment. Optional parties to the contract can be:

1. Persons, who are donors of biological materials (a healthcare organization acting as a bank of biological materials, or physical persons willing to be donors for particular intended parents);
2. Organizations, which provide services helping to select surrogate parents;
3. Other concerned parties (the surrogate mother's husband, who consents to his spouse's pregnancy, etc.)

Voidability of Surrogacy Agreements

When regulating a surrogacy contract, the legislator exercises the first-do-no-harm (*primum non nocere*) principle without interfering with citizens' personal rights. The legislator's silence should not contribute to the parties' overusing of these legal relations; violation of the few imperative rules, as well as failure to abide by the basic provisions of the family legislation will entail immediate voidance of the surrogacy agreement.

The legislator does not clearly specify the consequences of nullification. Although voidance of surrogacies is not widely practiced today, there is a risk of disputes, and it requires an adequate solution.

It is believed that the general approach to qualifying a surrogacy should be the same as the one applied to a marital agreement. Both are private-law contracts (*sui generis*) and therefore respective norms of the Civil Code of the RoK, which concern obligations and contracts, can be applied to them in a subsidiary fashion, unless this goes against the relation's nature (for instance, the freedom-of-contract doctrine can be relied on when determining the size of compensation for the surrogate mother, but the contract does not oblige the surrogate mother to consent to registering the genetic parents as parents in the birth log after the birth).

In case of nullification of a surrogacy contract prior to the beginning of its fulfilment. i. e. prior to the implantation of a donor embryo into the surrogate mother's body, general rules of Clause 2 of Article 167 of the Civil Code of the RoK, which regulates bilateral restitution, should be followed. In case it is no longer possible to restore the genetic parents' ownership rights for the biological material, when an embryo has been implanted, a court should reject the application of the results of voidance, which would otherwise run counter to the norms of order and morality. Consequently, imperative rules of the Civil Code of the RoK, which regulate the conformity between the genetic parents' and the surrogate mother's will, will be applied after the birth of a child.

Judicial Practice in the Sphere of Contractual Relations in the Republic of Kazakhstan

Thus, in 2017, the Judicial Collegium for Civil Cases of the Supreme Court of the Republic of Kazakhstan, after a public court proceeding on a civil residential property ownership lawsuit filed by T. against Zh. upon the request of T. to appeal against the K. city court's decision dated October 27, 2016, and the order of the Judicial Collegium for Civil Cases of the K. Regional Court issued on February 1, 2017, made the following decision.

T. filed a lawsuit against Zh., as described above. The K. City Court's decision dated October 27, 2016, which was left unchanged by the Judicial Collegium for Civil Cases of the K. Regional Court dated February 1, 2017, was to dismiss the lawsuit.

In the appeal, the plaintiff referred to the violation of the substantive law and procedural law and requested cancellation of the judicial acts being appealed against and satisfaction of the claim.

Based on the statements made by the plaintiff and her representatives, who supported the appeal, as well as on those of the defendant, who was objecting the appeal, on the materials of the case, and having discussed the appeal and objections to it, the judicial collegium concluded:

According to Part 5 of Article 438 of the Civil Procedural Code of the Republic of Kazakhstan (hereinafter CPC), fundamental breaches of the rules of the substantive law and the procedural law, which resulted in an unlawful judicial act, became a reason for causational proceedings to review the judicial acts, which had gone into effect.

The breaches related to the case were eventually discovered. As follows from the case materials, the parties had been officially married since July 27, 2011. The marriage was terminated on November 26, 2015.

Prior to marriage, T. had in possession Apartment 1 in the city of K., which she had bought on August 10, 2006.

On October 12, 2011, T., being married, sold the apartment, which she had owned.

According to the sale and purchase agreement signed on January 5, 2012, T. purchased Apartment 41 located in K. city (hereinafter the Disputed Apartment).

The plaintiff explained that the Disputed Apartment was no part of the community property, because it had been purchased with her personal funds, which she had been paid for the sold apartment she had purchased before marriage, as well as with money deposited at B. LLC. The defendant, in turn, had been unemployed and had not contributed to the property, because he had a first-degree disability.

The defendant disagreed to the plaintiff's requirements, as he stated that the Disputed Apartment was part of the community property purchased during marriage.

Local courts would dismiss the claim, as they concluded that property purchased during marriage was community property regardless of who was registered as the owner and which of the spouses had invested funds.

The judicial acts would not rely on facts and would run counter to the rules of the substantive law.

Article 35 of the Marriage (matrimony) and Family Law (hereinafter the Code) of the Republic of Kazakhstan contains a list of reasons, for which each spouse's personal property can be delimited from community property. First, spouses' personal property is property, which had been owned by a spouse prior to marriage.

As follows from Regulatory Resolution 5 of the Supreme Court of the Republic of Kazakhstan clarifying “*courts’ use of the legislation when hearing marriage termination cases*” dated April 28, 2000, property purchased during marriage with a spouse’s personal funds, which had belonged to him prior to marriage, shall not be deemed as community property.

According to the regulations mentioned above, a legally relevant fact in categorizing spouses’ property as community property is the characteristics of the funds (personal or shared), with which the property was purchased by one of the spouses during marriage. Acquisition of property during marriage with a spouse’s personal funds excludes it from the category of shared property.

During the proceedings, it was discovered that prior to getting married, T. had an apartment in possession, which she sold later, and the Disputed Apartment was bought with the funds raised from the sale.

The parties did not litigate the fact that the Disputed Apartment had been bought with the funds obtained by the plaintiff prior to marriage, as well as the funds raised from the sale of the apartment, which had belonged to the plaintiff prior to her marrying the defendant.

Zh.’s statements that the Disputed Apartment had been bought with his mother’s funds were deemed irrelevant, because the defendant failed to give evidence as required by Article 72 of the CPC.

Given the circumstances, local courts’ acts do not reflect the circumstances of the case, as the courts have not applied the rules stated in Article 35 of the Code.

During the proceedings, the courts failed to properly apply the norms of the substantive law; that resulted in unlawful judicial rulings, which are subject to reversal.

Given the fact that the case does not require extraction or additional review of the evidence, the facts relating to the dispute have been fully substantiated; however, the court has misevaluated the evidence, misinterpreted and misapplied the norms of the substantive law, the judicial collegium believes that the accepted judicial rulings are to be reversed, and a new judgment concerning the satisfaction of T.’s claim needs to be passed.

According to Subparagraphs 8 of Part 2 of Article 451 of the CPC, the Court Collegium of the Supreme Court of the Republic of Kazakhstan has ruled to cancel the judgment of the K. City Court dated October 27, 2016 and the judgment of the Court Collegium for Civil Cases dated February 1, 2017 and to make a new judgment to satisfy the claim. It has recognized Apartment 41 located in R. City the property of T. It has ruled to satisfy the appeal.

Matters Related to Improvement of the Family Legislation Concerning Contractual Legal Relations

Along from general reasons for voidance of deals, the Family Code stipulates specific rules concerning voidance of marital agreements.

First, a marital agreement should not handicap spouses’ legal capacity and capability. Therefore, a marital agreement cannot contain provisions limiting a spouse’s freedom of movement, work, professional activity, etc. Second, a marital agreement cannot limit spouses’ right to apply to a court to protect their legal rights and interests. Third, a marital agreement cannot contain any terms and conditions, which might put a spouse in an extremely unfavorable situation.

RESEARCH METHODOLOGY

Given the descriptive and biased nature of the term “*extremely unfavorable situation*,” it often raises questions concerning the practical use of the norm. Consequently, the category has become a topic for interpretation in the sphere of constitutional proceedings.

According to the Constitutional Court of the RoK, the term does not indicate any uncertainty of the norm, because

“The diversity of circumstances influencing spouses’ property status makes it impossible to provide a comprehensive list of these in the law... The problem of a marital agreement putting one of the parties in an extremely unfavorable situation should be solved by a court in each particular case with regard to particular circumstances. Meanwhile, the judge... makes a decision at his/her judicial discretion.” However, legal research has repeatedly attempted to frame the term and criteria of “extremely unfavorable situation.”

This statement appears to be erroneous, and these two categories should be viewed as separate and independent.

According to the Civil Code of the RoK, a one-sided transaction is an agreement stipulating extremely unjust terms, which one of the parties is forced to accept due to a confluence of reduced circumstances, which the other party has taken advantage of. In turn, this definition clarifies the main difference from the “*extremely unfavorable situation*” in the family law—a confluence of reduced circumstances, which forces a party to sign a marital agreement on terms that are extremely disadvantageous for him/her.

Also, given the personal and trust-based nature of marital relations, it is trust, devotion and love that lay ground for the transaction, rather than a confluence of reduced circumstances.

In case a spouse’s material status improvement is recognized as unlawful, a court should cancel the marital agreement.

However, when trying such cases, courts tend to focus on the potential share of a spouse’s property rather than spouses’ material status, as they apply the law to property relations between them.

In the USA, this category is presented in the provision of the Uniform Premarital Agreement Act, according to which a marital agreement shall not be fully complied with in case whereby a party judicially proves the other party’s unethical activities, particularly, whereby the agreement excludes marital support, which results in one of the party’s entitlement to the state’s assistance after retirement or divorce.

Recently, the Supreme Court of the RF included the term “*significant disparity*” in one of its acts. The Supreme Court of the RRF was resolving a dispute between spouses concerning the terms of a marital contract, according to which the husband received a garage and a vehicle, and the wife—an apartment and credit obligations. The Supreme Court noted that a marital agreement should not put one of the spouses in an extremely unfavorable position, for instance, due to a significant disparity between the sizes of property, or deprive a spouse of property purchased during marriage.

In this case, the Supreme Court of the RF has not discovered any “*significant disparity*” between the spouses’ property. The marital contract has remained valid, and the property has not been halved. However, the Supreme Court of the RF has not specified a concept and characteristics (criteria) for the “*significant disparity*,” and the question concerning the concept,

as well as the significance threshold, remains open. It is hardly possible to provide an explicit term for that, and in each particular case, a court should rely on a particular combination of circumstances.

However, it is possible to make an exemplary instruction, as it has been done in relation to the “*extremely unfavorable situation*.” For instance,

“In case one of the spouses is entitled to a much greater amount of property than the amount transferred to the other spouse in keeping with the marital agreement, the agreement can be deemed null and void due to the significant disproportion on condition that if the property had been subject to the lawful marital regime, the party would have been entitled to a much smaller amount”

For example, the wife receives a vehicle, and the husband receives a profitable business. Presumably, to ensure stable and legally certain civil transactions, the legal category being discussed requires additional explanation by the Supreme Court of the Republic of Kazakhstan.

CONCLUSION

Not infrequently, spouses decide to modify or terminate marital agreements. Once they apply to a civil-law notary or court, the agreement is nullified. This can be due to the incompetence of the notary signing it, or the lawyer, who has consulted the spouses, or due to a breach of the law. An improperly drafted agreement is considered null and void, so neither party is subject to any obligations stated in it.

Reasons for nullification of an agreement are specified in the Civil Code of the RoK and the Family Code of the RoK. These may include: a breach of the law and improper notarial certification; forced signing; signing an agreement with a physically or mentally handicapped spouse, who is not conscious of his or her activities; inclusion in the agreement of terms and conditions not related to material matters (distribution of family responsibilities, caring for children); inclusion of terms and conditions, which are unjust for one of the parties. Mostly, such agreements result from a spouse’s complete and utter financial dependence on the other spouse. Only one such term or condition shall be deemed a reason for nullifying the agreement.

In this country, a marital agreement is a new kind of institution. It is less developed than in the European countries due to our historically cemented national culture and traditions, morality standards, and the term “*marital agreement*” sounds weird to citizens of Kazakhstan.

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