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## NON-PECUNIARY RIGHTS OF INCAPABLE PERSONS IN FAMILY LEGAL RELATIONSHIPS

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### Summary

The article presents a comparative analysis between the international legal acts and the legislation of Ukraine of non-pecuniary rights of incapable persons in family legal relationships. The notion of incapability as a category of civil right is described. It is grounded that the Ukrainian legislation provides deprivation of non-pecuniary rights incapable persons, which do not meet international regulatory legal acts. In order to bring Ukrainian legislation to European standards, proposed certain changes in the Civil and Family law.

**Key words:** Family Code of Ukraine, family legal relationship, disability, non-pecuniary rights.

### Анотація

В статті проводиться порівняльний аналіз міжнародних нормативно-правових актів з законодавством України по вопросу неимущественных прав недееспособных лиц в семейных правоотношениях. Раскрывается понятие «недееспособность» как категория гражданского права. Обосновано, что законодательство Украины предусматривает лишение недееспособных лиц семейных неимущественных прав, что не соответствует международным нормативно-правовым актам. С целью приведения украинского законодательства к европейским требованиям предложены определенные изменения в Гражданском кодексе Украины и Семейном кодексе Украины.

**Ключевые слова:** Семейный кодекс Украины, семейные правоотношения, недееспособность, неимущественные права.

**Problem Statement.** International legal acts provide that the right to family is a human right. The Declaration of Human Rights, that was adopted and proclaimed by General Assembly resolution of December 10, 1948 provides that men and women of full age have the right without any restrictions to marry and to found a family [1]. Member states of the Council of Europe, who have signed the European Convention on Human Rights also reported, that men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right [2]. In addition, both of the above regulations provides that every person should have all right and all freedom, regardless of any situation and for using rights and freedoms shall be secured without discrimination on any ground. Unfortunately in some countries and in Ukraine, including the most vulnerable segments of the population there are persons with mental health, especially those who have limited capacity. Convention on the rights of

persons with disabilities notes that any incapable persons, whatever may have been the origin, the nature and severity of their injuries or limitations have the same fundamental rights, the right to found a family including their fellow citizens of the same age and the right to live in their homes [3]. That is, international regulations stipulate that most of the rights in the field of marriage and family relationships are integral.

**The purpose of this article** is a comprehensive study of the aggregate family rights of incapable persons.

**Scientific novelty of the research** lies in the fact that as a result of the study revealed that recognition in Ukraine incapacitated person, leads to a total limit of its family law is irreversible and does not meet the international obligations of Ukraine.

Ukraine Family Law defines family rights such as being closely related to a person and therefore cannot be transferred to another person. Traditionally family law relationship is divided in to property and personal which enforceable by



individuals independently. However, the uncertain situation in the implementation of family relationships is presented for incapable persons.

Disability – the category of civil law, which is characterized by the loss of ability to carry out individual civil rights and responsibilities as a result of chronic severe mental disorder, the consequences of this applies to all types of relationships and makes it impossible to be a member of any law relationship.

In general, the problematic issues of this study are the legal status of incapable persons in family law relationship. Analysis of the research indicates that the viability and disability of persons have been affected in the works of A.N. Almazova, I.V. Reshetnikov, K.M. Holdokovskoyi, I.N. Pyatiletova, P.P. Zavorotko, T.V. Blinov A.V. Ustalovoyi, M.H. Hutyzy, and others.

Family relationship – this is one of the most important spheres of human activity. Recognition incapacity of a person significantly affect his family law relationship status. According to the family law of Ukraine, family rights are closely linked to a person and therefore cannot be transferred to another person, but until 2006, art. 14 of the Family Code of Ukraine, it was assumed that the family rights of the incapacitated person performs his or her guardian. After making changes to this article, the Family Code of Ukraine, does not contain procedure of incapacitated persons family rights, which led to gaps in law, which can be understood as an opportunity to personal realization incapable person family rights.

Article 15 of the Family Code of Ukraine indicates that the incapable person is deprived from family non-pecuniary duty and pecuniary duty perform a guardian by the incapacitated person.

Subjective duty can be considered as a form measure and proper conduct of the person, their duties of perform in various ways: by performing active operations, or vice versa, by refraining from taking action. In the case of incapacity, it can not perform the duties of non-pecuniary nature: to raise a child, to represent its interests, to marry, etc. [4].

Rights in family law can be divided into two groups: property or pecuniary and non-pecuniary. To non-pecuniary concern: the personal non-pecuniary

rights of a spouses (right to maternity, paternity, the right to respect for their individuality, the physical and spiritual development, the right to change of name, the right man and wife on the distribution of responsibilities and common issues of family life, liberty and security of person, etc.), the non-pecuniary rights of parents and children (the right to determine and change name of the child, the rights of parents regarding the education of the child, the rights of parents to communicate, the right of parents to protect the child, the right of parents to determine the residence of a child) and non-pecuniary rights of other members of the family (grandmother and grandfather right, great-grandmother and great-grandfather on education grandchildren, great-grandchildren, and their right to protect grandchildren, brothers and sisters right to communicate, etc.).

Implementation of moral and property rights requires realization of voluntary actions and provides that an individual has to realise the significance of his actions and control them. In result with recognition of a family member as incapable problem of realization non-pecuniary and pecuniary rights of spouses, parental rights and the rights of other relatives, appears.

Family Law Ukraine expressly prohibited marriage by incapacitated person. One of the conditions of marriage – is voluntary, the person's consent is not considered voluntary, if it is at the moment of marriage was not fully aware of significances of his actions and could not control them. According to art. 39 of the Family Code of Ukraine, marriage declared invalid if it is registered to a person who was incompetent at the time of marriage. The action for annulment may file a woman or a man, other persons whose rights were violated because of the registration of marriage, parents, caretaker, guardian of an incapacitated person, the guardianship authority if need protection rights and interests child, a person who adjudicated incompetent, or a person whose capacity is limited. According to the concerned person of state civil registration cancels record of the marriage registered with the person who declared incompetent. Article 40 of Family Code of Ukraine stipulates that act freely can only fully competent person, that is incompetent person, and the person who was competent, but at the moment

of marriage was suffering from a mental disorder, and as a result couldn't fully aware of the significance of his actions and (or) could not control them, have no right to marry. If the last base recognition of marriage to be annulment consider in relation to civil law, we can conclude that in this case the Family Code of Ukraine has greatly expanded the bases on which the marriage by a court recognize to be invalid in relation to the bases recognizing the transaction invalid by a court on the bases under art. 225 Family Code of Ukraine. Unlike Family Code of Ukraine, Civil Code of Ukraine stipulates that the transaction is declared invalid if its conclusion competent individual who at the moment of its commission was not fully aware of the significance of his actions and (or) could not manage [5]. That is, in the case of forensic psychiatric expertise in case of marriage annulment, unlike the cases of recognition of transactions invalid, expert solutions to significant influence mental disorder a person's ability to realise the significance of their actions and manage is a base for marriage to be annulment. Thus, Family Code of Ukraine significantly restricts the rights of people with mental health because mental disorders that significantly affect a person's ability to realise the significance of his actions and control them, much more than mental disorders completely depriving a person of the ability to realise the significance of his actions and control them.

Based on the provisions of art. 107 Family Code of Ukraine, if a person is recognized as incapable after marriage, it is the basis for unilateral termination of marriage in the Registry Office at the request of a spouse, and the bases for divorce unilaterally a court decision on the recognition of a person incapable. Divorce at the request of one spouse may for the reason that the person is incapable due to mental disorder are not aware of their actions and cannot control them. agreement. Although agreement of incompetent person to divorce is not required, divorce it may not be messaged. These legal issues guardian incapacitated person has no right to decide, he cannot give consent instead of an incapacitated person or object, as in this case it is a purely personal relationship in which detection will instead incapacitated provided. Under art. 107 Family Code



of Ukraine the right to apply to authority of civil registration of the application for divorce if the other spouse recognized incapable is not mandatory and if it is not implemented, the incapacitated person will continue to have the status of spouse. However, when a similar statement appeal to the registry office, incapacitated person unable to protect their non-pecuniary rights of marriage [4].

Particular attention should be paid to the issue of parental rights of incapacitated person. The right for parenthood, raising children, to protect children – is inalienable natural rights that are assigned to Constitution of Ukraine and art. 50 Family Code of Ukraine [6]. According to family law parents protect and represent the interests of their children and complement their incomplete capacity. Recognition of incapable parents, as prescribed by law makes it impossible to protect the interests of minor children, and it is not about deprivation of parental rights, because art. 164 Family Code of Ukraine determine comprehensive bases list of parental rights. Incapacitated person actually deprives parental rights, and over his child custody or guardianship is established. Article 243 Family Code of Ukraine stipulates that custody and guardianship is established of children who were left without parental care when parents died. Over parents children established care if they are deprived of parental rights or recognized in the prescribed manner incapacitated or partially capable. In this case, the government takes care over the life and health of a child by which violating rights of their parents. In many mental disorders ability to communicate is persists, remains the core of the individual, no aggressive tendencies, that there is no reason to limit the parents rights to contact with children, but the existence of identical form and procedure for recognizing a person incapable, making it impossible implementation of parental rights even those parents who could do it. Family code of Ukraine stipulates that if an individual is recognized as incapable, it loses the opportunity to acquire the rights and actions to perform duties. That is, without his agreement can be changed name of his child and incapacitated consent is not needed and when a child is adopted, that such a person can ever be unable to communicate with

his own child. The legislature did not consider the irreversibility of the adoption procedure that can be conducted in closed session with the inability to disclosure of information concerning adoption. According to the Civil Code of Ukraine capacity can be restored if the reasons of recognition the person as incapable have fallen, but can happen when parents capacity is restored, never be able to educate their children. Furthermore, in accordance with art. 281 Civil Code of Ukraine with the consent of a guardian can happen sterilization incapacitated individual in the presence of medical and social indications that generally deprives opportunity to be parents [5].

The elements of the content capacity of physical person are: right capacity – the ability to independently carry out transactions; tort ability – an opportunity to bear financial responsibility; testament ability – an opportunity to make a will and be heir; trans capacity – the opportunity to choose a representative to represent himself; business capacity – an opportunity to engage in business activities; marriage and family capacity – the ability to be a part of family relations. Recognition of a person incapable automatically eliminates its ability to be a member of any relationship. Deprivation of persons marriage and family capacity not only deprives of his family property rights, which makes her guardian, but eliminates its ability to carry out non-family rights, which causes to irreversible circumstances.

Deprivation of family rights – is a violation of the constitutional right for a family and violation of the right to found a family, which provides Universal Declaration of Human Rights. It is understandable the limitation of family property rights of incapacitated person, but it is not permissible limitation of non-pecuniary family rights, since it involves an irreversible consequence and not answer the historical formation of the “incapability” legal category. Since this situation did not meet international standards for the protection of family rights in general and makes impossible the constitutional principle, would be appropriate to provide in Family code of Ukraine restricting property family rights and inability to limit non-pecuniary family rights. That is, non-pecuniary family rights of incapable should do

independently. Value Rights of the Child on the proposed changes requires a separate study, which together will propose appropriate amendments to the Family Code of Ukraine.

**Conclusions.** Thus, by comparing the result of international legal acts of legislation of Ukraine established the following. International regulatory acts not provided admissibility limiting the rights under any discriminatory grounds and on the basis of the presence of disability. Domestic legislation involving deprivation of incapable persons family moral rights that does not meet the obligations that took over Ukraine ratified international instruments above. In order to bring domestic legislation to European requirements, proposing in Civil and Family Law changes of this nature, “non-family law incapacitated person can exercise alone or under the control of a guardian, the court must establish that”.

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