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# PROPERTY RELATIONS IN KYRGYZ FAMILY: LEGAL ASPECTS

**Abstract.** The article provides legal analysis of features of family property relations in the custom law of the Kyrgyz people and the legislation of the Kyrgyz Republic.

Using analysis, synthesis, legal and historical law methods, the Matrimony and Family Code of the Kyrgyz SSR of 1969, the Family Code of the Kyrgyz Republic of 2003, the Code of Laws on Civil Status Acts, Matrimony, Family and Fiduciary Law of the RSFSR of 1918, The Code of Laws on Marriage, Family and Fiduciary of the RSFSR of 1926, The Ordinance of the President of the Kyrgyz Republic dated January 26, 2012 No. 17 "On declaring 2012 the Year of Family, Peace, Concordance and Mutual Forgiveness" and Family Support and Child Protection Program for 2018 - 2028 of Government of the Kyrgyz Republic were studied.

The article analyzes relevant theoretical and practical issues related to common property of spouses, separate property of spouses, relations between parents and children for joint ownership and use of each other's property, alimony responsibility of family members and property relations of factual spouses. According to the author, legal norms regulating property relations in family are important when courts consider cases in sphere of protection of property rights of family members. In particular, the authors came to the conclusion in the Kyrgyz Republic the legal regulation of property relations in family is basis for resolving contentious issues in the family law.

**Key words:** family, member of family, property, property relations, property, property of spouses, alimony, right to support, prenuptial agreement, division of property, agreement on payment of alimony.

**Introduction.** Currently, due to the involvement in the civil turnaround of new types of property, percentage of objects of property of citizens' rights has expanded significantly. Analogic processes are going on throughout the post-Soviet space. For example, in Bulgaria with the new Family Code a decisive reform of the matrimonial property law has been made. For the first time the intending spouses were allowed to choose the system of property relations in marriage (Petkova, 2011, p. 108). On the example of Albania E. Garunja reveals political and social-economic changes were associated with new phenomena (such as divorce, domestic violence, crime among young people, etc.) (Garunja, 2019, p. 151). G.B. Kovachek-Stanich and S. Samardcshich note in many jurisdictions, spouses/custom-law partners can choose which matrimonial property regime they want to be applied on their property relations. Viewed comparatively, such freedom exists in Western European countries for some time, but recently, both Eastern and Central European countries introduced the possibility of concluding marital property agreement in their legal systems, which changes the default marital property regime (Kovachek-Stanich & Samardcshich, 2016, p. 1065).

The society to a large extent needs to provide stable guarantees for protection of citizens' property rights, including those that appear in family. These guarantees have a positive effect on stability of family relationships. The proclamation in the Kyrgyz Republic of 2012 as the Year of Family, Peace, Consensus and Mutual Forgiveness is a prerequisite for the adoption and implementation of the complex of economic, legal and organizational measures to amplification social role of family. For example, in Kyrgyzstan, 2020 has been declared the Year of Regional Development, Digitalization and Support for Children; in 2017, the Government of the Kyrgyz Republic adopted the Family Support and Child Protection Program for 2018-2028.

The new regulation of family property relations is in the Family Code of the Kyrgyz Republic of August 30, 2003. The dispositive method replaced the mandatory legal regulation in this act. However, the family legislation of the Kyrgyz Republic does not fully defends tproperty rights and interests of spouses, parents and children. Property relations of spouses have transformed significantly, for example, men and women who receive high income prefer to have the most valuable things in separate ownership, because the legal mode of the common joint property of the spouses does not always coincide to their interests.

Reinforcement of the institution of private property predetermined the appearance in the legislation of the Kyrgyz Republic of prenuptial agreement, an agreement on the division of property, an agreement on the payment of alimony and others. Though family law of the Kyrgyz Republic has been allowing prenuptial agreements for almost ten years, this phenomenon has not become widespread. In addition, more often in Kirghizia actual marriage without legal registration is sighted. For example, according to the information of the National Statistical Committee of the Kyrgyz Republic for 2018, children born out of wedlock was 36,790, approximately 20,000 children were registered at the joint request of parents, and about 17,000 were recorded only at the request of mother (Women and Men of the Kyrgyz Republic, 2019, p. 30).

**Methods.** Using analysis, synthesis, legal and historical law methods, the Matrimony and Family Code of the Kyrgyz SSR of 1969, the Family Code of the Kyrgyz Republic of 2003, the Code of Laws on Civil Status Acts, Matrimony, Family and Fiduciary Law of the RSFSR of 1918, The Code of Laws on Marriage, Family and Fiduciary of the RSFSR of 1926, The Ordinance of the President of the Kyrgyz Republic dated January 26, 2012 No. 17 “On declaring 2012 the Year of Family, Peace, Concordance and Mutual Forgiveness” and Family Support and Child Protection Program for 2018 - 2028 of Government of the Kyrgyz Republic were studied.

**Results.** According to Kyrgyz law in sphere of property relations, the differences between the subsequences of actual and registered marriage are important. The Family Code of the Kyrgyz Republic recognizes only registered marriage (Article 11), and in this part, the Kyrgyz family law does not meet modern society needs.

Modern family in Kyrgyzstan is in crisis, many families are breaking up, denial of material support to even closest relatives is widespread. Percentage of divorces and, as a result, divisions of common property is growing every year (in 2017, amount of divorces was 9,588, for 2018 – 10434 (Women and Men of the Kyrgyz Republic, 2019, p. 31)). Analogic processes are taking place in other post-Soviet countries, for example, in Poland in 2016 - 2017 percentage of divorces increased 3.5 times (Sztaudynger, 2018, p. 104). Therefore scientific study of the legal aspects of the separate and common property of spouses, the procedure for the division of property upon divorce, the practice of applying this legislation will improve quality of family law and its practice.

State support for assailable populations in Kyrgyzstan is insufficient. The main load on the livelihood of disabled citizens, children and pensioners is borne on able-bodied members of family (parents, adult children, spouses). In judicial practice of the Kyrgyz Republic, cases of collection of alimony are one of prevalent categories of causes adjudicated in civil courts. According to the information of the Judicial Department of the Supreme Court of the Kyrgyz Republic for 2018, 25,331 receiving-orders were received for execution, 3556 were verified in full. 2565 writ of debtors for alimony payment are on the wanted list. There is a tendency towards a decrease in the full extent of enforcements of a court decision and an increase in percentage of those who evade child support. Therefore, the task of growth effectiveness of the legislation of the Kyrgyz Republic on alimony and its practice.

Property relations in family originate between strictly defined entities, close people, empowered with family rights and obligations. S.A. Muratova considers as an independent concept of "family" found in the text of several articles of family law. In this partition of law, family is considered to be a single collective entity, family members are also independent subjects of family legal relations (Muratova, 2006, p. 38).

According to the author, the legislator using the term "family" in the context of rights and obligations identified this definition with the concept of "family member", keeping in mind to a separate independent entity, a person who is part of corresponding family. In practice, determining the list of family members is important. These include spouses, parents and children (adoptive parents and adopted children), and in cases and within the limits established by family law, other relatives and persons. The anchorage of the list of family members is based on an analysis of subjects of relations regulated by family law.

Researching legal status of subjects of family property relations, it should be borne in mind they must have coincident family legal capacity and legal capacity.

The next element of family property relations is objects with which family members interact and property. It should be noted that in Art. 35 of the Family Code of the Kyrgyz Republic, the term "property", as an object of family relations of spouses, includes things and property rights. Object of family property relations is property: residential building, garage, summer residence, household and personal consumption items, vehicles, building, enterprise, equipment, construction, i.e. any property of consumer, industrial, social, cultural and other purposes. The exception is certain types of property provided for by law that cannot be owned by a citizen in connection with state or public safety or in accordance with international obligations of the state.

**Discussion.** Theorists of Family Law M.V. Antokolskaya, K.I. Asanova, S.A. Muratova, O.A. Ruzakova and others traditionally distinguished two categories of spouses' property relations: regarding ownership of things and provision of payments.

The relatively independent category of property relations of spouses regulated by family law are relations existed to liability of spouses for payments to other subjects. However, it should be noted these relations concern other subjects and cannot be regulated by the deal. Family property relations should be classified depending on subjects and establishments for their genesis between:

1) spouses: regarding joint property, regarding separate property created by prenuptial agreement, regarding mutual payments;

2) spouses and other subjects: regarding liability of spouses for common and/or separate obligations;

3) parents and children: regarding possession and use of each other’s property, regarding disposal of property of minor children, regarding provision of mutual payments;

4) other members of family: relations between able-bodied adult brothers (sisters) and minor brothers (sisters) regarding provision of maintenance, relations between grandfathers (grandmothers) and minor grandchildren (able-bodied adult grandchildren) regarding provision of support, relations between stepfather (stepmother) and able-bodied adult stepsons (stepdaughters) regarding provision of support.

According to the written sources of the adat – Erezhe (the law of biys), marriage was a property deal. Woman was a subject of purchase and sale and did not have property rights. According to M.Zh. Mukanova bride and groom were objects of contract and not subjects (Mukanova, 2003).

Marriage with payment of kalym is one of the forms of marriage according to custom law, which was widespread among the Kyrgyz. Such a marriage existed among the Turkic-speaking peoples before the adoption of Islam. Then Muslim ideologists established a kalym marriage as a form of a purchased marriage. Kalym began to play the same role as paying mahr among the Arabs (Vagabov, 1980, p. 146). Marriage was considered legally held after paying kalym – buyout for the bride. Contract was concluded by parents. By agreement of parties, marriage could be terminated subject to return of received kalym.

In the Soviet period, new family law was created through the adoption of decrees, codes, laws and other acts regulated property relations in family. In 1918, the codification of family law began. In accordance with Art. 105 of the Code of laws on acts of civil status, marriage, family and fiduciary law of the RSFSR, marriage did not create a common property of spouses. The principle of complete separability of property of spouses acted. From the point of view of K.I. Asanova, the principle of separation of spouses' property turned out to be just an anachronism, from the beginning of which judicial practice, and then the legislator, were forced to refuse (Asanova, 1999, p. 37). In the first years of the formation of the USSR, the second codification of family law was carried out by adopting the RSFSR Code of Laws on Marriage, Family and Custody of 1926, according to which property belonged to spouses before marriage remained separate. Property acquired by the spouses during marriage was considered common of the spouses. The very essence of marriage dictated need to recognize commonality of rights of each spouse to everything they obtained during their life together (Ryasentsev, 1971, p. 67; Vorozheykin, 1969, p. 16). This was the first step towards the unification of legal mode of spouses' property. In addition, Art. 125 of the Code provided for the equal shares of each spouse in common property. But by the decree of the Presidium of the Supreme Soviet of the USSR of September 15, 1945 the edition of this article was changed and size of share of property belonging to both spouses was determined by court. An important moment in the development of marital family law was the adoption on December 26, 1969 of the Marriage and Family Code of the Kyrgyz SSR. This act enshrined mode of common joint property of spouses along

with common shared property and individual property. With common joint ownership, there is complete equality of rights to own, use and dispose of property acquired by spouses in marriage. In addition, the Code did not fix all the conditions for genesis of alimony obligation between spouses, did not disclose the concept of spouse's disability, which caused discussions in the legal literature. The Code on Marriage and Family of the Kyrgyz SSR did not specify legal status of grandchildren obliged to pay child support, namely, working capacity and full age, therefore, some difficulties arose in determining amount of child support, or those who took their children for constant upbringing and maintenance were obliged to pay them forced maintenance if they refused to provide content.

Constitutional norms on the rights and freedoms have become the foundation of modern family law of the Kyrgyz Republic. The Family Code of the Kyrgyz Republic as a codified normative act contains legal norms reflecting the specifics of legal regulation of family relations, including property relations in family.

Researching examined the sources of legal regulation of family property relations, the authors concluded family law changed significantly depending on modifications in state ideology and permutations in society. There is a correction in the structure of legislation, the emergence of codified sources. In addition, in each subsequent source percentage of norms enlarged, more often individual provisions began to be detailed, many peremptory norms were replaced by dispositive ones.

Reinforcement of the dispositive principle in family law has led to the wider application of civil norms in the regulation of family property relations. One of the current issues in legal science is the question of the relations between family and civil legislation in the regulation of family relations, this problem still does not find a definite solution, while it has theoretical and practical meaning. Having studied the norms of the Family Code of the Kyrgyz Republic and the research of S.S. Alekseeva, M.V. Antokolskaya, Ch.I. Arabaev, M.I. Braginsky, N.D. Egorova, S.M. Muratbekova, A.M. Nechaeva, V.P. Nikitina, V.V. Pavlenko, L.M. Pchelintseva, A.P. Sergeyev and others, the authors came to the conclusion family law regulating family relations, including property relations in family, taking into account the specifics of such relations is a priority, and in case of unresolved family law subsidiary civil law should apply.

Legal mode of spouses' property in the Kyrgyz Republic can be represented as jointly acquired and separate property. Property of spouses is material basis of their life together. The list of joint property of spouses in Art. 35 of the Family Code of the Kyrgyz Republic is far from exhaustive, which, of course, creates controversial issues and difficulties in law enforcement.

According to A.M. Belyakova, V.A. Ryasentseva and S.Yu. Chashkova in property of spouses includes things and property rights, but not debts. M.V. Antokolskaya, L.M. Pchelintseva V.A. Tarkhov and A.M. Erdelevsky believe common debts of spouses are one of components of property they acquired. Debt is essentially purchase during family life. Joint debts represent joint property. According to the author, it is necessary to include things, rights of claim and debts in common property of spouses, but the "core" of property relations of spouses will be property relations. Therefore, it will be fair to recognize the point of view of scientists in sphere of civil law, who distinguish between the categories of "property of spouses" and "property of spouses", the composition of which is not limited only to objects of property right.

To establish unity of the legal regulation of property relations between spouses regarding common joint ownership, the authors proposes to add Clause 2 of Article 35 of the Family Code of the Kyrgyz Republic: "Common property of spouses includes debts acquired by spouses (one of them) by concluding deals in interests of family". Accordingly, the rules contained in Clause 3 of Article 40 and Clause 2 of Article 48 of the Family Code of the Kyrgyz Republic when dividing common property of spouses, common debts are distributed between them in proportion to shares awarded, acquire logical completeness.

In judicial practice questions arise regarding separate property of spouses, property acquired jointly by persons, if judge declared marriage invalid; legal nature of things purchased during marriage, but with funds owned by one of spouses before marriage; legal mode of dowry, wedding gifts and gifts that one spouse made to another; legal mode of income received during marriage from use of separate property of one of spouses, etc. In many cases, it is advisable to solve these problems by concluding a marriage contract.

Joint property of spouses division is a long and complicated process during which difficulties arise in court, especially in cases where spouses divorce and at the same time have property claims to each other. Currently, there is increase in quantity of divorces in the Kyrgyz Republic. In 2017, percentage of divorces was 9,588, in 2018 – 10,434 (Women and Men of the Kyrgyz Republic, 2019, p. 31). Analogic processes take place in other post-Soviet countries, for example, in Poland (Roman, 2018, p. 2). When divorce is not often matters of division of property is peacefully resolved. Therefore, theoretical elaboration of issues related to separate and common property of spouses, and with procedure for division of property upon dissolution of marriage and their proper practical application will help to avoid disputes arising when dividing joint property of spouses.

When trialing between spouses on division of joint property, court shall establish: composition of the shared property; absence of rights of claims of other entities on property; property not subject to division; value of property. Court has right to depart from the principle of equal shares of spouses, based on interests of minor children and interest of one of spouses, in cases where other spouse did not receive income without a good reason or spent common property of spouses to detriment of interests of the family. When sharing some things problems arise due to the fact that not all types of property can be divided without damage. In this case, thing is awarded to one of spouses who has important interest in its use, and to other spouse – monetary compensation.

In absence of disagreement on division of joint property, spouses have to independently conclude an appropriate agreement (Clause 2 of Article 39 of the Family Code of the Kyrgyz Republic). This deal may determine fate of common property that spouses already possess. Spouses have right to divide common property equally or to deviate from the principle of equal shares. The Family Code of the Kyrgyz Republic does not contain special requirements for form of agreement on division of property of spouses, they are given the right to choose necessary form themselves. From the point of view of the author, preparation of such deal without notarization by a notary does not fully protect rights of spouses. When signing a deal, a notary can verify legal capacity of spouses and subsequently always confirm in court document was signed in his presence by both spouses whose legal capacity was verified. The agreement on division of common property and court decision have the same legal force. A notarized document is effective evidence in litigation.

Concluding prenuptial agreement, spouses have right to change legal mode of ownership, establish regime of joint, shared or separate property of all their property, its separate types or property of each of spouses, both existing and future. The authors believe the purpose of such contract is to change legal mode of spouses' property to maximize adaptation of this regime to their needs. Spouses have right to establish rights and obligations for mutual maintenance in marriage contract; ways to participate in each other's incomes; procedure for spending each of them family funds; property that will be transferred to each of them in case of divorce; any property provisions.

However, as the analysis of the norms of the Family Code of the Kyrgyz Republic regulating marriage contract has shown, there are lacuna and contradictions which complicates the application of this act. Important questions are raised by the determination of the legal nature of marriage contract. The position of M.Zh. Mukanova deserves attention, who insists prenuptial agreement by its legal nature is an independent civil agreement with certain specific features (Mukanova, 2004, p. 210). I.V. Zlobina, L.B. Maksimovich, O.N. Nizamiev did not consider prenuptial agreement by a kind of civil deal, but saw in it a special kind of agreement (sui generis), family law agreement. In our opinion, family-legal nature of marriage contract is determined by specific features, among which a strictly defined subjective composition stands out; close dependence on marriage, outside which deal cannot exist; originality of subject of contract.

According to the author, it is necessary to establish the essence of matter and subjects of marriage contract. In the Family Code of the Kyrgyz Republic there are no rules detailing rights and obligations of spouses in legal modes other than legal. Future research needs base, procedure and legal consequences of changing and terminating of prenuptial agreement, invalidating it, which will more effectively protect rights and legitimate interests of spouses. Conclusion of contract also affects the interests of third parties. Therefore, of particular importance is the study of foreclosure on spouses' property, legal mode of which is established by prenuptial agreement.

The special requirements for subjects of prenuptial agreement make it impossible to conclude deal between actual spouses, who are becoming more widespread. The negative attitude of society towards cohabitation is replaced by liberal views. The scientific interest in problem of actual marriage is growing. According to M.V. Antokol, between actual spouses, it is possible to conclude agreement to which the rules on the marriage contract can be applied by analogy with the law. Moreover, the authors believe, due to significant prevalence of actual marriages, it is advisable to explicitly allow such spouses to conclude marriage agreement, including with the condition that common joint property mode be extended to their property (Antokolskaya, 1999, p. 168-169). From the point of view of M.Zh. Mukanova although contractual relations may arise between actual spouses regarding their joint property, it is undesirable to regulate these relations by prenuptial agreement, this will only cause confusion in practice (Mukanova, 2004, p. 212).

**Results.** In our opinion, it is advisable to simultaneously introduce two alternative ways of establishing actual marriage: by concluding a special agreement and by adjudication. Both methods should lead to the same consequences: recognition of actual marriage by state; providing actual spouses with rights, obligations and legal protection. The authors propose to provide persons who are in unregistered marriage, opportunity to conclude property agreement between persons who are in marital relationship without registering marriage. In contract, these persons can establish legal mode of property owned or acquired by them, and settle obligations of obligation among themselves. The application of marriage contract by analogy is possible by direct reference in contract to the relevant articles of the Family Code of the Kyrgyz Republic.

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**ҚЫРҒЫЗ ОТБАСЫНДАҒЫ МҮЛІК ҚАТЫНАСТАРЫ: ҚҰҚЫҚТЫҚ АСПЕКТІЛЕР**

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**ИМУЩЕСТВЕННЫЕ ОТНОШЕНИЯ В КЫРГЫЗСКОЙ СЕМЬЕ: ПРАВОВЫЕ АСПЕКТЫ**

**Аннотация.** Целью исследования является юридический анализ особенностей семейных имущественных отношений семьи в Кыргызской Республике.

С применением анализа, синтеза, юридического и историко-правового метода изучены Кодекс о браке и семье Кыргызской ССР 1969 г.; Семейный кодекс Кыргызской Республики 2003 г.; Кодекс законов об актах гражданского состояния, брачном, семейном и опекунском праве РСФСР 1918 г.; Кодекс законов о браке, семье и опеке РСФСР 1926 г.; Указ Президента Кыргызской Республики «Об объявлении 2012 г. Годом семьи, мира, согласия и взаимного прощения» и Программа Правительства Кыргызской Республики по поддержке семьи и защиты детей на 2018 – 2028 гг.

В статье освещены актуальные теоретические и практические вопросы, касающиеся общего и раздельного имущества супругов, отношений детей и родителей по совместному владению и пользованию имуществом друг друга, алиментных обязательств членов семьи и имущественных отношений фактических супругов. Авторы пришли к выводу, что правовое регулирование имущественных отношений в семье является основой для разрешения спорных вопросов в сфере семейного права.

Исследовав отдельные положения семейного законодательства Кыргызской Республики, авторы сделали вывод, что данная отрасль права претерпела существенные изменения вследствие перемен в обществе и изменений государственной идеологии. Наблюдается увеличение числа источников семейного права и правовых норм, появление кодифицированных источников, большая детализация некоторых положений семейного права, замена отдельных императивных норм на диспозитивные.

Относительно самостоятельную категорию имущественных отношений супругов, регулируемых семейным правом, составляют отношения, связанные с ответственностью супругов по обязательствам перед тре-

тьими лицами. С точки зрения авторов, они не могут подвергаться договорному регулированию, следовательно, составлять его предмет, поскольку указанные отношения затрагивают интересы третьих лиц,

Авторы поддерживает точку зрения, в соответствии с которой семейное законодательство, регулирующее семейные, в том числе имущественные отношения в семье, и учитывающее специфику таких отношений имеет приоритетное значение, а в случае неурегулированности их семейным законодательством субсидиарно применяются нормы гражданского права.

В статье отмечается, что в состав общего имущества супругов необходимо включать вещи, права требования и долги, но «сердцевину» имущественных отношений супругов будут составлять отношения собственности.

Для установления единства правового регулирования общей совместной собственности супругов авторами предлагается п. 2 ст. 35 Семейного кодекса Кыргызской Республики дополнить следующими положениями: «К общему имуществу супругов относятся долги, приобретенные супругами (одним из них) заключением сделок в интересах семьи».

Авторы отмечают, что перед судебной практикой встают вопросы, связанные с раздельным имуществом супругов; имуществом, приобретенным совместно лицами, брак которых признан недействительным; правовой природой вещей, купленных во время брака, но на средства, принадлежащие одному из супругов до вступления в брак; правовым режимом приданого, свадебных подарков, а также подарков, которые один супруг делал другому; правовым режимом доходов, полученных во время брака от использования раздельной собственности одного из супругов и др. Во многих случаях данные проблемы целесообразнее решать, заключая брачные контракты.

Проведённый авторами анализ норм Семейного кодекса Кыргызской Республики, регулирующих отношения, связанные с брачным договором, показал, что существуют пробелы и противоречия, которые усложняют его практическое применение, в частности определение правовой природы брачного договора. Основываясь на положениях научных трудов в сфере семейного права, авторы приходят к выводу, что брачный договор по своей правовой природе является самостоятельным гражданско-правовым договором, обладающим определенными специфическими чертами, и семейно-правовая природа данного контракта обусловлена специфическими особенностями, среди которых следует выделить строго определенный субъективный состав; тесную зависимость от брака, вне которого эта сделка не может существовать, а также своеобразие предмета договора.

**Ключевые слова:** семья, член семьи, имущество, имущественные отношения, собственность, имущество супругов, алименты, право на содержание, брачный договор, раздел имущества, соглашение об уплате алиментов.

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