

Transactions with the Personal Non-Property Right

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Abstract

The problematic issues of the possibility of settlement of the transactions with the personal non-property right on name are contemplated in the article. During the development of the society and the public relations the new types of civil relations originate and demand the corresponding legal regulation. The presence of the contradictions between spheres of “due”, “real” and “knowledge about real and due” points at the existence of the scientific problem in legal literature. In general accepting such approach, the author methodologically constructed the research in the same sequence (the sphere of “due”, “real” and “knowledge about real and due”).

Keywords: Legal fact, Transaction, Action, Rights and duties, Name.

I. INTRODUCTION

In present realities of time during the development of the society and the public relations the new types of civil relations originate and demand the corresponding legal regulation. A lot of transactions with such personal non-property right as the right on name are being concluded in the sphere of the real but mechanism of regulation of such transactions is not defined. In order to define it the need of research of the possibility of the conclusion of such transactions appears.

Relevance of the subject-matter of the research is confirmed by the degree of the subject-matter explication – at the present time there is almost no fundamental work devoted to the possibility of the conclusion of the transactions with the personal non-property right on name.

II. PROPOSED ALGORITHM

In the conditions of the formation of the modern legal system of Ukraine reconsideration of basic legal categories of civil law to which transactions belong is important. The transaction is the one of the most typical for civil law legal fact with which the law connects accrual, alteration and the termination of the subjective rights and duties.

Transactions can be concluded in different spheres of the social life and allow to reconcile the interests of the participants of the civil circulation: natural persons and legal entities, state and others social and public institutions. As the volitional act transaction has inherent properties which characterize intentions and actions of the subjects of the civil relations. Just by this it is explained that the validity of the transaction depends on the validity of the elements that it consists of. The conclusion of the transaction which has defect of the one of the elements of its structure can not create those legal consequences that parties were waiting for.

The point of view that the personal non-property rights are so closely connected with their holder that the last owns them for life, can not refuse or be deprived from them is widespread in the theory of civil law. Personal nature of the personal non-property rights is characterized by the impossibility of the conclusion of any transactions concerning non-material objects [1]. Therefore all ordering contracts with them are invalid [2]. On the basis of the mentioned prerequisites the conclusion about impossibility of the participation in civil circulation all the personal non-property rights is drawn [3]

In connection with the given characteristic it is considered that the civil legislation does not provide the bases for alteration of personal non-property legal relationship as it can lead to refusal from the rights of the subject of the personal non-property legal relationship in whole or in part or to deprivation of them.

Whereas that the right-altering legal facts can lead to transition of the rights from one participants of the civil relations towards another, change of the object or the content of the personal non-property legal relationship, that calls into question the close, lifelong and indissoluble connection of the rights for objects of personal non-property legal relationship with their subjects, so it is necessary to incline to the thought that the right-altering legal facts can not be in the mechanism of legal regulation of the personal non-property relations at all.

Thus, the conclusion that dynamics of the personal non-property legal relationship is connected only with three legal facts, which are the birth, the law and death of the person. Similar approach is represented in the Article 269 of Civil Code of Ukraine [4].

As S. N. Berveno states, referring to G. Dernburg and K. F. Chillarzha's works, many scientists prove exclusively property character of the obligations as the last make out commodity turnover process and therefore have to belong to the group of the property relations [5].

But at present in connection with establishing of the civil-law institute of the personal non-property rights in Ukraine and granting important social value to these rights in practice a lot of problematic issues concerning execution and protection of such rights appear, which are conditioned by the limits of the regulation of the personal non-property relations by the current legislation.

For example, today the voice, the image, the name of the known or even the little-known natural person are even more often used in advertising, creating additional appeal of these or those merchandise, and their such use leads to that the voice, the image, the name are more often considered as the objects of property legal relationship, as merchandise. At the same time, as a rule, the specified changes stand aside the legal regulation and scientific interest.

The relations that accrue concerning the mentioned goods continue to be characterized and regulated as those that are deprived of the economic content, and their objects are considered in the sequel as inseparable from the holder, and such which are not a subject to a monetary assessment. Therefore today the scholars and practitioners call into question the categoricity of the theory of the contractual regulation of only the property rights.

The right on name is the personal non-property right which provides to the person the legal individualization and gives legally provided opportunity to have a name and to demand from people around to be named by his/her own name. The content of this right is submitted by the following authorities: the right to use a name; the right to change a name in the order established by the law; the right to demand the termination of illegal use of a surname, a name, a middle name. Moreover, despite of the non-materiality (that is lack of physical substance), in legal literature this good was one of the first carried to the objectified "spiritual" [6]

R. Yu. Molchanov defines the name as objectified external good which thanks to its useful properties satisfies the needs of the person. It belongs to a person. In turn, rules of law, considering the ability of name to satisfy human needs, provide the opportunity to carry out or demand to carry out certain actions or to abstain from actions in relation to these goods [7].

Without calling in question a non-property component of the personal non-property rights, notably the right on name, we should note that the statement about absence of the economic content in them needs to be checked.

Is standard to consider the right on name is the one of the first human rights which can not be alienated or violated [8]. But the right on name is the personal, subjective, non-property right which individualizes the citizen in society [9]. It defines the realization of all other subjective rights and accompanying duties [10]. M. M. Maleina claims that the right on name consists of authorities concerning possession, usage and disposal of a name [11; 12]

The name has strongly pronounced civil-law nature as being the personal non-property good (p. 1 of the Art. 201 of Civil Code of Ukraine) it gives the opportunity to the natural person to accrue the rights and to create for itself the civil duties, and also to execute these rights and to fulfill the civil duties under own name (p.1 of the Art. 28 of Civil Code of Ukraine). The name needs to be considered in wider content of this concept; the name is not only a name of the man, but also its surname and a middle name. That is by the general rule the structure of the name of the natural person is “tripartite” and consists of a surname (a patrimonial name), a name (a personal name) and a middle name (a patriarchal name) [13]

So except the non-property nature the right on name can be appraised in money. As S. O. Slipchenko states, personal non-property legal relationship which provide social existence of the natural person, as well as legal relationship of intellectual property, can have the double nature, that is consist of the pair rights - non-property and property [14]. Thus the right of usage incorporates all questions connected with providing the third parties with access to these goods and their use [15]. It is that very access to use of the object defines the property character of this right. The transactions were known at the time of Aristotle and that is his treatise is called: “The wealth is in use, but not in the right of property”. In other words, it is not obligatory to have any good in property for obtaining the income, it is necessary to have the right to use this good to receive the income.

V. A. Belov states that it is necessary to distinguish three types of transactions relative to the entitlement of the right of usage of the name: 1) the transaction between the parents about the assignment of the name to the child at the birth, and also - about the change of the name of the child who did not reach the age of 14-th years old; 2) the transaction under which one person (licensor) allows the other person (licensee) to use in definite purposes and volume licensor’s name for a payment or free of charge; 3) the legal transaction under which one person gets the right to demand from the other its name in definite way (they are realized, as a rule, within author's contracts). In consideration of the transactions of the second sort, the scientist notes the following.

The transactions concerning the entitlement of the right of usage of own name have to be referred to the fiduciary (personal and confidential) that means, in particular, the possibility of its unilateral alteration and cancellation by the licensor at any time without explanation of motives and (by the general rule) without compensation for damages. Such transaction can be only not exclusive, that is it can not be followed by the termination of the right of usage of the name by the licensor. The essential conditions of such transaction are the name which is the subject of this transaction, its exact description; definition of the sphere, volume, ways and other conditions of use of the name; the direct permission of commercial use of the name and distribution of the incomings gained from such use.

For example, Russian singer Grigoriy Viktorovich Lepsveridze, who is better known under the stage name “Grigory Leps”, concluded the transaction with the owners of the karaoke-bar in Kyiv, concerning the entitlement of the ight to use in the name of the restaurant its stage name – “Leps Bar”, in that way the owners of the restaurant wanted to increase the number of the visitors, and they undoubtedly managed it. Though “Grigory Leps” is the stage name but it is expressed through an objective form. S. O. Slipchenko notes that a legal name (a name, a surname, a middle name) through registration procedure is formalized, objectified and get the definiteness, singularity [4]. The scientist states that it is impossible to deny the proximity of these two objects. Both of them are directed on protection of the person ant its dignity.

Name for the natural person is the same as name (or a trade name) for the legal entity [16; 17]. Moreover the word “name” is quite often used in the legal theory for designation of the name of the organization. For example, one of the signs of the legal entity is formulated as ability of the organization to participate in civil circulation and in courts from its own name [18]. Thus, the name of the natural person and the name of the legal entity have an identical functional purpose.

Functional similarity of the objects causes the analogousness of the rights on name of the participants of the civil relations by the content and by the structure. A similar view relative to the legal entities, though in some specific form, was expressed by V. S. Tolstoy who includes the right on name of the legal entity in the right for designation (the right to choose a designation) which, in turn, beside other non-property rights forms the right for autonomous activity [19]. That is, the right on name of the legal entity is the same personal non-property right as the right on name of the natural person [20]. It is obvious that such statements concern the

subjects of public law too. And as it is noted in legal literature, it is concerned not only legal entities of public law, but also about the state of Ukraine in general. The last has the right not only on the name, but also the right to use the state symbols [21].

For example, according to Article 121 of the Law of Ukraine “On the associations of citizens” the name of the association of citizens has to consist of two parts – the general and individual. Different associations of citizens can have an identical general name (party, movement, congress, union, association, fund, establishment, cooperative, society, etc.). The individual name of the association of citizens is obligatory and has to differ significantly from individual names of the associations of citizens with the same general name registered according to the established procedure.

The President of Ukraine Petro Poroshenko on August 27, 2014, participating in the work of extraordinary 10-th congress of the party “All-Ukrainian Association “Solidarity” during which the head of the state assented to use his name in the name of the party after that the decision to change the name of this political force on “Block of Petro Poroshenko” was made [22]. So, Petro Poroshenko concluded the transaction about the entitlement of the use of the personal non-property good.

Thus, the name is necessary both for the holder and for the third parties. And one of the functions of this non-material good is an ability to personify the concrete person. It is obvious that such ability, in particular, possibility of the third parties to personify the name holder, remains also after the death of the last that testifies about the separability of the considered good.

The ability to be separated is connected also with that fact that the social assessment of the natural person is inseparably linked with his/her name [21]. The assessment of different person’s actions is personified with his/her name. In other words, all set of ideas of external and internal qualities of the holder is connected with a name [22].

Above mentioned indicates not only the opportunity of the turnover of such personal non-property good as a name, but also still point out one more feature – the possibility of using a name after death of their holders that pushes to a conclusion about separability of these objects from their subjects. So, p. 2 of Article 296 of Civil Code of Ukraine provides not only possibility of use a name after death of its holder, but also the transition to a certain circle of natural persons (children, widow or widower, parents, brothers and sisters of the dead) the right to give the consent to its use. For example, it is possible to speak about the unilateral transaction, notably about the testament.

The possibility of the testamentary orders of non-property character is directly defined in the legislation. Thus, according to the Article 1240 of Civil Code of Ukraine, the testator can obligate the successor to commit certain actions of non-property character, in particular, concerning the disposal of the personal papers, definition of a place and a form of execution of the ritual of burial; to commit certain actions directed on an achievement of the generally useful purpose. A. V. Barkov and R. Yu. Grachov name the direction about the organization of ritual service of burial of the testator and perpetuating of his memory a special type of testamentary disposition [23].

D. Vatman in his work gave such examples of testamentary disposition. The widow of the outstanding soviet composer S. S. Prokofyev bequeathed a grand piano, furniture and other valuable things that were at dacha, to the State Central Museum named after M. I. Glinka and expressed a wish that the successor created at noted dacha a memorial House museum of S. S. Prokofyev [24].

The right of citizens for burial of their body and declaration of intent concerning appropriate relation to a body after death is determined by the Article 6 of the Law of Ukraine “On burial and undertaking” [25]. Such declaration of intent can be expressed in consent or disagreement for carrying out a postmortem examination, exception of organs and tissues of a body, a wish to be buried in a certain place, under certain customs, near the certain earlier dead people or to be cremated.

One of the famous researchers of the inheritance law V. I. Serebrovskiy wished there were no traditional inscription with the indication of the surname, the name and the middle name on its monument. Such inscription, as he considered, is pertinent on apartment doors where a person lives. He wrote an epitaph to himself: “Here lies the body of professor-lawyer Vladimir Ivanovich Serebrovskiy” which is on a monument [26]

III. CONCLUSION

It is possible to draw a conclusion that at present day scientists directly or mediately state the possibility of the conclusion of transactions with the non-material goods only in certain works. Thus it should be noted that S. N. Berveno when analyzing transactions with the non-property content states that the issues of an admissibility of actions of non-property nature as the subject of contractual obligations is a topic of scientific discussions.

Lack of research despite of lighting of some aspects of the conclusion of transactions with the personal non-property goods by certain scholars conduces to uncertainty of the theoretical and methodological base, contradictory law enforcement practice concerning such transactions. From above mentioned it is possible to state that in the sphere of real the transactions with the right on name are concluded, such personal non-property good is not alienated, and the owner only entitle another person to use the name both during lifetime and after death of the owner of the name.

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