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## **The legal nature and mechanism of protection of the right of first refusal in joint shared ownership**

The article is devoted to an urgent and practically significant problem arising during the realization of real rights to common property — the right of first refusal. A significant number of court cases and the presence of facts of their appeal testify to some problems in the effectiveness of the regulatory framework governing this sphere in questions of its interpretation. In this article, the essence of the right of first refusal as the official power of a participant in joint shared ownership, which entails a decrease in the number of participants in joint shared ownership and an increase in the size of the share of some of them, is considered. Since the realization of the right of first refusal leads to the transformation of a legal relationship or to its liquidation, the article analyzes in detail all the risks associated with its implementation. The most typical causes of its violation are singled out, among which are the improper performance of a share by the seller of the obligation to notify the other co-owners of the sale of the share, or in its sale to an outside person before the expiration of the period, and its protection is considered. Particular attention is paid to the issue of reimbursement of expenses incurred by the buyer, who is not a co-owner, when transferring the rights and obligations of the buyer to the participant in joint shared ownership.

*Keywords:* owner, common property, right of first refusal, shared ownership, share, transforming claim, transfer of rights and obligations of a buyer, official authority.

### *Introduction*

The joint shared ownership is characterized by a complex interweaving of both external relations, who connect co-owners with all third parties, and internal relations, which connect co-owners among themselves. The latter is far from indifferent who will take the place of a person retiring from shared ownership relations. In addition, if initially there were two co-owners, the remaining co-owner may be interested in the transfer of multi-subject property to single-subject property. Of course, consideration of the interests of persons between whom shared ownership relations remain, as well as individuals who wish to become owners of all property, that is, move from shared ownership to single-subject, should be done in such a way that in no way impairs the right of each participant on the free disposal of their shares. On a strict accounting of mutual interests and rules on the disposal of a participant in the share ownership of his shares are built.

The disposal of a shareholder belonging to it may be carried out in compliance with the requirements established by law. In accordance with paragraph 1 of Article 216 CC when selling a share in shared ownership to an outsider, the other participants in common share ownership have the right of first refusal to buy the sold share at the price for which it is sold and on other equal conditions, except for the case of sale from public markets.

### *Methods and materials*

In the study of the topic of the scientific article were used: comparative legal, logical-legal, system-structural, and also special legal methods of interpretation of legal norms.

### *Results*

The right of first refusal to purchase has, although important, but a different meaning, different from that which is assigned to independent powers. Powers of ownership use and disposal in their entirety reveal the essence of the legal relationship of common share ownership, while the realization of the right of first refusal leads to the transformation of the legal relationship or to its liquidation. So, if the number of co-owners is three or more, the right of first refusal either reduces the number of participants from three to two, or increases the size of the share of the participant in common ownership who bought the share. If the number of co-owners is two, the acquisition by one of them of the share of the other ceases to have a share ownership relationship, since one-person property arises.

Despite the fact that the realization of the right of first refusal does not affect the interests of the seller in any way, to other co-owners, right of first refusal to purchase makes it possible to avoid the occurrence of undesirable persons for one reason or another.

Since the right of first refusal of purchase is an advantage of the co-owners over all third parties who are potential buyers of the sold share, it cannot be considered as a certain privilege granted to one co-owner due to the infringement of the rights of other participants in shared ownership. The right of first refusal of the sold share does not confer the advantage of one of the co-owners, depending on the size of its share. The size of the shares in this case does not matter. When one of the participants in common shared ownership sells its share, the other co-owners have equal rights to acquire it. Questions do not arise when a sale is made by one co-owner, from two to the other. However, if there are more than two co-owners, and all of them have expressed a desire to acquire the sold share, there is a possibility of a dispute. The legislation does not specifically address this situation. There is reason to assume that the choice of the buyer among the participants in joint shared ownership is the prerogative of the co-owner-seller: «... the seller can sell the share at his discretion to any of the co-owners who have expressed a desire to acquire a share» [1; 423]. However, some authors believe that such a solution «does not guarantee objectivity of choice and the absence of abuse by the seller», therefore, «it is more expedient for the buyer to recognize the co-owner who earlier agreed to buy a share» [2; 107].

In our opinion, the choice of one buyer among several co-owners who expressed a desire to acquire a share may significantly affect the interests of the other co-owners, since any of them are interested in the nature of their rights and the rights of others, and in this case the share of one of them increases. For individuals, this may not be of fundamental importance, but when it comes to the realization of the right of first refusal to purchase consortium participants, the co-owners may not be profitable to strengthen the positions of one of them. Therefore, we offer the paragraph 2 of Article 216 of the Civil Code to add the following rule: «if there are two or more participants in common share ownership who wish to use the right of first refusal a share, unless otherwise provided for by agreement, the right of first refusal to purchase a share is exercised by the participants in proportion to their shares». Not in equal parts, but in proportion to the size of shares, since, once agreeing with the inequality of shares, the co-owner having a large share subsequently has the right to maintain his primacy.

Protection of the violated right of first refusal is exercised by the court. Violation of the right of first refusal is usually expressed in the seller's failure to fulfill the share of the obligation to notify the other co-owners of the sale of the share, or in its sale to a third party before the expiration date specified in paragraph 2 of Article 216 CC.

A participant in joint shared ownership may exercise the right to protect a violated right of first refusal within three months. In science, this term is considered as a shortened period of limitation [3; 38]. The violated right is protected by the court by transferring the rights and obligations of the buyer from an outside party to a participant in joint shared ownership. The specified three-month period is a special limitation period. The beginning of its course is determined by the general rules of Section 1, Article 180 CC. This period is subject to the rules on suspension, interruption and restoration of periods of limitation.

One of the questions that arises when transferring the rights and obligations of a buyer to a participant in joint shared ownership is the question of compensation of expenses incurred by an outsider when purchasing a share. Chapter 11 of the Civil Code does not resolve this issue. The question disappears if the buyer-outsider knew that the share in the ownership of the common property is being sold to him in violation of the right of first refusal. In case of bad faith of the buyer, about any compensation of expenses is out of the question. However, what if an outsider is a conscientious purchaser? Article 216 of the Civil Code does not contain any recommendations on this subject, and, meanwhile, in our opinion, it is necessary to ensure the interests of a conscientious purchaser in the case of his expenses arising from a violation by the seller of the right of first refusal. In this case, in our opinion, point 1 of article 413 of the Civil Code should be applied, according to which «the seller is obliged to transfer the goods to the buyer free from any rights of third parties.... Failure by the seller to fulfill this obligation gives the buyer the right to demand... termination of the contract and damages, unless it is proved that the buyer knew or should have known about the rights of third parties to this product» [4].

According to paragraph 4 of Article 216 CC concession of the right of first refusal of share is not allowed. The law recognizes the right of first refusal as an inalienable right, therefore, transactions, related to the assignment of this right or its refusal, are deemed invalid.

Speaking about the sale of a share in the right of shared ownership, it should be noted that this share passes to the acquirer from the moment of the conclusion of the contract (Article 217 of the Civil Code). The rule stated in Article 217 of the Civil Code, is not a deviation from the rule, which is enshrined in paragraph 1 of Article 238 of the Civil Code, according to which the property right of the acquirer of property under the contract arises from the moment of transfer of the thing, unless otherwise provided by legislative acts or the contract. Article 217 of the Civil Code determines the moment of transition to the acquirer under the contract is not the ownership of the thing, but the share in the right of joint shared ownership. This share is transferred to the acquirer under the contract from the moment of the conclusion of the contract, unless otherwise provided by agreement of the parties. The rule of Article 217 of the Civil Code is a confirmation that the participant in the common share ownership does not own any specific part of the common thing, but a share in the ownership of the thing.

The norm of the law on the transfer of ownership of a share to its acquirer under the contract is dispositive. The agreement of the parties may provide for a different moment of transfer of ownership. For example, by agreement of the parties, the moment of transition to the acquirer of the right to a share can be attributed to some later point than the moment of conclusion of the contract. Such a moment can be, for example, the moment of full payment of the purchase price.

The moment of transfer of ownership of a share in the right, if real property or another property is in common ownership, the contract for the alienation of which is subject to state registration or notarization is subject to the general rules on the moment of the occurrence of ownership of the acquirer under the contract provided for by paragraph 2 of Article 238 CC. Ownership of the acquirer in this case arises from the moment of state registration or notarization of the contract. In the case when the contract is subject to notarization and state registration, the ownership right to a share in the joint shared ownership arises from the moment of state registration of such a contract.

#### *Discussion*

The right of first refusal is the opportunity provided by the law to members of joint shared ownership to acquire the right to a share sold by one of the co-owners, mostly to outsiders, on equal terms with him [2; 100].

According to the legislation previously in force in Kazakhstan, the advantage of the co-owners in the sale by one of them of a share in the right of share ownership concerned only the purchase price. The advantage of the other terms and conditions of the sales contract did not apply. So, if the co-owner offered the price at which the participant in the common share property intended to sell the share to an outside person, it was the co-owner who received the advantage in the purchase. According to the current CC, the advantage of the co-owners concerns not only the purchase price, but also other conditions of the contract of sale. So, if the seller of a share in the right provides a third party with a cashless settlement, then the same owner may also require the same payment method, of course, if he agrees to pay the price for which the share was sold to a third party.

The law strictly outlines the right of first refusal limits. Firstly, the right of first refusal can be discussed only when the share is sold to an outsider, who is not among the co-owners; secondly, the right of first refusal takes place when a share is sold or when a share is alienated under a barter agreement [5]. The right of first refusal to purchase a share applies to all cases of sale of a share, except the case of sale at public markets. From this two practical conclusions follow. The owners cannot exercise their right of first refusal when the share is sold to one of them. The seller has the right to choose which of the co-owners he will sell the share [6; 124]. In addition, the co-owners cannot take advantage the right of first refusal, when the share is not sold and does not change, but is alienated otherwise. The alienation of a share under a contract of donation does not create advantages for other participants in joint shared ownership. The right of first refusal a share does not apply to the case of selling it at public markets.

For the most effective analysis of the realization by co-owners of the right of first refusal, it is necessary to investigate its legal nature.

Despite the fact that the right of first refusal is a permanent element of the subjective right of the co-owner, it is significantly different from the powers of possession, use and disposal. Each of these powers is independent and in certain cases may be a prerequisite for the emergence of other relations. For example, the power to dispose of shares may generate an employment relationship. The preemptive right of purchase is not an independent authority and can exist only if all three powers of the owner are present. It cannot exist

separately from the powers of possession, use and disposal. In addition, it is impossible to transfer the right of first refusal without transferring the right to a share. Despite the fact that the right of first refusal arises simultaneously with the powers of ownership, use and disposal, its realization takes place only when one of the owners of its share is sold to an outside person [5].

According to I.A. Pokrovsky, the right of first refusal refers to the number of property rights to other people's things. Thus, in particular, he once pointed out: «Strengthening the crowding of buildings... raises the question of creating such legal forms that would ensure the possibility of... the participation of one person in the ownership of another. This purpose serves the property rights to other people's things. Rights of this kind... in terms of their content... can be divided into the following three categories. Some of them give a person the right to use someone else's thing. Another group consists of the rights to receive a certain value from a thing. Finally, the third group consists of a variety of rights to acquire a known thing. These are the right of first refusal, various redemption rights» [7; 207, 208].

It is impossible not to draw attention to the fact that the basis of this approach is the construction of a share in an object, for it is only then that one can speak of «rights to someone else's thing». However, from the standpoint of current legislation, this approach raises some doubts. As previously noted, property in joint shared ownership is considered as a single object. The object in the right of joint shared ownership is the property as a whole. By acquiring a share in the ownership of another participant, the co-owner increases the scope of his rights, but the object remains the same. Strictly speaking, the right of first refusal provides an opportunity for the co-owner to increase the measure of rights, and not to acquire the rights to someone else's thing. Therefore, we should talk about the special powers granted to participants of the right of joint shared ownership by law [5].

In the legal literature of the Soviet period, there were repeatedly raised questions about the pattern of enshrining the right of first refusal in legislation. In addition, the researchers tried to find out exactly what the service role of this right is, if the co-owners do not have the right of first refusal to restrict the rights of sellers of a share [2; 101].

Along with a positive assessment of the right of first refusal, some authors opposed securing this right in law. So, M.V. Zimeleva believed that «the right of first refusal extraordinarily ravel and complicates the sale of shares in common property...» [8; 64]. This problem can be analyzed. If we take into account the principle of freedom of contract proclaimed by civil law, then imposing on the owner-seller of the share of the obligation to respect the right of first refusal the other co-owners is a kind of restriction. But it does not follow from this that «the right entails a great burden for the owner» and that it is necessary «to free the accomplices from this constraint, especially in view of the numerous controversies and disputes to which this right gives rise to» [9; 30].

The seller-owner may be interested in selling his share to a third party who is not a member of joint shared ownership. But he cannot realize his desire, since the other participants in shared ownership are guaranteed the right of first refusal. Such a restriction on the free choice of the counterparty under the contract takes place not only when the share is sold by one of the participants in joint shared ownership. Thus, in accordance with Article 557 of the Civil Code «the employer, who duly performed his duties, has... the priority over other persons' right to conclude a property rental contract for a new term» [4].

A much greater risk for the co-owner of the seller is that concluded in paragraph 2 of Article 216 of the Civil Code the provision that the seller is entitled to sell his share to an outside person only after a certain period of time, during which the remaining co-owners have the right to refuse to acquire or buy the sold share. For the sale of a share in the ownership of real estate, this period is one month, and in respect of another property, ten days from the date of receipt of the notice by the owners. The risk is that if during the specified period the participants in joint shared ownership do not exercise their right of first refusal or refuse to acquire the sold share, the co-owner-seller may also lose the outside buyer.

The legislator does not directly determine the form in which the refusal should be expressed. It is logical to assume that such a refusal should be expressed in writing, since it is in this form that the other co-owners are notified of the intention to sell the share to a third party. Meanwhile, the Civil Code does not contain an imperative rule on the writing of such a refusal. Based on this, it can be assumed that the refusal to buy the sold share can be expressed orally. But since the receipt of a refusal from other co-owners about the purchase of a sold share gives legitimacy to the actions of the owner-seller to sell his share to third parties, an oral refusal may complicate the proof of its receipt in the event of a dispute. Therefore, in our opinion, it is advisable in paragraph 2 of Article 216 of the Civil Code to include the rule that the refusal to purchase the sold share in the ownership right must be expressed in writing.

The realization of the right of first refusal is ensured by a special procedure. When certifying an agreement on the sale by one of the participants of the joint shared ownership of a share in the right of common share ownership to an outsider, the notary requires proof that the seller has notified the remaining participants of joint shared ownership of the intention to sell his share to the outsider specifying the price and other conditions.

The issue of realization of the right of first refusal is directly related to constitutive claims. «A transformative (constitutive) lawsuit is a lawsuit aimed at changing or terminating the legal relationship existing between the plaintiff and the defendant by a court judgement». This type of lawsuits is considered in many textbooks on civil procedure [10; 366].

In the Soviet period, the theory of constitutive claims received the most complete and detailed development in the works of M.A. Gurvich, in whose opinion, the right of first refusal, arising on the basis of the right of joint shared ownership and the fact of alienation by any of the participants of this right of his share to an outsider, is aimed at liquidating the new legal relationship arising on the basis of alienation common property [10, 366]. Meanwhile, not all scholars recognized the existence of this type of lawsuits, referring to the fact that the court only protects the existing violated or contested right, but does not create new civil rights [11; 23]. The position of opponents of the existence of constitutive claims was based on the following provisions: «the court should protect only the right that the claimant had and does exist in reality; the court cannot, by its judgment terminate or change subjective rights and, moreover, create rights or obligations that the plaintiff did not have before the judgment; the court only confirms the right that existed prior to applying for judicial protection; the court should only check whether there is a right under the given specific circumstances» [10; 367].

Currently, paragraph 1 of Article 9 of the Civil Code provides that the protection of civil rights may be carried out by the court by terminating or changing legal relations. In addition, Article 7 of the Civil Code considers a court judgment that establishes civil rights and obligations as a legal fact.

All this testifies to the fact that a court judgment can be considered as a legal fact that entails a transformation (change or termination) of legal relations in cases established by law. A characteristic feature of the constitutive judgment and lawsuits is that «... the court can make such judgments only in cases specified by law, if there are facts with which the law associates the emergence of the right to change or terminate legal relations» [10; 367].

The traits of the transformation are attached to the implementation of the legal relationship of joint shared ownership of section 3, Article 216 of the Civil Code, which states: «when selling a share with a violation of the right of first refusal, any other participant in joint shared ownership has the right during three months to demand in court for the transfer of the rights and obligations of the buyer to it» [12]. It is in this case that the right of first refusal takes on the character of transformative power, since the court's judgment terminates the legal relationship between the seller of a share and its acquirer, an outsider. The court judgment gives rise to the rights and obligations of another buyer-participant in the legal relationship of joint shared ownership. Thus, it is the judicial realization of the right of first refusal gives it a transformative nature.

A participant in joint shared ownership may exercise the right to protect a violated right of first refusal within three months. In science, this term is considered as a shortened period of limitation [3; 38]. The violated right is protected by the court by transferring the rights and obligations of the buyer from an outside party to a participant in joint shared ownership. The specified three-month period is a special limitation period. The beginning of its course is determined by the general rules of section 1, Article 180 CC. This period is subject to the rules on suspension, interruption and restoration of periods of limitation.

Meanwhile, the law does not mention what is happening with the transaction concluded between the seller of a share in the right to common property and its acquirer — an outsider, in violation of the right of first refusal. Some authors believe that the transfer of rights and obligations of a buyer to a common property participant as a result of judicial protection of a violated right of first refusal is possible only under the condition that the seller's transaction with the outside buyer will be declared invalid either fully or in part of the composition [13; 135]. We do not agree with this view. You cannot transfer non-existent rights and obligations. That is how they become as a result of the invalidation of the transaction, the occurrence of which it is directed. By a court judgment, the co-owner, whose right of first refusal is violated, can be transferred only to real rights and obligations of the buyer arising from the contract concluded with the co-owner-seller. In addition, there are no grounds for obliging the seller to conclude a new contract with the

co-owner. For the same reasons, the construction of recognizing a transaction as invalid in part is also unacceptable, since there is no reason to believe that the transaction would have been completed without the inclusion of the invalid part. Based on this, the most expedient means of resolving the conflict that has arisen between the participants in joint shared ownership is to transfer the rights and obligations of the buyer to the co-owner, the implementation of which is possible only if the sales contract entered into by the seller with the outside buyer is valid. To transform the legal relationship of joint shared ownership, it is necessary to have two facts — the fact that the co-owner has the right of first refusal and a court judgment based on the substantive law [2; 113, 114].

### Summary

Thus, the right of first refusal is the specific competence of the participants in the joint shared ownership relationship. Being a permanent element of the subjective right of the co-owner, it is significantly different from other powers. Not being independent, the right of first refusal arises at the same time as other powers, such as the powers of possession, use and disposal. His official role is that it is intended to protect the interests of co-owners when one of them sells its share in the property right to an outsider, since the realization of this right leads to the transformation of the legal relationship of joint shared ownership or its liquidation and the formation of individual property.

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## Үлестік ортақ меншіктегі сатып алудың басым құқығын қорғау механизмі және заңдық мәні

Мақала сатып алудағы басым құқық — ортақ меншікке заттық құқықтарды іске асыруда туындайтын тәжірибелік маңызы бар және өзекті мәселеге арналған. Соттық істер санының көптігі және оларға шағым жасау фактілерінің болуы осы саланы реттейтін нормативтік базаның тиімділігіне және оны талқылауда кейбір мәселелердің бар екендігін дәлелдейді. Осы бапта ортақ меншіктегі қатысушының қызметтік өкілеттіктері ретінде басым құқығының мәні бар, бұл ортақ меншіктегі қатысушылардың санын азайтуға және олардың кейбіреулерінің үлесінің ұлғаюына әкеп соқтырады. Сатып алудағы

басым құқықты жүзеге асыру құқық қатынастарын өзгертуге немесе оны таратуға әкелгендіктен, мақала оның жүзеге асырылуымен байланысты барлық тәуекелдерді егжей-тегжейлі талдайды. Оның бұзылуының ең типтік себептері бөлінеді, оның ішінде сатушының үлесті сатудың басқа, бірлескен иелеріне хабарлау міндеттемесінің үлесін немесе оны сату мерзімінің аяқталуына дейін өзге тұлғаға сату туралы талаптарын дұрыс орындамау және оны қорғау мәселелері қарастырылды. Ортақ үлестік меншікке қатысушылар сатып алушының құқықтары мен міндеттерінің ауысуы бірлесіп иеленуші болып табылмайтын сатып алушының шыққан шығынтарын өтеуге ерекше назар аударылды.

*Кілт сөздер:* меншік иесі, ортақ мүлік, сатып алу құқығы, үлестік меншік, үлес, түрлендіруші талап, талапты қайта беру, сатып алушының құқықтары мен міндеттерін беру, қызметтік өкілеттілік.

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## Юридическая сущность и механизм защиты права преимущественной покупки в общей долевой собственности

Статья посвящена актуальной и практически значимой проблеме, возникающей при реализации вещных прав на общее имущество, — праву преимущественной покупки. Значительное количество судебных дел и наличие фактов их обжалования свидетельствуют о некоторых проблемах в эффективности нормативной базы, регулирующей данную сферу и в вопросах ее толкования. В рамках данной статьи рассмотрена сущность права преимущественной покупки как служебного правомочия участника общей долевой собственности, влекущего уменьшение числа участников долевой собственности и увеличение размера доли некоторых из них. Поскольку осуществление права преимущественной покупки приводит к преобразованию правоотношения либо к его ликвидации, в статье детально проанализированы все риски, связанные с ее осуществлением. Выделены наиболее типичные причины его нарушения, к числу которых отнесено ненадлежащее исполнение продавцом доли обязанностью известить остальных собственников о продаже доли, либо ее продаже постороннему лицу до истечения срока, и рассмотрены вопросы его защиты. Особое внимание уделено и вопросу возмещения расходов, понесенных покупателем, не являющимся собственником, при переводе прав и обязанностей покупателя на участника общей долевой собственности.

*Ключевые слова:* собственник, общее имущество, право преимущественной покупки, долевая собственность, доля, преобразовательный иск, перевод прав и обязанностей покупателя, служебное правомочие.

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