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THE WAIVER AND RESTRICTION OF FAMILY LEGAL CAPACITY

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Abstract. *The article proves the impossibility of waiver and restriction of general family legal capacity in view of its abstractness and inalienability from the personality of the bearer, while it is possible to restrict and waive only a subjective right. Almost all examples of waiver and restriction of legal capacity, which were previously cited by researchers, are not a waiver of legal capacity or its restriction, but a waiver (restriction) of rights or the exercise of a right. It is necessary to distinguish between legal capacities, which are part of the content of specific subjective rights, and abstract capacities, which constitute elements of legal capacity. In spite of the fact that waiver of legal capacity in general is impossible, it is possible to waive individual capacities included in the structure of legal capacity, for example, it is possible to waive reproductive legal capacity as a variant of parental capacity, if the person resorts to medical sterilization.*

Keywords: *legal personality, legal capacity, subjective rights, somatic rights, waiver of legal capacity, restriction of legal capacity.*

A person, once born, acquires legal personality, from which he cannot renounce, because legal personality is an inalienable element of a person and cannot be lost, it does not depend on the will of the person, it arises and terminates through objective law[1].

[1] *Marchenko M. N.* Teoriya gosudarstva i prava: ucheb. 2-e izd., pererab. i dop [The Theory of State and Law: Textbook. Second edition, edited and updated]. M.: TK Velbi; Izd-vo Prospekt, 2008. P. 591.

As long as a person is alive, we can talk about the existence of legal personality. If a person renounces his life, then we can talk about the renunciation of legal personality only in the case when a person consciously refuses to be a subject of law and, as a consequence, voluntarily renounces his life, which is almost impossible, since the person at that moment is moved by other thoughts and desires. As an example, we can consider the refusal of juveniles from life with the desire to stop being a child for their parents, that is, theoretically, this example can be subsumed under the refusal of a juvenile from the legal personality of a child. However, by virtue of age features, depression, disharmony in the family and other reasons disclosed by psychologists[1], the juvenile is not so much willing to give up his legal personality, as he is willing to attract attention to himself. All the more so, the desire to give up life is not natural to man, because the fear of death, according to researchers, is at the basis of almost all fears: a person under the influence of the instinct of self-preservation is afraid of death as a reflex. In the opinion of J. Hinton, the fear of death is "a part of the human constitution, necessary for the existence of the individual"[2]. S. Kyerkegor wrote that the fear of death is inherent only in man[3].

Very close to legal personality are somatic rights, in particular the right to death, which is understood as "the possibility of a person consciously and voluntarily, at a time of his choice, to depart from life in a chosen and available to him way"[4]. M. A. Lavrik includes suicide and euthanasia as forms of exercising the right to death[5], the latter being prohibited by the Federal Law "On the Fundamentals of Health Protection in the Russian Federation"[6]. However, in the context of this law, active euthanasia is prohibited, while the refusal of medical intervention (this is actually passive euthanasia) is allowed by the same law in Articles 19, 20.

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[1] *Sinyagin Yu. V., Sinyagina N. Yu*. Detskiy suitsid. Psikhologicheskiy vzglyad [The Child Suicide. Psychological viewpoint]. SPb.: KARO, 2006. P. 154.

[2] *Hinton J. Michael.* Perception and identification // Philosophical Review. 1976. No. 76 (October). P. 421.

[3] *Kyerkegor S.* Strakh i trepet. Per. s dat. [Fear and trembling. Translated from Danish]. M.: Respublika, 1993. P. 203.

[4] *Malinovskiy A. A.* Zloupotreblenie pravom: monografiya [Abuse of Law: monograph]. M.: MZ Press, 2002. P. 78.

[5] *Lavrik M. A.* K teorii somaticheskikh prav cheloveka [On the theory of somatic human rights] // Sibirskiy yuridicheskiy vestnik. Irkutsk: Yuridicheskiy institut IGU [The Siberian Law Herald. Irkutsk: Law Institute of Irkutsk State University]. 2005. No. 3. P. 82.

[6] Federalnyy zakon "Ob osnovakh okhrany zdorovya grazhdan v Rossiyskoy Federatsii" ot 21.11.2011 No. 323-FZ [Federal Law "On the Fundamentals of Health Protection in the Russian Federation" of 21.11.2011 No. 323-FZ] // Rossiyskaya gazeta [The Russian Newspaper]. 2011. No. 263.

According to current legislation, the right to death through a waiver of medical intervention may only be exercised by a person. The participation of a representative is permitted only in the cases stipulated in Article 20 of the Law, when the question of the waiver of legal personality of the ward by the representative arises. This is possible in relation to persons declared legally incapacitated, if the latter are unable to refuse medical intervention due to their condition. Also with respect to juveniles under the age of 15, and if one of the parents refuses medical intervention necessary to save a juvenile's life, then the medical organization has the right to appeal to court to protect the interests of such a person, since the parents' refusal to treat a child with a chronic illness is equal to a threat to life.

Euthanasia in the case of juveniles is prohibited in all states because of the special protection of their lives. At the moment, the main state where assisted dying is possible is Belgium[1]. It should be noted that the Federal Law "On the Fundamentals of Citizens' Health in the Russian Federation" does not apply the rules of partial legal capacity of juveniles when the latter exercise their refusal of medical intervention, allowing juveniles who have reached the age of 15 to refuse medical intervention without the consent of their legal representative (Article 54, Paragraph 2 of the Federal Law)[2]. An exception is when medical intervention is necessary for emergency indications in order to eliminate a threat to the life of a person (a juvenile).

As a possible option for the renunciation of legal personality, we should consider the actions of a person aimed at changing gender. There is no unequivocal answer to the following questions: can we talk about the social death of a person, about the replacement of one subject of law by another when changing gender, does changing gender affect the scope and content of rights and obligations, the scope of legal personality, legal capacity and legal competence?

However, the legal status of a person who has changed gender remains unchanged. With a change of gender, a person continues to exist, he does not cease to be a subject of law, he does not experience social and biological death, he does not give up legal personality, but his individual rights change or are lost. After gender reassignment, the person retains the same level of family legal personality that he or she had before the gender reassignment. But in the case of gender reassignment, a person's original biological gender identity determines his or her ability to exercise legal capacity. For example, a man, even after gender reassignment, will not be able to bear a child.

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[1] Report of the CFCEE (Commission regulating euthanasia in Belgium) for the year 2018 [Electronic resource] // URL: https://organesdeconcertation.sante.belgique.be/fr (date of address: 06.11.2021).

[2] *Skorobogatova V. V.* Pravovye aspekty evtanazii [The Legal Aspects of Euthanasia] // Rossiyskiy yuridicheskiy zhurnal [The Russian Law Journal]. 2009. No. 5. P. 100.

Just as a person cannot give up legal personality, so he cannot give up legal capacity. A person has family legal capacity from birth until death. Full or partial waiver of legal capacity by a person is impossible, and legal capacity cannot be taken away[1]. A. V. Myskin writes that legal capacity "is the same objective legal law as the physical law of gravitation or the biological law of gradual aging of any living organism"[2]. Waiver of legal capacity should be seen as an action or inaction, as a result of which a person's legal capacity is self-limited. Waiver of legal capacity turns a person from a subject of law into an object, which is prohibited by international[3] and national law[4]. The rejection of legal capacity must be the rejection of an abstract ability, which belongs to every subject of law, which is impossible, since it contradicts the essence of legal capacity. Accordingly, only the refusal to exercise legal capacity in cases not prohibited by law is possible.

However, despite the fact that the waiver of legal capacity as a whole is impossible, it is possible to waive individual abilities that are part of the structure of legal capacity[5]. For example, it is possible to waive reproductive legal capacity as a variant of parental legal capacity, we are talking about the so-called "Child-free"[6] citizens, the Federal Law "On the Fundamentals of Health Protection

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[1] *Stepanyuk A. V.* Ogranichenie grazhdanskoy pravosposobnosti fizicheskikh lits [The limitation of civil legal capacity of individuals] // Problemy pravosubektnosti: sovremennye interpritatsii: mater. nauch.-prakt. konf. Samara, 29 fevralya 2008 g. Vyp.6. Samara: Samar. gumanit. akad. [Problems of legal personality: modern interpretations: materials of the scientific-practical conference. Samara, February 29, 2008. Issue 6. Samara: Samara Humanitarian Academy], 2008. P. 248.

[2] *Myskin A. V.* Dva ocherka iz oblasti tsivilistiki [Two Essays on Civics]. M.: Statut, 2015. P. 34.

[3] For example, the World Declaration of Human Rights, 1948; the International Covenant on Civil and Political Rights, 1966; the International Covenant on Economic, Social and Cultural Rights, 1966; the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956; the International Labor Organization Convention 29, Concerning Forced or Compulsory Labor, 1930; and others.

[4] Konstitutsiya Rossiyskoy Federatsii (prinyata vsenarodnym golosovaniem 12.12.1993) (s uchetom popravok, vnesennykh Zakonami RF o popravkakh k Konstitutsii RF ot 30.12.2008 No. 6-FKZ, ot 30.12.2008 No. 7-FKZ, ot 05.02.2014 No. 2-FKZ, ot 21.07.2014 No. 11-FKZ) [Constitution of the Russian Federation (adopted by popular vote on 12.12.1993) (as amended by the Russian Federation Laws on Amendments to the Constitution of the Russian Federation of 30.12.2008 No. 6-FKZ, of 30.12.2008 No. 7-FKZ, of 05.02.2014 No. 2-FKZ, of 21.07.2014 No. 11-FKZ)] // Sobranie zakonodatelstva RF [Collection of Legislation of the Russian Federation]. 2014. No. 31. St. 4398; Ugolovnyy kodeks Rossiyskoy Federatsii ot 13.06.1996 No. 63-FZ (red. ot 23.04.2019) [Criminal Code of the Russian Federation of 13.06.1996 No. 63-FZ (edition of 23.04.2019)] // Sobranie zakonodatelstva RF [Collection of Legislation of the Russian Federation]. 1996 No. 25. St. 2954.

[5] *Suslov A. A.* Otkaz ot pravosposobnosti v grazhdanskom prave [The waiver of legal capacity in civil law] // Prolog: zhurnal o prave [Prologue: A Journal of Law]. 2017. No. 1. P. 10.

[6] *Veevers J. E.* 1980. Childless by choice. Toronto: Butterworth, Canada. P. 189.

of Citizens in the Russian Federation" in Article 57 fixes the possibility, upon the written application of a citizen, of medical sterilization for the purpose of depriving a person of the ability to procreate of persons older than thirty-five years or a citizen with at least two children, and with medical indications and the informed voluntary consent of the citizen.

Waiver of legal capacity and its restriction are prohibited by law, as a result of which there are practically no studies in the field of this problem. According to Paragraph 3 of Article 22 of the Civil Code of the Russian Federation, a complete or partial waiver of legal capacity or legal competence and other transactions aimed at restricting legal capacity or legal competence are void, except in cases where such transactions are permitted by law[1]. The Family Code of the Russian Federation does not contain a norm prohibiting the deprivation or restriction of legal capacity, except for Paragraph 3 of Article 42 of the Family Code of the Russian Federation, which stipulates that a marriage contract cannot restrict the legal capacity or legal competence of the spouses. This is also reflected in court practice.

Thus, the Constitutional Court of the Russian Federation in its Order indicates that "Paragraph 1 of Article 42 of the Family Code of the Russian Federation, which enshrines the right of spouses to change the statutory regime of joint ownership by concluding a marriage contract, which may contain any provisions relating to the property relations of spouses, considered in the system of the current legislation, including in conjunction with Article 22 "Inadmissibility of deprivation and restriction of the legal capacity and legal competency of a citizen" of the Civil Code of the Russian Federation, which establishes the nullity of a complete or partial waiver of a citizen's legal capacity or legal competency and other transactions aimed at restricting the legal capacity or legal competency, except cases where such transactions are allowed by law, and developing the constitutional principle of freedom of contract within the framework of marriage and family relations, cannot be considered as violating the constitutional rights of A. R. Kolesov mentioned in the complaint"[2].

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[1] See, for example, Postanovlenie FAS Severo-Zapadnogo okruga ot 30.08.2011 po delu No. A66–8547/2010 [The Decree of the FAS Northwestern district from 30.08.2011 in the case of No. 66–8547/2010].

[2] Opredelenie Konstitutsionnogo Suda RF ot 27.09.2018 No. 2320-O "Ob otkaze v prinyatii k rassmotreniyu zhaloby grazhdanina Kolesova Andreya Rafailovicha na narushenie ego konstitutsionnykh prav punktom 1 stati 42 Semeynogo kodeksa Rossiyskoy Federatsii" [Order of the Constitutional Court of the Russian Federation of 27.09.2018 No. 2320-O "On refusal to accept for consideration the complaint of citizen Kolesov Andrei Rafailovich on violation of his constitutional rights by paragraph 1 of Article 42 of the Family Code of the Russian Federation"].

According to the majority of scientists, the Family Code of the Russian Federation allows limiting family legal capacity and legal competence. As an example they cite Article 14 of the Family Code of the Russian Federation which restricts a person's marital legal capacity, Article 127 of the Family Code of the Russian Federation restricts adoptive legal capacity. L. M. Pchelintseva believes that limitation of family legal capacity is observed when parental rights are deprived or restricted[1]. V. V. Lazarev holds a similar opinion[2]. As an example of limitation of legal capacity is often cited the prohibition of a spouse without the consent of the wife to initiate a case for dissolution of marriage during the pregnancy of the wife and within a year after the birth of the child (Article 17 of the Family Code of the Russian Federation).

Recognition of a person as legally incapable also refers to grounds for limiting legal capacity, since such a person cannot exercise their ability to marry, become an adoptive parent, a guardian (custodian) until they have been recognized by a court as legally capable, at the same time a legally incapable person may be a parent, although limited in parental rights, according to article 73 of the Family Code of the Russian Federation. According to S. P. Grishaev, in the above examples involving incapacitated persons we should speak not about limitation of family legal capacity, but about its loss, since, for example, the guardian of such a person cannot enter into marriage instead of the ward. However, it misses the right of such persons to receive alimony or the obligation to pay it. M. V. Antokolskaya believes that if family rights can only be exercised personally, without the possibility of participation of representatives, then not only family legal competence, but also family legal capacity is lost or restricted[3].

M. A. Khvatova argues that incapacitated and juveniles are limited in family legal capacity (in particular adoptive and guardian legal capacity), since they cannot properly bring up children and protect their rights[4].

According to many authors, age, health status, citizenship, kinship relations, social factors are also reasons for limiting the realization of family rights, and family legal capacity is limited through the restriction of specific family rights.

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[1] *Pchelintseva L. M.* Semeynoe pravo Rossii [The Family Law of Russia]. M., 2006. P. 100.

[2] *Lazarev V. V.* Osnovy prava. Semeynye pravootnosheniya: uchebnik. 3-e izd., pererab i dop. [Fundamentals of Law. Family legal relations. Textbook. Third edition, edited and updated]. M.: Yurist, 2002. P. 134.

[3] *Antokolskaya M. V.* Semeynoe pravo [Family law]. M.: Yurist, 2003. P. 83.

[4] *Khvatova M. A.* Ogranichenie i utrata grazhdanskoy deesposobnosti, kak predposylka ogranicheniya semeynoy pravosposobnosti [Limitation and loss of civil capacity as a prerequisite for limiting family legal capacity] // Pravo [Law]. No. 9. P. 74.

Only some scientists believe that it is impossible to refuse and limit legal capacity in view of its inalienability from the personality of the bearer, since it is possible to limit and refuse only from the right[1]. Examples of refusals and restrictions on legal capacity, which were cited above, are not a waiver or restriction of legal capacity, but a waiver (restriction) of specific rights or the exercise of a right.

V. A. Khokhlov sees a difference between legal capacity, which is included in the content of specific subjective rights, and abstract capacity, which constitutes elements of legal capacity. He believes that the confusion of these concepts occurred due to Article 22 of the Civil Code of the Russian Federation, which prohibits the restriction of legal capacity and legal competence, but, on the other hand, allows the restriction, if it is not prohibited by law[2]. V. A. Khokhlov writes that even in courts there is a confusion of these two notions: according to Article 22 of the Civil Code of the Russian Federation, agreements that restrict not legal capacity, but only certain legal opportunities are invalid, thus courts narrow legal capacity.

It is necessary to agree with V. A. Khokhlov: it is necessary to distinguish between capabilities, which are included in the content of specific subjective rights, and abstract abilities, which constitute elements of legal capacity. This once again confirms the fact that the content of legal capacity includes not rights and obligations, but abilities to have these or those rights and obligations. Thus, it is only possible to limit individual capacities in specific legal relations, and the waiver of specific capacities is not a waiver of legal capacity, but a waiver of the implementation of these capacities[3].

Thus, a person's legal capacity is invariable and inalienable, it cannot be restricted; only the right, the ability to exercise the right, can be restricted. Legal capacity and its elements are static and abstract, they represent a person's ability to have rights and obligations. Thus, a person may not exercise all the abilities constituting legal capacity, or may refuse to exercise individual abilities for a specific period. And the waiver of legal capacity must be the waiver of an abstract capacity, which belongs to every subject of law, which is impossible, since

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[1] *Zhaglina M. E.* Grazhdanskaya pravosubektnost nesovershennoletnikh [The civil legal personality of juveniles] // Vestnik Voronezhskogo instituta MVD Rossii [Herald of the Voronezh Institute of the Ministry of Internal Affairs of Russia]. 2016. No. 2. P. 56.

[2] *Khokhlov V. A.* Obshchie polozheniya ob obyazatelstvakh: ucheb. posobie [The General Provisions on Obligations: Textbook]. M.: Statut, 2015. P. 125.

[3] *Belov V. A.* Grazhdanskoe pravo: ucheb.: v 4-kh t. T. 2: Obshchaya chast. Litsa, blaga, fakty [The Civil Law: Textbook: in 4 Volumes. Vol. 2: General part. Persons, goods, facts.]. M.: Yurayt, 2013. P. 340.

it contradicts the essence of legal capacity; accordingly, only the waiver of the exercise of legal capacity is possible in cases not prohibited by law.

A person always has legal capacity, as opposed to a subjective right. General legal capacity is the same for all natural persons: everyone has equal capacity to possess rights and bear responsibilities, it cannot be restricted under any circumstances, it cannot be waived. If a person could restrict or deprive his or her legal capacity, then it would be a complete exclusion of the ability to acquire and exercise family rights and obligations. However, as long as the person is alive, this is not possible.

However, it is possible to limit institutional legal capacity, for example, due to the deprivation of parental rights, but at the same time the sectoral family legal capacity is retained. Thus, on the grounds stipulated by family law, a person may be limited in his or her ability to become a subject of child-parent relationships, marriage relationships, relationships to accept a child left without parental care into a family, but the ability to have family rights and obligations in general is retained.

Thus, we can conclude that it is impossible to waive and limit general family legal capacity in view of its abstractness and inalienability from the personality of the bearer, while it is possible to limit and waive only a subjective right. Virtually all examples of waiver and restriction of legal capacity cited by researchers are not a waiver or restriction of legal capacity, but a waiver (restriction) of rights or the exercise of a right. As a consequence, it is necessary to distinguish between legal capabilities, which are part of the content of specific subjective rights, and abstract capabilities, which constitute elements of legal capacity.

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