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ТЕОРЕТИЧНІ ТА ПРАКТИЧНІ ПРОБЛЕМИ ЗАХИСТУ ПРАВА ВЛАСНОСТІ В СПАДКОВИХ ПРАВОВІДНОСИНАХ

Анотація. *Актуальність обраної теми обумовлюється тим, що спадкування є однією з найпоширеніших підстав набуття майна у власність фізичними особами. Зважаючи також на ту обставину, що найчастіше спадкоємцями є родичі спадкодавця, з метою уникнення спорів між ними, законодавство має містити ефективний механізм як врегулювання відносин між спадкоємцями з приводу перерозподілу спадщини чи зміни черговості спадкування, так і механізм захисту прав та інтересів спадкоємців у разі виникнення спорів. Метою даної статті є виявлення прогалин та суперечностей в цивільному законодавстві та судовій практиці при дослідженні основних способів захисту прав спадкоємців у спадкових правовідносинах, та способів їх вирішення. Зазначається, що при наявності спорів між спадкоємцями здійснюється не захист права власності, адже спадкоємці ще не набули право власності, а захист права на спадщину, за яким вони зможуть набути право власності на спадкове майно. Відзначається відсутність в законодавстві України конкретного переліку способів захисту прав спадкоємців, що негативно впливає на судову практику, адже часто використовують неналежні способи захисту. В статті аналізується судова практика розгляду спадкових спорів та визначаються основні помилки, які допускають суди при вирішенні таких справ. Окрема увага зосереджена на дослідженні таких способів захисту як визнання свідоцтва про право на спадщину недійсним, визнання спадковим того майна, яке належало померлому, але не ввійшло до складу спадщини. В статті досліджено момент виникнення права власності на спадкове майно у спадкоємців та здійснено критичний аналіз норми ст. 1268 ЦК, якою визначається момент, з якого спадщина належить спадкоємцеві – а саме з моменту відкриття спадщини. Відзначається колізія між нормами ст. 1268 та ст. 3 Закону України «Про державну реєстрацію речових прав на нерухоме майно та їх обтяжень» в частині встановлення моменту виникнення права власності на нерухоме майно в порядку спадкування.*

Ключові слова: спадщина, спадкоємці, заповіт, цивільне законодавство, нерухоме майно.

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THEORETIC AND PRACTICAL ASPECTS OF PROTECTION OF THE RIGHT OF OWNERSHIP IN THE HEREDITARY RELATIONS

Abstract. *The relevance of the subject matter lies in the fact that inheritance is one of the most common grounds for acquiring property by individuals. Considering the fact that the heirs are often relatives of the testator, to avoid disputes between them, the law should contain an effective*

mechanism for resolving relations between heirs over the redistribution of inheritance or change of the order of inheritance, and a mechanism to protect the rights and interests of heirs in case of disputes. The purpose of this study is to identify gaps and inconsistencies in civil legislation and case law in the study of the main ways to protect the rights of heirs in hereditary relations, and ways to resolve them. It is noted that in the presence of disputes between the heirs, it is not the protection of property rights that is carried out, because the heirs have not yet acquired the right of ownership, but the protection of the right to inheritance, according to which they will be able to acquire ownership of the inherited property. There is a lack of a particular list of ways to protect the rights of heirs in the legislation of Ukraine, which has a negative impact on judicial practice, as they often use inappropriate methods of protection. The study analyses the case law of hereditary disputes and identifies the main mistakes that courts make in resolving such cases. Particular attention is focused on the study of such methods of protection as the recognition of the certificate of inheritance as invalid, the hereditary recognition of the property that belonged to the deceased, but was not part of the inheritance. The study investigates the moment of ownership of the hereditary property of the heirs and a critical analysis of the provisions of Article 1268 of the Civil Code, which determine the moment from which the inheritance belongs to the heir – namely from the moment of opening the inheritance. There is a conflict between the rules of Article 1268 and Article 3 of the Law of Ukraine "On state registration of real rights to immovable property and their encumbrances" in terms of establishing the moment of ownership of immovable property by inheritance.

Keywords: inheritance, heirs, will, civil legislation, immovable property.

INTRODUCTION

Acquisition of property by inheritance is often accompanied by disputes between the heirs over the size of the inherited shares, the presence or absence of the right to inherit, as well as the procedure for exercising the right of ownership in the future. Protection of property rights can be carried out not only when the heirs have already acquired the right of ownership of the inheritance and this right is violated by other persons, but also at the stage of acceptance of the inheritance, by other potential heirs. The specific feature of the protection of the rights of potential heirs is that in this case it is not the protection of property rights, because they have not yet acquired it, but the protection of the right to inheritance, under which they can acquire ownership of inherited property.

Inheritance is one of the common grounds for acquiring property by individuals. Legal regulation of inheritance is carried out by Book Six of the Civil Code of Ukraine[1] which defines the grounds and procedure for acceptance and refusal of inheritance, the moment from which the inheritance belongs to the heir, requirements for the will and its types, grounds and procedure for invalidation of the will. However, neither the Book Six nor Article 16 of the Civil Code of Ukraine specify particular ways to protect inheritance rights. Therewith, their list can be determined based on the provisions of Article 16 of the Civil Code of Ukraine, considering the specific features of hereditary relations. Thus, such methods of protection include invalidation of the will, invalidation of the certificate of the right to inherit or invalidation, recognition of the right to inherit in case of its challenge, or non-recognition by other potential heirs, etc.

Hereditary relations have been the subject of research by many civilians, including

[1] Civil Code of Ukraine. (2003, January). (last amended on July 19, 2020). Retrieved from http://zakon1.rada.gov.ua/laws/show/435-15

M.M. Dyakovych [1], Yu.O. Zaika, O.O. Kot [2], L.V. Kozlovskaya [3], O.V. Korotyuk, O.E. Kukhariev, O.P. Pechenyi, Ye.O. Riabokon, I.B. Spasybo-Fatieieva, S.Ya. Fursa, E.A. Kirillova [4], I.A. Dikovska [5], I. Musaeva [6], M. Hammad [7], K. Spivack [8], V. Tadros [9], V. Zarosylo [10], V.A. Maltsev [11], V.V. Vapniarchuk [12], M. Zalutski [13], A. Bell [14], F. Viglione [15], Z.V. Romovska [16], and others. Therewith, most of them concerned either the general provisions of inheritance law or certain aspects of inheritance relations. Therefore, issues of protection in hereditary legal relations are understudied in the modern period. All this determines the relevance of the chosen subject matter. Thus, Z.V. Romovska analysed the ways of protection of inheritance rights and the types of claims with which the heirs have the right to go to court [16]. M.M. Dyakovych explored the legal nature of the right to inherit [1]. Considering the features of protection of hereditary rights, O.O. Kot notes that the main problems are related to the protection of inheritance rights, due to the lack of modern private law institution of inheritance law [2]. At the same time, not all legislative and practical gaps and contradictions in the protection of inheritance rights have been studied by these civilists, which necessitates a more thorough study.

The purpose of this study is to identify gaps and inconsistencies in civil legislation and case law in the study of the main ways to protect the rights of heirs in inheritance, and ways to resolve them. The main objectives of this study include a thorough analysis of the provisions of the Book Six of the Civil Code of Ukraine, which regulates hereditary relations, as well as the judicial practice of resolving inheritance disputes; determination of the main ways to protect the rights of heirs, identification of the main mistakes made by courts in resolving inheritance disputes; formulation of proposals to fill the gaps and contradictions identified in this study.

1. MATERIALS AND METHODS

To reveal the main ways to protect the rights of heirs in inheritance, the study analyses the Civil Code of Ukraine[1], other laws and regulations governing the acceptance of inheritance, as well as the legal regime of real estate as a type of inherited property. The study also identifies gaps and contradictions in the studied regulations, as well as ways to overcome them. Notably, in the inheritance dispute settlement, it is not the protection of property rights that is carried out, because heirs have not yet acquired them yet, but the protection of the right to inheritance, under which they can acquire ownership of inherited property. There is a lack of a particular list of ways to protect the rights of heirs in the legislation of Ukraine, which has a negative impact on judicial practice, as they often use inappropriate methods of protection. The study analyses the judicial practice of hereditary disputes and identifies the main mistakes that courts make in resolving such cases.

To achieve the purpose of the study, the following research methods were used: comparative, dialectical, and Aristotelian, and other general scientific methods of scientific knowledge, in particular, analysis, synthesis, specific definition, regulatory, systemic, etc. which allowed to identify problems of conflict regulation of the moment of

[1] Civil Code of Ukraine. (2003, January). (last amended on July 19, 2020). Retrieved from http://zakon1.rada.gov.ua/laws/show/435-15

ownership of inherited real estate, and to draw conclusions for their elimination. The analysis of legislation and legal science demonstrated the diversity of opinions in the civilistic literature and practice on the origin of the right to inherited real estate, the possibility of including in the inheritance mass the real estate unregistered by the testator in its lifetime, etc. The method of synthesis helped define the main approaches to understanding the protection of inheritance rights in the Ukrainian private law doctrine. The methodological base helped identify the basic concepts related to the protection of inheritance rights, and a hermeneutic interpretation of the rules of inheritance law was carried out to clarify the possibility of applying specific rules of law to solve problems associated with contradictions in civil legislation regarding the emergence of property rights to inheritance.

A theoretical and retrospective analysis of scientific articles of leading civilists on the issues of inheritance law and property rights was conducted. This allowed to trace the evolution of approaches to the definition and interpretation of ways to protect inheritance rights. Legislative acts, in particular the Civil Code of Ukraine and the Law of Ukraine "On State Registration of Real Property Rights and Encumbrances"[1]. were analysed with the help of the regulatory approach. Some articles concerning the definition of the right to protection of inheritance rights and ways of their protection are analysed. Much attention is paid to the analysis of the legal positions of the Supreme Court, which on particular examples allowed to describe the ways of protection of inheritance rights in the Ukrainian judiciary, as well as to highlight the opposite positions of courts in the selected category of inheritance cases.

2. RESULTS AND DISCUSSION

Book Six of the Civil Code of Ukraine[2] does not specify particular ways to protect inheritance rights. However, this does not mean that it is impractical to single them out. After all, the rights of heirs can be violated not only by other heirs, but also by third parties, such as creditors, debtors, etc. They must therefore choose an appropriate and effective way of protection, based on the method of violation and other important circumstances. The list of such methods of protection can be determined based on provisions of Article 16 of the Civil Code of Ukraine, considering the specific features of hereditary relations. Exploring the possible grounds for the protection of civil rights in inheritance, Professor Z.V. Romovska, based on the analysis of the Resolution of the Plenum of the Supreme Court of Ukraine No. 7 dated May 30, 2008 "On Judicial Practice in Inheritance Cases"[3] identified 15 requirements to be considered in inheritance cases, including the establishment of family relations with the testator and establishing the fact of living with the testator in one family; on establishing the fact of acceptance of the inheritance; on granting the right to inherit; on recognising the will as invalid; on

[1] Civil Code of Ukraine. (2003, January). (last amended on July 19, 2020). Retrieved from http://zakon1.rada.gov.ua/laws/show/435-15; Law of Ukraine No 1127 “On state registration of real rights to real estate and their encumbrances”. (2020, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1127-2015-%D0%BF#Text

[2] *Ibidem*, 2003.

[3] Resolution of the Plenum of the Supreme Court of Ukraine No 7 “On Judicial Practice in Inheritance Cases”. (2008, May). Retrieved from https://zakon.rada.gov.ua/laws/show/v0007700-08#Text

compulsory execution of the will; on the division (redistribution) of inheritance; on granting an additional term for acceptance of inheritance; on making changes to the certificate of the right to inheritance or declaring it invalid; etc. [16].

At the same time, neither the Civil Code of Ukraine[1], nor the above list of requirements that may be the subject of court proceedings does not apply the concept of "methods of protection of ownership of inherited property", "methods of protection of inheritance rights". As noted by some scholars, not all requirements in this list can be considered as ways to protect subjective rights, as some of them are aimed only at creating the preconditions for further protection of the right, and the list is not exhaustive [2]. Accordingly, it was proposed to consider as such the claims for removal from the right to inherit by law, the recognition of property rights by inheritance, the determination of shares in the inheritance [3; 17].

As prescribed by the provisions of Article 1268 of the Civil Code of Ukraine, for the heirs who accepted the inheritance, the right of ownership arises at the time of opening the inheritance, regardless of the time of its acceptance, and therefore there is uncertainty in the legal regime of inherited property from the time of opening the inheritance to the time of its acceptance. Therefore, all claims of heirs to the inheritance in the case of recourse to the court in a period of such uncertainty are aimed not at protecting ownership, but at protecting property rights, which should be carried out mainly by a system of special methods and sanctions of inheritance law, and after acceptance of the inheritance (including by receiving the certificate of the right to inheritance) – mainly by the general ways and the sanctions stipulated by Article 16 of the Civil Code of Ukraine, as well as the rules of Chapter 29 of the same. It is impossible to agree with the position of L.V. Kozlovskaya that when opening the inheritance, the heirs may require recognition of ownership and allocation of shares in kind, and therefore in such situations do not apply the rules of acceptance of the inheritance [3]. Such claims are possible only after the heirs accept the inheritance, because in the period from the opening of the inheritance to the moment of its acceptance, they can not be considered owners.

It is also impossible to unconditionally agree with the position of E.O. Ryabokon, who argues that the proivision of Part 5 Article 1268 of the Civil Code establishes the retroactive legal force of the transaction of acceptance of the inheritance [17]. Firstly, the application for acceptance of the inheritance indicates the date of its submission, and not the moment of opening the inheritance. Secondly, it may not be about giving retroactive effect to the deed of acceptance of the inheritance (because for some categories of heirs it is accepted automatically, so it does not contain all the necessary features of the deed, but constitutes a legal fact), but about giving retroactive effect to the title document (the certificate on acceptance of inheritance). Therewith, there is no provision in any regulation that governs the state registration of real rights to immovable property, which would make provision for the indication of the moment of acquisition of property rights by the heir on the date of opening the inheritance. There is no similar reservation in the certificate of the right to inheritance. Therefore, despite the exclusion from the Civil

[1] Civil Code of Ukraine. (2003, January). (last amended on July 19, 2020). Retrieved from http://zakon1.rada.gov.ua/laws/show/435-15

Code of Ukraine of Article 1299 of the Civil Code, which stipulated a special moment of ownership of real estate by the heir – from the moment of state registration of this property, in fact, it can be argued that this property still applies to real estate. This fact is also confirmed by other circumstances – neither in fact nor legally, the heir cannot dispose of the inherited property until the state registration of ownership of real estate. Furthermore, the heir may change their mind and refuse to accept the inheritance, therefore it will not be appropriate to consider them the owner of the inheritance. The Law of Ukraine "On state registration of real rights to immovable property and their encumbrances"[1], also fails to solve this issue and, in accordance with its Article 3, "real rights to immovable property and their encumbrances, which are subject to state registration in accordance with this Law, arise from the moment of such registration". Therefore, in fact, despite the provision of Part 5 Article 1268, this law establishes another moment of origin of the property right to the inherited real estate. This problem can be solved by harmonising the provisions of Article 3 of the Law "On state registration…." with the provisions of Part 5 Article 1268 of the Civil Code of Ukraine. Furthermore, it will help to solve this problem and indicate the time of ownership of the inherited property in the certificate of inheritance.

That is, it can be argued that the legislator presumes the emergence of ownership of immovable (and movable) property from the heir. Therewith, in respect of immovable property, the heir has the right of ownership in full only from the moment of receipt of title documents and registration of ownership of the inherited real estate. Ye. O. Ryabokon most convincingly substantiated the feasibility of the existence of the provision of Part 5 Article 1268 of the Civil Code on the moment from which the inheritance belongs to the heir. Thus, in his opinion, in cases where "the hereditary property passed to unauthorised persons between the moment of opening and the moment of acceptance of the inheritance, the heir by virtue of this rule acquires the right to claim this property from someone else's illegal possession, as well as the right to present a claim for damages caused as a result of illegal possession, use, or disposal of the said property" [18].

Therefore, a mention should be given to certain restrictions on the heirs in the choice of methods of protection of inheritance rights due to the lack of the status of the owner in the period established for the acceptance of the inheritance. This deprives them of the opportunity to go to court under Article 392 of the Civil Code with a claim for recognition of ownership of inherited property, as well as claims for recognition of ownership of the deceased, because with such a claim no one but the owner can go to court, as evidenced by existing case law [19].

In our opinion, the heirs can protect the inheritance rights by going to court to sue for the recognition of the property that belonged to the deceased, but was not a part of the inheritance. However, in court practice, the specific features of recognising the right of ownership of property by deceased persons are not always considered in lawsuits. Thus, the Podilskyi District Court of Kyiv by its decision of May 13, 2013 (case No. 2607/12944/12), upheld by the Decision of the Supreme Specialised Court of Ukraine for

[1] Law of Ukraine No 1127 "On state registration of real rights to real estate and their encumbrances". (2020, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1127-2015-%D0%BF#Text

Civil and Criminal Cases of January 29, 2014, satisfied the claim of the testator's wife about exclusion of the former wife of the testator from the number of heirs, as well as the recognition of property as belonging personally to the deceased [20]. In principle, the court found a somewhat compromise terminology, because in the claim the plaintiff requested to recognise the property of the deceased as personal private property. Satisfaction of the claim in the wording of the plaintiff would lead to incorrect application of Article 392 of the Civil Code, which gives the owners the right to claim recognition of property rights. In the present case, the fact that the property belongs to the deceased at the time of death is not actually recognised, but only confirmed.

In judicial practice, certain errors are made in making decisions when considering inheritance cases. Thus, courts do not always determine the existence of ownership of the testator (in particular, do not require title documents, do not verify their validity), and therefore recognise the ownership of the heir to real estate without a title document issued to the testator [21]. Notably, the incorrect wording of the claims – for example, "cancel the will" instead of declaring it invalid; to decide on the issuance of a certificate of the right to inherit or to oblige the notary office to issue a certificate of inheritance; to deprive a person of the right to a mandatory share instead of reducing the size of such a share or removing it from the right to inherit. Also, the courts do not always correctly establish the circle of heirs and the fact of their acceptance of the inheritance (for example, at the time of opening the inheritance, the heiress was a minor, but the courts did not establish which category of succession she belonged to, and whether there were other heirs; accordingly, they did not check whether she accepted an inheritance based on Part 4 Article 1268 of the Civil Code in the case of the creditor to the heirs). This is important for establishing the scope of persons entitled to appeal to court, because according to the Procedure for the performance of notarial acts by notaries of Ukraine[1], the right to appeal against a notarial action or refusal to execute a notarial act is held by a person whose rights and interests are related to such actions or acts. Therefore, the precondition for applying to the court of the heir should be the refusal of the notary to perform a notarial action, because in the case file there must be a reasoned decision on the refusal of the notary to perform a notarial action, in particular, refusal to issue a certificate of inheritance.

Certain features are inherent in the consideration of inheritance disputes related to the inheritance of real estate, including objects of unfinished construction. Thus, a notary issues a certificate of the right to inherit property, the ownership of which is subject to state registration only after the submission of documents certifying the ownership of the testator to such property. If the inherited property includes immovable property, the notary receives information from the State Register of Real Rights to Immovable Property by direct access to it. If the heir does not have the necessary documents for the issuance of a certificate of inheritance, the notary shall explain the procedure for resolving this issue in court.

Important for decisions in cases related to the acquisition of the right to unregistered real estate is the legal position formulated in the decision of the Supreme

[1] Order of the Ministry of Justice of Ukraine No 296/5 “On the procedure for performing notarial acts by notaries of Ukraine”. (2012, February). (last amended on July 19, 2020). Retrieved from https://zakon.rada.gov.ua/laws/show/z0282-12#Text

Court in case 23523/3522/16-ц of August 14, 2019. Thus, based on the interpretation of provisions of Article 1268 and 1296 of the Civil Code by the Supreme Court, the legislator distinguishes between the concepts "the emergence of the right to inherit" and "the emergence of ownership of immovable property that is part of the inheritance", and connects the emergence of these property rights with different legal consequences. Occurrence of the heir's right to inheritance, which is associated with its acceptance as a property right determines the inclusion of the right to it in the inheritance after the death of the heir, who did not receive a certificate of inheritance and did not carry out state registration [22].

Thus, in case the court did not consider the fact that the testator did not comply with the requirement for proper registration of ownership of the disputed object of unfinished construction, and this, in the opinion of the court, did not affect their ownership of this object, as state registration is only a state confirmation of the right that arose based on the concluded agreement. Therefore, the panel of judges concluded that the registration service does not establish ownership, in particular, of the object of unfinished construction, but registers it based on the clearly defined title documents and the district court erroneously considered that the lack of registration of the object of unfinished construction deprives the heir of this property after the death of the mother, therefore the decision is subject to cancellation with the adoption of a new decision to satisfy the claims [23].

The decision in case No. 638/6703/16-ц is somewhat different, where the decision of the district court was overturned and the decision of the appellate court on claims for recognition of property rights by inheritance by the heir was upheld. The district court noted that the heir (wife) accepted the inheritance in the accordance with the procedure prescribed by law, but due to the lack of title documents for non-residential premises, it was deprived of the right to issue it in the manner prescribed by law, therefore the court concluded that there are grounds for satisfaction of claims. Annulling the decision of the court of first instance and making a new decision to refuse to satisfy the claims, the appellate court reasonably assumed that the plaintiffs did not provide the court with proper and admissible evidence confirming that in their lifetime, the testator registered the ownership of the disputed non-residential premises in the manner prescribed by law. Considering the above and guided by the provisions of Part 3 Article 332 of the Civil Procedural Code of Ukraine[1], the panel of judges rejected the appeal and upheld the decision of the Court of Appeal [24].

One of the most common remedies in hereditary relations is to invalidate the certificate of inheritance. Thus, in accordance with Article 1301 of the Civil Code of Ukraine[2] "certificate of the right to inheritance is rendered invalid by court decision, if it is established that the person to whom it was issued had no right to inherit, as well as in other cases established by law". S.Ya. Fursa notes other grounds for recognising the certificate as invalid: in case of invalidation of the marriage between the spouses and legal inheritance by the surviving spouse; in case of renunciation of the inheritance [25].

[1] Civil Procedure Code of Ukraine. (2020, August). Retrieved from https://zakon.rada.gov.ua/laws/show/1618-15#Text

[2] Civil Code of Ukraine. (2003, January). (last amended on July 19, 2020). Retrieved from http://zakon1.rada.gov.ua/laws/show/435-15

It should be borne in mind that the certificate of inheritance is not a transaction, so to extend the rules governing the invalidity of transactions to this remedy is incorrect. As noted in the Generalisations of the Supreme Court of Ukraine "Practice of consideration of civil cases on invalidation of transactions by courts", the invalidity of the transaction must be distinguished from the invalidity of other related legal structures. The authors of the Generalisations noted that in the Civil Code of Ukraine this term is applied to invalidation of intellectual property rights (Articles 469, 479, 499); to invalidity of the prohibition of assignment of the right of monetary claim (Article 1080); to invalidation of the certificate of the right to inheritance (Article 1301); to invalidity of the right of claim (Articles 197, 519); to invalidity of the obligation (Articles 198, 548, 565); to invalidity of the act (Article 882); to invalidity of the check (Article 1102) [26].

According to Article 1301 of the Civil Code of Ukraine, the certificate of the right to inheritance can be recognized as invalid by the court decision. It is obvious that the certificate of inheritance has a different legal nature than the transaction. In this regard, the decision of the Supreme Court of Ukraine of May 14, 2014 "On rendering the certificate of inheritance and mortgage agreement invalid"[1] is of some interest. This Resolution notes that contrary to the requirements of Articles 548, 549 of the Civil Code of the Ukrainian SSR[2] the court linked the preservation or loss of the heirs' ownership of the inherited property with the fact of receiving or not receiving a certificate of inheritance, while the certificate is only documentary evidence of rights (Article 560 of the Civil Code of the Ukrainian SSR).

While supporting the overall legal position of the Supreme Court of Ukraine in the above Resolution, one cannot fail to note a certain underestimation of the legal value of a certificate of the right to inheritance, which is not an ordinary documentary evidence of ownership, but should be considered a document of title, securing the presumption of the legality of its acquisition by the owner of the property right. Such title documents also include a certificate of ownership, a certificate of ownership of a share in the joint property of the spouses, a state act on the right of ownership of land. It is important to emphasise that the recognition of such documents as invalid is carried out, according to judicial practice, not according to the rules established for transactions, but according to the rules established by special rules, for example, Article 1301 of the Civil Code of Ukraine[3], which invalidates the certificate of the right to heritage. However, the title of the above Resolution is somewhat incorrectly worded, as it is worded in such a way that it may give reason to believe that it is possible to invalidate the certificate of inheritance and the mortgage agreement under the same rules.

Under certain conditions, in judicial practice, certificates of ownership are also recognised as invalid, despite the absence of a direct rule about this in the Civil Code of Ukraine. For example, the decision of the Supreme Court of Ukraine in the panel of

[1] Resolution of the Supreme Court of Ukraine “On recognising the certificate of inheritance and mortgage agreement invalid”. (2014, May). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/VS140184.html

[2] Civil Code of the Ukrainian SSR. (1963, July). Retrieved from https://zakon.rada.gov.ua/laws/show/1540-06#Text

[3] Civil Code of Ukraine. (2003, January). (last amended on July 19, 2020). Retrieved from http://zakon1.rada.gov.ua/laws/show/435-15

judges of the Commercial Court of Cassation dated April 3, 2018 states that the certificate of ownership is only a document that formalises the right, but is not a transaction under which this right arises, changes or terminates, such a certificate does not give rise to the subject of the relevant right, but only records the fact of its existence. Therefore, in the opinion of the Supreme Court, since the decision on registration of the right of ownership is lawfully recognised as invalid, the documents that formalise the relevant right must be recognised as invalid [27]. A similar legal position is upheld by the courts in other cases as well [28].

Most of the analysed gaps and contradictions are conditioned by the lack of a unified approach in civil legislation to determine the moment of ownership, which may depend, in particular, on the type of property, the basis for its acquisition. Also, the legislation in the field of inheritance does not actually consider the importance of state registration of real rights to immovable property, recognising the rules of inheritance law as special rules, and not vice versa. Therewith, this legislative approach is caused by the fact that if the heir recognises real estate from the moment of state registration of property rights, firstly, the heir will acquire ownership of movable property from the opening of the inheritance, and real estate – from another moment; secondly, there will be legal uncertainty of the regime of such real estate and its owner from the moment of opening the inheritance to the moment of state registration of real rights to it. Notably, these are not all the gaps and contradictions that arise in hereditary relations, at the same time they can be the subject of separate independent studies. When exercising the right to protect inheritance rights by the heirs of rights, the following should be considered: until the receipt of a certificate of the right to inheritance, it is not the protection of property rights that is carried out, because the heirs have not yet acquired the right of ownership, but the protection of the right to inheritance, by which they can acquire the right of ownership of the inheritance property, and after receiving such a certificate – according to the rules established for the protection of property rights.

There are certain restrictions on the heirs in the choice of methods of protection of inheritance rights due to the lack of them in the period established for the acceptance of the inheritance, the status of the owner. This deprives them of the opportunity to appeal to court under Article 392 of the Civil Code with a claim for recognition of ownership of inherited property, as well as claims for recognition of ownership of the deceased, because with such a claim no one but the owner can appeal to court.

An incorrect wording of the plaintiffs' claims is particularly noted – "cancel the will" instead of declaring it invalid; "resolve the issue of issuing a certificate of inheritance" instead of obliging the notary office to issue a certificate of inheritance; "deprive a person of the right to a mandatory share" instead of reducing the size of such a share or removing it from the right to inherit.

Opposing legal positions in cases of inclusion in the inheritance of the testator's ownership of immovable property during their lifetime are investigated: in some cases the courts recognise the right to inherit such real estate, arguing only the legal confirmation of state registration of property rights and the presumption of legality; in other cases, which have more convincing arguments, deny the heirs the inclusion of such property in the inheritance and do not recognise the heirs' ownership of such property.

Specific features of invalidation of certificates of the right to inheritance and

certificates of the right of ownership are investigated.

Other gaps and inconsistencies in civil legislation also require further study. Thus, the Civil Code of the Ukrainian SSR made provision for the possibility of disposing of movable property, including funds acquired by the heirs since the opening of the inheritance on certain grounds, while the current Civil Code of Ukraine does not make provision for such a possibility. The legislation also does not define the consequences of disposing of the testator's property until the moment of receipt of the certificate of the right to inherit, including the misapplication of such property by the heir (heirs). Other heirs have the right to apply to the court for the return of unjustifiably obtained property in a conditional claim.

In Article 1281 of the Civil Code defines the term for filing a claim by the creditor to the heir(s) and the period within which the heirs must notify the creditor(s) of the testator of their acceptance of the inheritance, while Article 1282 does not stipulate the period in which the heir(s) must satisfy the claim of the creditor(s), but only states the need for the heir(s) to satisfy the claim by a single payment. Therefore, the question arises whether it is possible to extend to these legal relations the provisions of Part 2 Article 530 of the Civil Code of Ukraine, which establish a 7-day grace period for performance of obligations. It is not uncommon when, upon accepting an inheritance, discrepancies are found in the characteristics of the real estate that is part of the inheritance in the title document and in a certificate from the property inventory and registration authority on the specifications of a real estate object that was not registered in the state register of real rights to immovable property due to the acquisition of such property by the testator prior to the moment when such a register was put into operation. However, so far the judicial practice does not clearly define the method of resolving such a problem and does not define a particular way to protect the rights and interests of the heir(s).

CONCLUSIONS

Based on the foregoing, it should be noted that there are gaps in the civil legislation in the field of protection of inheritance rights. They can be eliminated by the creation of appropriate legal positions by the Supreme Court of Ukraine, as well as by consolidating the list of requirements with which the heirs have the right to apply to the court at the level of decisions of the Plenum of the Supreme Court.

Despite the fact that Art. 1268 of the Civil Code of Ukraine determines the moment of the emergence of ownership of the heir from the moment they accepts the inheritance, in fact, the heir is not endowed with all the powers of the owner from that moment. This is especially true in relation to immovable property, which is part of the inheritance.

The study notes the absence of a unified approach to determining the moment of emergence of ownership of inherited immovable property in the civil legislation. Thus, according to the Civil Code of Ukraine, the only moment is determined – the opening of an inheritance, regardless of the type of property. According to the legislation on state registration of rights to real estate, such a moment is exclusively the moment of state registration of real rights. This problem is caused by the exclusion of a provision from Article 1299 of the Civil Code of Ukraine, which stipulated a special moment for the emergence of ownership of real estate by the heir – from the moment of state registration

of this property. The purpose of this exclusion was to unify the moment of acquiring ownership of such property by the moment of accepting the inheritance. Therewith, the legislation on registration of rights to real estate has not changed in this part. This problem can be solved by harmonising the provisions of Article 3 of the Law of Ukraine "On State Registration..." with the provision of Part 5 Article 1268 of the Civil Code of Ukraine. Furthermore, it will help to solve such a problem and indicate the moment when the ownership of the inherited property arises in the certificate of the right to inheritance.

Therefore, the indicated gaps and contradictions, as well as other problems related to the exercise of the right to inheritance by the heirs and the right to protection in case of its violation, non-recognition or contestation, which arise during the consideration of hereditary disputes, may be the subject of a separate scientific study.

REFERENCES

[1] Dyakovych, M.M. (2014). Protection and defense of family rights and interests by a notary. Kyiv: Istyna.

[2] Kot, O.O. (2017). Exercise and protection of subjective civil rights: problems of theory and judicial practice. Kyiv: Alerta, 2017.

[3] Kozlovska, L.V. (2015). Theoretical principles of implementation and protection of inheritance cases. Kyiv: Yurinkom Inter.

[4] Kirillova, E.A., Pavlyuk, A.V., Blinkov, O.E., Blinkova, E.V., & Sidorenko, E.L. (2019). Digital inheritance of social media accounts. *International Journal of Engineering and Advanced Technology,* 8(4), 963-967.

[5] Dikovska, I.A., & Prytyka, I.D. (2019). Inheritance of a share in a limited liability company under Ukrainian law. *Journal of Advanced Research in Law and Economics,* 10(2), 528-532.

[6] Mussayeva, I., & Bozhkarauly, A. (2018). Realization of the right of inheritance: Problems of legislation and law enforcement practice. *Journal of Advanced Research in Law and Economics,* 9(7), 2387-2392.

[7] Hammad, M. (2017). Succession. *Semiotica,* 214, 351-372.

[8] Spivack, C. (2019). Broken links: A critique of formal equality in inheritance law. *Wisconsin Law Review,* 2, 191-211.

[9] Tadros, V. (2019). Ownership and the moral significance of the self. *Social Philosophy and Policy,* 36(2), 51-70.

[10] Zarosylo, V., Korostashyvets, Y., Maksymova, L., & Nechyporuk, S. (2018). Features of the legal protection of property rights in Ukraine and the european union. *Naukovyi Visnyk Natsionalnoho Hirnychoho Universytetu,* 6, 124-130.

[11] Malcev, V.A., Kamishansky, V.P., Slesarev, V.L., Elyazyan, A.S., & Ryzhik, A.V. (2018). The protection of the right to use the property by the european court of human rights judgments. *International Journal of Civil Engineering and Technology,* 9(10), 2013-2019.

[12] Vapniarchuk, V.V., Puchkovska, I.I., Tavolzhanskyi, O.V., & Tashian, R.I. (2019). Protection of ownership right in the court: The essence and particularities. *Asia Life Sciences,* 2, 863-879.

[13] Załucki, M. (2018). Attempts to harmonize the inheritance law in europe: Past, present, and future. *Iowa Law Review,* 103(5), 2317-2338.

[14] Bell, A., & Parchomovsky, G. (2019). The privacy interest in property. *University of Pennsylvania Law Review,* 167(4), 869-920.
[15] Viglione, F. (2018). The influence of fundamental rights on the law of succession. *European Business Law Review,* 29(5), 773-789.
[16] Romovska, Z.V. (2009). Ukrainian civil law. In *Inheritance law* (pp. 79-83). Kyiv: Alerta; KNT; TSUL.
[17] Krupchan, O.D., & Luts, V.V. (Ред.). (2012). *Features of protection of subjective civil rights.* Kyiv: Research Institute of Private Law and Entrepreneurship of the National Academy of Pedagogical Sciences of Ukraine.
[18] Dzera, O.V., Kuznetsova, N.S., & Maidanik, R.A. (2010). Civil law of Ukraine. A special part. Kyiv: Yurinkom Inter.
[19] Letter of the Supreme Court of Ukraine dated 01.07.2013 "Analysis of some issues of application by courts of the law on property rights in civil cases". Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/VSS00069.html.
[20] Ruling of the Supreme Specialized Court of Ukraine for Civil and Criminal Cases of January 29, 2014 in case No 2607/12944/12. Retrieved from http://reyestr.court.gov.ua/Review/31411038.
[21] Decision of the Bobrynets District Court of the Kirovohrad Region in Case No 2-111 / 11. Retrieved from http://reyestr.court.gov.ua/Review/15349442.
[22] Judgment of the Supreme Court in case No 523 / 3522/16-ц of 14 August 2019. Retrieved from http://reyestr.court.gov.ua/Review/83819683.
[23] Decision of the Court of Appeal of Odessa region from 29.05.2017, proceedings 22-ts / 785/3090/17. Retrieved from http://reyestr.court.gov.ua/Review/66755440.
[24] Decision of the Board of Judges of the Judicial Chamber for Civil Cases of the High Specialized Court of Ukraine for Civil and Criminal Cases of October 19, 2017 in case No 638/6703/16-ts. Retrieved from http://reyestr.court.gov.ua/Review/69762922.
[25] Furs, S.Ya. (Ed.). (2007). Inheritance law: Notary. Advocacy. Court. Kyiv: Publisher S.Ya Furs: CST.
[26] Romanyuk, Y.M., Kostenko, V.Y., & Melnik, Z.P. (2009). The practice of consideration by courts of civil cases on invalidation of transactions: Generalization of the Supreme Court of Ukraine of 24.11.2008. *Bulletin of the Supreme Court of Ukraine,* 1(101), 22-34
[27] Resolution of the Commercial Court of Cassation of the Supreme Court of April 3, 2018 in case No 917/927/17. Retrieved from http://www.reyestr.court.gov.ua/Review/73278037.
[28] Resolution of the Commercial Court of Cassation of the Supreme Court of June 27, 2018 in case No 925/797/17. Retrieved from http://www.reyestr.court.gov.ua/Review/75135379.

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