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Ганна Вікторівна Чурпіта

Кафедра цивільного права і процесу
Національна академія внутрішніх справ
Київ, Україна

ДЕЯКІ АСПЕКТИ СУДОВОГО ЗАХИСТУ СІМЕЙНИХ ПРАВ ТА ІНТЕРЕСІВ

Анотація. Наукова стаття присвячена деяким аспектам судового захисту сімейних прав та інтересів. На сучасному етапі розвитку суспільства одним із пріоритетних напрямів державної політики в Україні є захист сімейних прав та інтересів. Досягнення цієї мети забезпечується за допомогою різних правових засобів, серед яких особливе місце посідає судовий захист. У зв'язку із дублюванням переліку способів судового захисту у сімейному та цивільному законодавстві України, однією із проблем, яка привертає увагу, є співвідношення способів цивільно-правового і сімейно-правового захисту, а також з'ясування можливості застосування актів цивільного законодавства до регулювання сімейних відносин. Відтак, метою цієї наукової статті є аналіз проблемних аспектів сімейно-правового та цивільно-правового регулювання способів судового захисту сімейних прав та інтересів. В результаті проведеного дослідження обґрунтовано, що єдиною обов'язковою передумовою встановлення правовідношення за рішенням суду є попереднє встановлення судом відповідного юридичного факту як підстави виникнення, зміни чи припинення правовідношення. З огляду на це, суд, за винятком справ про усиновлення, а також про встановлення режиму окремого проживання за заявою подружжя, здійснює захист сімейних прав та інтересів у порядку окремого провадження не шляхом встановлення правовідношення, а у спосіб підтвердження наявності або відсутності юридичних фактів, які є підставою його виникнення, зміни чи припинення. Встановлено, що регламентація законодавцем таких особливих способів судового захисту сімейних прав та інтересів, як встановлення правовідношення та його анулювання, зумовлена особливою юридичною природою сімейних правовідносин, що водночас не виключає можливості «субсидіарного застосування» для захисту прав та інтересів їх суб'єктів нерегламентованих сімейним законодавством способів цивільно-правового захисту (визнання права та визнання правочину недійсним).

Ключові слова: судовий захист, сімейні правовідносини, майнова шкода, сімейно-правовий захист, факт батьківства.

Hanna V. Churpita

*Department of Civil Law and Process
National Academy of Internal Affairs
Kyiv, Ukraine*

SOME ASPECTS OF THE COURT PROTECTION OF FAMILY RIGHTS AND INTERESTS

Abstract. *The scientific article is devoted to some aspects of judicial protection of family rights and interests. At the present stage of development of society, one of the priority areas of public policy in Ukraine is the protection of family rights and interests. Achieving this goal is ensured through various legal means, among which a special place is occupied by judicial protection. In connection with the duplication of the list of methods of judicial protection in family and civil legislation of Ukraine, one of the problems that attracts attention is the ratio of methods of civil and family protection, as well as clarifying the possibility of applying civil legislation to regulate family relations. Therefore, the purpose of this scientific article is to analyse the problematic aspects of family law and civil law regulation of judicial protection of family rights and interests. As a result of the study, it is substantiated that the only mandatory prerequisite for establishing a legal relation by a court decision is the prior establishment by a court of a relevant legal fact as a basis for the emergence, change or termination of the legal relationship. In view of this, the court, except for cases of adoption, as well as the establishment of a separate residence on the application of spouses, protects family rights and interests in a separate proceeding not by establishing a legal relationship, but by confirming the presence or absence of legal facts, which are the basis for its occurrence, change or termination. It is established that the legislator's regulation of such special methods of judicial protection of family rights and interests as establishing a legal relationship and its annulment is due to the special legal nature of family legal relations, which does not exclude the possibility of "subsidiary application" to protect the rights and interests of their subjects using civil protection methods (recognition of the right and invalidation of a transaction).*

Keywords: judicial protection, family legal relations, property damage, family legal protection, fact of paternity.

INTRODUCTION

The strategic course for the accession of the Ukrainian state to the European Union requires the further development of the judiciary, which should be characterised by independence, fairness, transparency and efficiency [1]. It should be noted that the important role and authority of international norms for the protection of citizens' rights are due to the positive results of their implementation in the legislation of the most developed countries of the world, their rich history, to the fact that these acts express unchanging universal values [2].

In the legal literature, judicial protection, self-defence is regarded as the legal protection of a person and other persons, as well as the interests of society and the state against socially dangerous encroachments [3]. At the present stage of society development,

one of the priority directions of state policy in Ukraine is the protection of family rights and interests. According to scientists, the solution of family problems should be given priority [4]. The protection of family rights and interests is ensured through a variety of legal means, among which judicial protection is of particular importance, as the court itself has the broadest powers conferred by the legislator in the field in question by comparison with other jurisdictions. The task of judicial protection of family rights and interests is to restore the violated, unrecognised or contested rights, freedoms or interests of individuals, rights and interests of legal entities, interests of the state. Appropriate tasks are being pursued by the court, including for the purpose of strengthening the family, affirming a sense of duty to parents, children and other family members, building family relations on a parity basis, on feelings of mutual love and respect, mutual assistance and support, and also providing each child with family upbringing, opportunities for spiritual and physical development [5-7].

The list of methods of judicial protection of family rights and interests is set out in Part 2 of Art. 18 of the Family Code of Ukraine (hereinafter referred to as the FC of Ukraine)¹. In particular, in accordance with this provision, the court has the right to protect family rights and interests by: 1) establishing legal relations (paragraph 1 of Part 2 of Article 18 of the FC of Ukraine); 2) compulsory performance of voluntarily unfulfilled duty (paragraph 2 of Part 2 of Article 18 of the FC of Ukraine); 3) termination of legal relation, as well as its cancellation (paragraph 3 of Part 2 of Article 18 of the FC of Ukraine); 4) termination of actions that violate family rights (paragraph 4 of Part 2 of Article 18 of the FC of Ukraine); 5) restoration of the legal relation that existed before the violation of law (paragraph 5 of Part 2 of Article 18 of the FC of Ukraine); 6) compensation of material and non-pecuniary damage, if stipulated by the FC of Ukraine or by the agreement (paragraph 6 of Part 2 of Article 18 of the FC of Ukraine); 7) changes in legal relations (paragraph 7 of Part 2 of Article 18 of the FC of Ukraine); 8) recognition of illegal decisions, acts or omissions of a state authority, CAR authority or a local government body, their officials (paragraph 8 of Part 2 of Article 18 of the FC of Ukraine).

At the same time, almost the same list of remedies, but already civil rights and interests, contains part 2 of Art. 16 of the Civil Code of Ukraine (hereinafter – the CC of Ukraine)², according to which such methods are: 1) recognition of the right (paragraph 1 of Part 2 of Article 16 of the CC of Ukraine); 2) recognition the transaction invalid (paragraph 2 of Part 2 of Article 16 of the CC of Ukraine); 3) termination of the infringing action (paragraph 3 of Part 2 of Article 16 of the CC of Ukraine); 4) restoration of the situation that existed before the violation (paragraph 4 of Part 2 of Article 16 of the CC of Ukraine); 5) compulsory performance of duty in kind (paragraph 5 of Part 2 of Article 16 of the CC of Ukraine); 6) change of legal relation (paragraph 6 of Part 2 of Article 16 of the CC of Ukraine); 7) termination of legal relation (paragraph 7 of Part 2 of Article 16 of the CC of Ukraine); 8) compensation for losses and other methods of compensation for property damage (paragraph 8 of Part 2 of Article 16 of the CC of Ukraine); 9) compensation for moral (non-pecuniary) damage (paragraph 9 of Part 2 of Article 16 of

¹ Family Code of Ukraine: Law of Ukraine. (2002, January). Retrieved from: <https://zakon.rada.gov.ua/laws/show/2947-14>.

² Civil Code of Ukraine: Law of Ukraine. (2003, January). Retrieved from: <https://zakon.rada.gov.ua/laws/show/435-15>.

the CC of Ukraine); 10) recognition of decisions, actions or omissions of a state authority, CAR authority or a local government body, their officials as illegal (paragraph 10 of Part 2 of Article 16 of the CC of Ukraine). The list of methods of protection provided in Part 2 of Art. 16 of the CC of Ukraine is not exhaustive.

In this respect, the opinion of N.S. Kuznetsova, which emphasises that the court has the right to allow such a method of protection, which, although not provided for by law or contract, nevertheless corresponds to the essence of the relations between the parties, deserves attention [8].

Thus, the rules of the CC of Ukraine define the ways of protection of rights, specify the powers of the courts in the consideration of legal relations, but allow the courts to go beyond the limits determined by law, to regulate and specify the legal relations by analogy of right or law [8]. Due to the duplication of the list of judicial remedies in the family and civil law of Ukraine, as well as the exhaustive nature of the first and inexhaustible nature of the last list, one of the problems that attracts attention is the correlation between the civil and family legal remedies, as well as the possibility of applying acts of civil law to the regulation of family relations.

Therefore, the purpose of this scientific exploration is to analyse the problematic aspects of family law and civil law regulation of the methods of judicial protection of family rights and interests.

1. MATERIALS AND METHODS

In accordance with this goal, the basis of methodology for the study of problematic aspects of the judicial protection of family rights and interests became general scientific and special methods of knowledge of legal phenomena. In particular, the comparative legal method was used when comparing scientific views on the possibility of subsidiary application of civil law rules to regulate family relations in the context of the protection of the rights and interests of their subjects. Methods of induction and deduction made it possible to classify ways of protecting family rights and interests by the courts and to conduct their comparative analysis. The systematic method enabled the relation between a particular family relation and applied by the court way to protect the rights and interests of its subjects. The dogmatic method was applied in the interpretation of legal categories, as a result of which the conceptual and categorical apparatus of the respective legal institute was deepened and clarified, the character of the law was clarified and definitions were given to such legal categories as: “annulment of legal relation”, “recognition of right”, “establishment of legal relation” and some others. Formal-logical method was used as a universal means of argumentation of scientific conclusions. In particular, through the formal-logical method, the author has come to the conclusion that the annulment of a legal relation can be applied by a court solely for the purpose of protecting family rights and interests arising from marital relations, as well as the legal relation of adoption, while at the same time declaring a transaction invalid is a civil legal way of protection of rights and interests of parties to the transaction as grounds for the emergence, change or termination of the relevant legal relation. Based on the method of systematic analysis, a gap was found in the legal regulation of the list of ways of protecting family rights and interests by a court, in connection with which it was proposed to amend paragraph 1 p. 2 of Art. 18 of the FC of Ukraine, stating the stated legal norm in the following wording: “1) establishment of

legal relation and (or) legal fact, which is the basis for the emergence, change or termination of legal relation”.

Regarding the methodological basis of the research, its foundations were the fundamental works of civil scientists, as well as experts in the field of family law. The systematic analysis of the scientific positions of the said representatives of the scientific doctrine, as well as the relevant norms of the current civil and family legislation of Ukraine allowed to reveal gaps in the legal regulation of the ways of protecting family rights and interests by a court, as well as to conclude on the feasibility of subsidiary application of the rules of the civil legislation to regulate the relevant legislation.

The legal basis for the study was codified legal acts – sources of family and civil legislation of Ukraine, namely: the Civil Code of Ukraine and the Family Code of Ukraine. In addition, a series of court decisions have been analysed to illustrate the enforcement of the relevant rules, which have been reflected in the Unified State Register of Judgments.

2. RESULTS AND DISCUSSION

2.1 Correlation between the methods of civil and family law protection of family rights and interests

As already noted, in connection with the duplication of the list of judicial remedies in the family and civil law of Ukraine, as well as the exhaustive nature of the first and inexhaustible nature of the last list, one of the problems that attracts attention is the correlation of civil and family legal remedies. A comparative analysis of the relevant norms (Part 2 of Article 18 of the FC of Ukraine and Part 2 of Article 16 of the CC of Ukraine)¹ gives grounds to conclude that the list of methods of judicial protection of family and civil rights and interests is identical, with the following exceptions: 1) the family law of Ukraine provides the possibility of compensation for material and non-pecuniary damage, if it is provided by the FC of Ukraine or by an agreement (paragraph 6 of Part 2 of Article 18 of the FC of Ukraine). At the same time, the Civil Code of Ukraine does not contain such a condition and regulates the possibility of compensation for material and moral damages in all cases of its task (paragraphs 8, 9 p. 2, Art. 16 of the CC of Ukraine); 2) In addition to the termination of legal relations, the FC of Ukraine regulates such a way of judicial protection of family rights and interests as its annulment. At the same time, the CC of Ukraine does not provide for an adequate way of protecting civil rights and interests. Instead, it regulates an almost identical in legal nature method – the recognition of a transaction invalid (paragraph 2 of Part 2 of Article 16 of the CC of Ukraine); 3) FC of Ukraine, unlike the CC of Ukraine, in paragraph 1 of Part 2 of Art. 18 provides for such a method of judicial protection as the establishment of a legal relation. In the CC of Ukraine (paragraph 1, Part 2, Article 16), a similar legal method of protection has another name – recognition of the right.

The analysis makes it possible to state that the FC of Ukraine significantly expands the possibilities of judicial protection of family rights and interests and for the first time

¹ Family Code of Ukraine: Law of Ukraine. (2002, January). Retrieved from: <https://zakon.rada.gov.ua/laws/show/2947-14>.

Civil Code of Ukraine: Law of Ukraine. (2003, January). Retrieved from: <https://zakon.rada.gov.ua/laws/show/435-15>.

introduces such traditional civil rights remedies as compensation for material and non-pecuniary damage. Family law has always held that one of the main civil remedies – compensation for damages – cannot be used to protect family rights and interests, because by their very character they are not repaid. Recently, the view on this issue has changed significantly. Family relations, especially property, can be protected by way of compensation for the loss of a victim. However, given the specific nature of their legal nature, this can only be done in cases provided for by law or contract [9]. Thus, persons who have applied for marriage registration are considered to be bride and groom. In this case, according to Part 3 of Art. 31 of the FC of Ukraine, the person who refused a marriage is obliged to compensate the other party for the expenses incurred in connection with the preparation for a wedding and marriage registration.

Regarding the ratio of such methods of protection of family and civil rights and interests as the cancellation of a legal relation (paragraph 3 of Part 2 of Article 18 of the CC of Ukraine) and the invalidation of a transaction (paragraph 2 of Part 2 of Article 16 of the CC of Ukraine), family law is characterised by the presence of legal relations with a special legal nature, such as marriage and adoption, the rights and interests of which are protected by the court in a special way – the cancellation of a legal relation.

A large explanatory dictionary of the modern Ukrainian language defines “cancellation” as abolition, recognition of something invalid [10]. In this case, despite the identical lexical construction used by the legislator, talking about the consequences of violating the law at the time of marriage, during the transaction or court decision on adoption (it is about “invalidation of marriage”, “invalidity of a transaction”, as well as “invalidation of adoption”), the invalidation of a transaction and the cancellation of the legal relations are different in their legal consequences ways to protect the rights and interests. Thus, a transaction is a legal fact that entails the emergence, change or termination of legal relations. Recognition of a transaction as invalid has the consequence of invalidity of the respective legal relation. At the same time, marriage and adoption by their legal nature are already legal relations, the legal basis of which is not a transaction, but a legal fact of law-establishing nature (a fact of state registration of marriage, a fact that a court decides on adoption). Given law-establishing nature, family law does not regulate the possibility of invalidating a fact of state registration of marriage, as well as a fact that a court decides on adoption, but provides for the possibility of cancellation of legal relations arising on their basis.

Based on the above considerations, it can be argued that the cancellation of a legal relation can be used by a court only to protect family rights and interests arising from marriage and adoption, while invalidating a transaction is a civil way to protect the rights and interests of parties as grounds for the emergence, change or termination of a relevant legal relation. Nevertheless, such a conclusion does not negate the possibility of subsidiary application of such a method of protection as the invalidation of a transaction in order to protect the rights and interests of participants in family relations arising from the transaction. Then – the recognition of law as a way to protect civil rights and interests (paragraph 1 of Part 2 of Article 16 of the CC of Ukraine) and the establishment of legal relations as a way to protect the rights and interests of family law (paragraph 1 of Part 2 of Article 18 of the Civil Code). It should be emphasised at once that recognition of the right is one of the most common means of protection. The theory of recognition in the civil

procedural aspect was developed in the pre-revolutionary period by the famous Soviet lawyer V.M. Gordon. “The court decision on the recognition of law”, the scientist wrote, “does not establish anything new, but only adds strength to existing legal relations, confirms their existence with such force that subsequent litigation was inadmissible. In this case, the main object of recognition is a subjective right” [11]. Therefore, in response to the question, whether a court can recognise the existence of facts that have legal significance, V.M. Gordon answered no, believing that until a fact led to the emergence of a legal relation, a court could not begin to discuss its existence [11].

Analysing the recognition of the right as a way to protect family rights and interests, Z.V. Romovskaya draws attention to the fact that in judicial practice the term “recognition of the right” is used in three different cases. First, to confirm an existing subjective right in order to eliminate a dispute or to prevent future disputes (for example, the requirement of one of the spouses to recognise his right to housing, which arose from the moment of moving into the apartment and exists at the time trial). Second, the recognition of a right is the restoration of a pre-existing subjective right that has ceased due to the expiration of its exercise (for example, the restoration of a missed limitation period). Third, the recognition of the right is the satisfaction of the requirements of persons seeking to establish the desired legal relation (for example, the recognition of copyright). In addition, Z.V. Romovskaya emphasises that in family law there is no recognition of the right as a way of protection, but it is necessary to address many issues related to property rights. Thus, in case a husband does not recognise the independent right of a wife to housing, a court on a claim of the latter recognises this right for her [12].

The above views lead to the conclusion that the necessity for recognition of the right arises when a person has a certain subjective right is in doubt, the subjective right is challenged, it is not recognised whether there is a real threat of such actions. Thus, the uncertainty of the subjective right leads to the impossibility of its implementation or, at least, complicates it [13]. Unlike the recognition of the right, which is regulated as a method of protection in the Central Committee of Ukraine, the establishment of a legal relation is a way to protect subjective rights and legally protected interests in family law.

Quite successfully and fully, in author’s opinion, the establishment of legal relations in family law was analysed by O.M. Ponomarenko, who noted that this method of protection corresponds to the essence of some family relations, because one of the specific features of the latter is the possibility of family relations emergence outside a will of a subject. This is due to the need to protect the most vulnerable, “weak” family member, usually a child. The need for it arises when a certain legal fact necessary for the emergence of a legal relation is not recognised by a subject and a person concerned applies to a court to establish it. In such cases, the court's decision to recognise a legal fact is the basis for the emergence of a legal relation (i.e. is a legal fact) [14].

Z.V. Romovskaya, considering the establishment of a legal relation as a way to protect family rights and interests on the example of establishing paternity, writes, “Satisfying the claim for paternity, the court thus confirms the existence between the child and the defendant of biological connection – origin, which is one of the grounds for the emergence of a legal relation between them. Having endowed the defendant with the legally significant quality of a father, the court decision is one of the links in the general chain of legal facts that give rise to the legal relation between the child and his father” [15].

From the point of view of O.V. Dzera and I.O. Dzera, the establishment of a legal relation is associated with the adoption of certain measures aimed at restoring the violated subjective right of a person in the state in which it existed before its violation. That is, to file a lawsuit, it is necessary that the subjective right is not terminated and can be restored by eliminating the consequences of an offence [16]. The fact that the establishment of a legal relation is the basis for the emergence of rights leads some scholars to the conclusion that in essence this method of protection is identical to the recognition of the right. Thus, Y.F. Bepalov notes that as a way to protect the rights of a child establishing the origin (legal relation) is a measure aimed at restoring (recognising) the violated (disputed) rights of a child [17]. At the same time, there is an opposite position in scientific doctrine, the supporters of which insist that the establishment of legal relations and recognition of law are different ways of protecting family rights [18]. Their arguments are as follows: the need for recognition of a right arises when a subject's existing subjective right is challenged or not recognised. Thus, the role of a court is limited to confirming an existing right. When establishing a legal relation, a subjective right arises on the basis of a court decision. Proof of this, for example, is the fact that a child's right to alimony is linked to a court decision recognising paternity [14].

Regarding the legal nature of such a way of protecting family rights and interests as establishing a legal relation, it is necessary to emphasise this. According to the provisions of the general theory of law, the legal relation arises, changes or terminates on the basis of a legal fact. A legal fact in family law is a specific life circumstance, the legal construction of which is provided or permissible by family law, the occurrence of which causes legal consequences for family relations (emergence, change, termination, suspension, impediment or restoration) and (or) for family law legal capacity (emergence, expansion, termination or restriction) [19]. Hence, the only obligatory precondition for establishing a legal relation, with certain exceptions, is the prior establishment by a court of a relevant legal fact as a ground for the emergence, change or termination of the legal relation. In view of this, a court, with certain exceptions, may not establish a legal relation, but may establish only legal facts that are the basis for its occurrence, change or termination. For example, the establishment by a court of a fact of paternity results in the emergence of a legal relation between a father and a child.

Here is an example from case law. In March 2016 the applicant applied to the court to establish the fact of paternity in respect of her son, citing the fact that her son had been born during her cohabitation with the husband who was suited. However, since the parties lived without marriage, on the instructions of the mother in the child's birth certificate in the column "father" the civil registry office made an entry in accordance with Part 1 of Art. 135 of the FC of Ukraine. The child's father died at the home of the applicant's parents. The establishment of the fact is important for the implementation of her personal non-property and property rights, in particular, the right to financial assistance in connection with the loss of a provider. After hearing the explanations of the applicant and his representative, the representative of the interested person, the testimony of witnesses, examining and evaluating the evidence in their entirety, the court concluded that the application was satisfied because the deceased had acknowledged his paternity to the applicant's son. Thus, the court obtained sufficient evidence to reliably confirm the fact of the applicant's son's origin, which was also confirmed by the documents available in the

case file. Establishing the fact of paternity has legal significance for the applicant, as it is necessary to obtain the right to financial assistance in connection with the loss of a provider. It is impossible to establish the fact of paternity in another order, so the application is subject to satisfaction [20].

Thus, the way to protect family rights and interests by the court in this case was not to establish a legal relation, but the fact of paternity, which, in turn, is the basis for the emergence of a legal relation between father and child. In the legal literature, scholars also argue that the court, acting in the manner prescribed by law, directly determines the legal consequences of established facts and situations, requiring a legal response [21]. Nevertheless, it should be emphasised that there are two exceptions to this general rule: the court can protect family rights and interests by establishing a legal relation, deciding on adoption (Part 1 of Article 207, Article 232 of the FC of Ukraine), and on the establishment of a regime of separate residence at the request of spouses (Article 119 of the IC of Ukraine).

Given the above, the authors consider unfounded the position of the legislator, who among the ways to protect family rights and interests does not call the establishment of a legal fact that is the basis for the emergence, change or termination of the relation [22-25]. As proved above, the legal relation, with the exception of legal relations of adoption, as well as the establishment of separate residence at the request of the spouses, arises solely on the basis of legal fact, the establishment of which, along with the establishment of a legal relation, should be qualified as one of the ways of judicial protection of family rights and interests. In this regard, the author proposes to make appropriate changes to paragraph 1 of Part 2 of Art. 18 of the FC of Ukraine, setting out the specified legal norm in the following wording: “1) the establishment of a legal relation and (or) a legal fact that is the basis for the emergence, change or termination of the legal relation.”

And the last thing to pay attention to – how do the recognition of the law and the establishment of the legal relation and (or) legal fact, which is the basis for the emergence, change or termination of the relation, as ways to protect family rights and interests? As emphasised above, the need for recognition of a right arises when a person has a certain subjective right in doubt, the subjective right is challenged, it is not recognised whether there is a real threat of such actions. The characteristic feature of the recognition of the right is that this method does not create new substantive legal relations: the court recognises the presence or absence of the relevant subjective right of its holder. At the same time, the establishment by a court of a legal relation and (or) a legal fact, which is the basis for the emergence, change or termination of a legal relation, has the consequence of “creating a new legal relation” that did not exist before. In view of this, it can be argued that the recognition of the right and the establishment of a legal relation and (or) legal fact, which is the basis for the emergence, change or termination of the legal relation, are independent ways to protect family rights and interests.

2.2 Application of acts of civil legislation to the regulation of family relations in the context of protection of the rights and interests of their subjects

The second aspect that deserves attention in the study of problematic aspects of family law and civil law regulation of ways to protect family rights and interests by the court is the possibility of applying in the appropriate context of civil law to regulate family relations.

It should be noted that this dispute has a long history, its beginning is associated with a separate codification of civil and family law. It should be noted that no one has ever questioned the possibility of applying civil law to regulate family relations. This is due to the fact that the FC of Ukraine, operating with many civil law terms, does not disclose their content [14]. Thus, O.M. Ponomarenko notes that the purpose of family law regulation is to consolidate a special regulation of family relations, which corresponds to the specifics of the latter. And at times when the regulation of relations between family members does not differ from the regulation of relations between other subjects of civil relations, it should be attributed to the parish of the CC of Ukraine [14].

In the appropriate context, O.V. Nekrasova even identifies forms of subsidiary application of civil law to family relations, such as: a) conditionally subsidiary application provided by Art. 8 of the FC of Ukraine, without defining specific categories of family relations to which the norms of the CC of Ukraine may apply; b) direct subsidiary application, enshrined in the FC of Ukraine, to regulate the norms of the CC of Ukraine of specific types of family relations, for example, the exercise of the right of joint ownership after divorce. In addition, the author considers it appropriate to apply the basic principles of civil law to regulate family relations by analogy with the law [18]. Proponents of another point of view point out that family law is historically separated from civil law, so some family law remedies repeat the content and procedure for their application of the relevant civil law remedies, but the direct application of the CC, which provides for the protection of civil rights, to ways to protect family rights is impossible due to the substantive features of family relations, which are characterised by lack of payment, special subject composition, duration in time, the presence of a close family communication and personal trust [26]. For example, Yu.F. Besspalov writes in this regard, “Some family law methods coincide with civil law. But both the first and the second are independent legal phenomena and have features determined by the subject, method of legal regulation, as well as the functions of the branches of family and civil law” [17].

In author’s opinion, the use of those methods of protection that are regulated by the CC of Ukraine to protect family rights and interests is not only possible, but also directly regulated by the FC of Ukraine. Thus, according to Art. 8 of the FC of Ukraine, if personal non-property and property relations between spouses, parents and children, other family members and relatives are not regulated by the FC of Ukraine, they are regulated by the relevant norms of the CC of Ukraine, unless it contradicts the essence of family relations. It seems that the relevant norm also applies to the ways of protection of civil rights and interests, which can be used to protect family rights and interests, if it does not contradict the essence of family relations. Thus, there is a “subsidiary application” of the methods of judicial protection of the rights and interests defined by the CC of Ukraine to protect the rights and interests of the subjects of family relations.

Concluding the study of methods of judicial protection of civil and family rights and interests in the comparative aspect, as a result, the author notes that the legislator's regulation of special methods of judicial protection of family rights and interests, such as establishing a legal relation and its annulment, due to the special legal nature of family relations excludes the possibility of “subsidiary application” to protect the rights and interests of their subjects using civil legal protection methods unregulated by family legislation (recognition of the right and invalidation of the transaction).

CONCLUSIONS

The only obligatory precondition for establishing a legal relation by a court decision is the prior establishment by the court of the relevant legal fact as a ground for the emergence, change or termination of the legal relation. In view of this, the court, except for cases of adoption, as well as the establishment of a separate residence on the application of the spouses, protects family rights and interests in a separate proceeding not by establishing a legal relation, but by confirming the presence or absence of legal facts. is the basis for its occurrence, change or termination.

The legislator's regulation of such special methods of judicial protection of family rights and interests as the establishment of legal relations and its annulment is due to the special legal nature of family legal relations, which does not exclude the possibility of "subsidiary application" to protect the rights and interests of their subjects using civil legal protection methods unregulated by family legislation (recognition of the right and invalidation of the transaction). In order to optimise the family legislation of Ukraine in the context of legal regulation of ways to protect family rights and interests, the author proposes to set out in the new version of paragraph 1 of Part 2 of Art. 18 of the FC of Ukraine: "1) the establishment of a legal relation and (or) a legal fact that is the basis for the emergence, change or termination of the legal relation."

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Hanna V. Churpita

Doctor of Law, Professor
Professor of the Department of Civil Law and Process
National Academy of Internal Affairs
03035, 1 Solomenskaya Sq., Kyiv, Ukraine

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