

УДК 347.611:347.625:347.615

DOI: 10.37635/jnalsu.27(1).2020.26-38

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ДЕЯКІ ПРОБЛЕМНІ АСПЕКТИ ЗДІЙСНЕННЯ ТА ЗАХИСТУ МАЙНОВИХ ПРАВ ПОДРУЖЖЯ

Анотація. *Актуальність дослідження проблем, пов'язаних зі здійсненням подружжям закріплених в сімейному законодавстві майнових прав та їх захистом у разі невизнання, оспорювання чи порушення зумовлена тим, що майнові права подружжя становлять основу правового статусу чоловіка і дружини, а їх реалізація слугує зміцненню майнових засад сім'ї, забезпеченню матеріального добробуту як подружжя, так і дітей. Мета дослідження полягає у виявленні прогалин у законодавстві, що регулює майнові відносини подружжя та з'ясуванні їх впливу на забезпечення здійснення та захисту їхніх майнових прав. При проведенні дослідження були використані різноманітні методи наукового пізнання. Так, історичний метод використовувався при аналізі норм Кодексу законів про шлюб та сім'ю України, що регулювали майнові права подружжя та визначали способи їх захисту. Порівняльно-правовий метод застосовувався для порівняння норм ЦК України та СК України, що регулюють подібні або схожі відносини, зокрема щодо спільної сумісної власності, визнання недійсними договорів тощо. Методи аналізу і синтезу застосовувалися для виявлення недоліків і прогалин в чинному сімейному законодавстві та в практиці його застосування. На підставі формально-логічного методу сформульовані пропозиції щодо удосконалення деяких положень сімейного законодавства України. В роботі розглянуто загальне правило, згідно з яким дружина, чоловік розпоряджаються майном, що є об'єктом права спільної сумісної власності подружжя, за взаємною згодою. Інший аспект здійснення майнових прав подружжя стосується утримання та його правового регулювання. Не менш проблемним аспектом здійснення та захисту майнових прав подружжя, який розглянутий в роботі, є питання щодо поділу майна. Зокрема, в судовій практиці при розгляді справ про поділ майна подружжя виникають складнощі у разі відступу від засади рівності часток подружжя за обставин, що мають істотне значення. Такі обставини, що аналізуються в статті, можуть бути підставами як зменшення, так і збільшення частки одного з подружжя, у тому числі – колишнього. Одержані результати можуть бути використані при удосконаленні сімейного законодавства та практики його застосування, в подальших наукових дослідженнях, що стосуються майнових прав подружжя, а також при викладанні курсу сімейного права в навчальних закладах вищої освіти.*

Ключові слова: спільне майно, визнання договору недійсним, утримання одного з подружжя, поділ майна, шлюбний договір.

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SOME PROBLEM ASPECTS OF IMPLEMENTATION AND PROTECTION OF PROPERTY RIGHTS OF SPOUSES

Abstract. *The relevance of research on the problems associated with the implementation by spouses of enshrined in family law property rights and their protection in case of non-recognition, contestation or violation due to the fact that the property rights of spouses form the basis of the legal status of spouses and their implementation serves to strengthen the family's the material well-being of both spouses and children. The purpose of the study is to identify gaps in legislation governing spouses' property relations and to determine their impact on securing the enjoyment and protection of their property rights. Various methods of scientific knowledge were used in the research. Thus, the historical method was used in the analysis of the provisions of the Code of Laws on Marriage and Family of Ukraine, which regulated the property rights of spouses and determined ways to protect them. The comparative legal method was used to compare the norms of the CC of Ukraine and the FC of Ukraine governing alike or similar relations, in particular regarding shared ownership, invalidation of contracts and the like. Methods of analysis and synthesis were used to identify the shortcomings and gaps in current family law and in the practice of its application. On the basis of the formal-logical method, proposals for improvement of some provisions of the family law of Ukraine were formulated. The paper considers the general rule that a husband, wife disposes of the property, which is the subject of the joint property right of the spouse, by mutual consent. Another aspect of spousal property rights concerns the maintenance and legal regulation of a spouse. No less problematic aspect of the exercise and protection of property rights of spouses, which is considered in the paper, is the issue of property division. In particular, in case law, when considering cases of separation of property of a spouse, difficulties arise in the event of deviation from the principle of equality of spouses in the circumstances of significant importance. Such circumstances, which were analysed in the article, may be the reasons for both a decrease and an increase in the share of one of the spouses, including the former. The results obtained can be used to improve family law and the practice of its application, in further scientific studies concerning the property rights of spouses, as well as in teaching the course of family law in higher education.*

Keywords: joint property, invalidation of a contract, support of one spouse, separation of property, marriage contract.

INTRODUCTION

An important area of application of the rules of family law, designed to regulate relations between spouses, is the sphere of property relations, characterised by certain characteristics. The specificity of these relations is, in particular, that they are regulated, in

addition to the norms of the Family Code of Ukraine¹ (hereinafter – the UK Code), by a number of general rules on property, means, property rights, protection of property rights, etc. of the Civil Code of Ukraine² (hereinafter – the CC of Ukraine), as well as rules of other laws governing obligations, corporate relations, inheritance relationships, and more. In the literature, attention has been paid to the unequal application by the courts of the provisions of the Civil Code of Ukraine and the Ukrainian Criminal Code in cases when it comes to the exercise of their property rights by spouses [1; 2]. One of the problems that needs to be resolved is to ensure that the property rights of spouses are properly exercised by them and to protect the said rights in case they are not recognised, violated or contested.

Among the principles of family law, some authors refer, in particular, to the principle of judicial protection of family rights and interests [3-6]. One of the arguments of this statement is called the norm of Part 10 of Art. 7 of the Criminal Code of Ukraine, according to which “every participant in family relations has the right to judicial protection”.

The right to defence (not only judicial but also in extrajudicial form, including the right to self-defence of the infringed right and interest) in the general theory of law and in the science of civil law is considered by most scholars to be one of the competences within the subjective law. Therefore, it can be assumed that the exercise of the subjective right of a participant in family relations also includes the possibility of protecting that right. Therefore, the allocation of the right to defence as an independent subjective right and as a principle of family law is considered to be unjustified. At the same time, the issues related to the implementation of spouses’ property rights are inextricably linked to the issues of their protection.

Despite the fact that Part 1 of Art. 18 of the IC of Ukraine, in contrast to Part 1 of Art. 15 of the Civil Code of Ukraine, does not indicate in which case a participant of family relations has the right to appeal to a court for the protection of his right or interest, it is clear that there are cases of its violation, non-recognition or contestation. Similarly, in this part of Art. 18 of the FC of Ukraine should not be about any interest, but interest protected by law. However, the wording of Part 1 of Art. 18 of the IC of Ukraine is built in such a way that the main focus is on the attainment of a family member of a certain age, which gives him the right to apply to a court for the protection of his right or interest. In this regard, the author proposes to formulate part 1 of Art. 18 of the IC of Ukraine as follows: “1. Every member of a family who has attained the age of fourteen has the right to a direct appeal to a court for the protection of his or her right in the event of its non-recognition, violation or contestation, and protected by law interest.

1. MATERIALS AND METHODS

Background materials for the study of some of the problematic aspects of the implementation and protection of property rights of the spouses were the provisions of the CC of Ukraine, the FC of Ukraine³ and other regulatory legal acts, materials of court practice, as well as sources of special literature on family law. The methodology of this study is based on the combination of different methods of scientific knowledge. Their

¹ Family Code of Ukraine. (2020, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/2947-14>

² Civil Code of Ukraine. (2020, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/435-15>

³ Family Code of Ukraine, op. cit.

application has made it possible to establish that the implementation of spouses' joint property rights should be performed in accordance with the provisions of the FC of Ukraine, as a special legal act, and not in accordance with the CC of Ukraine, which contains general provisions on shared ownership. Thus, the historical method was used to find out the content of the marriage and family laws of the Code of Laws on Marriage and Family Law, which regulated the property rights of spouses and determined the procedure for appealing to the court for protection of the violated right, before the adoption of the CC of Ukraine. The comparative legal method was used to compare the norms of the CC of Ukraine and the FC of Ukraine governing alike or similar relations, in particular regarding shared ownership, invalidation of contracts and the like. This made it possible to conclude that the legislator unjustifiably not included in the grounds for acquiring the right to withhold the refusal of one spouse to financially support the other.

Methods of analysis and synthesis were used to identify the shortcomings and gaps in current family law and in the practice of its application. Thus, based on the analysis of Art. 76 of the FC of Ukraine, which established the right of a spouse to financially support the other after a divorce, it was found that the legislator did not foresee the possibility of concluding a contract of custody for them. Instead, the Principles of European Family Law stipulate that spouses should be able to enter into a post-divorce custody agreement, which may specify the amount of an allowance, the procedure, duration and conditions of termination of the maintenance obligation and the possible waiver. In view of this, the relevant changes to the FC of Ukraine were proposed.

On the basis of the formal-logical method, proposals are made to improve certain provisions of the family law of Ukraine, in particular, concerning: the right of one spouse to apply to court with a request for financial support from the other spouse; the right to the financial support of a spouse with whom a child with disability lives after a divorce; the right of the spouses to conclude a contract of custody not only during the marriage, but also after divorce.

2. RESULTS AND DISCUSSION

2.1 Recognition of invalid property contracts

One of the aspects that should be addressed is the invalidation of contracts for the disposal of property owned by a husband and wife on shared ownership, concluded by one spouse without the consent of the other. As established by Art. 63 of the FC¹, a wife and a husband have equal rights to own, use and dispose of property belonging to them according to the right of shared ownership, unless otherwise agreed by an agreement between them. In view of this Part 1 of Art. 65 of the Criminal Code of Ukraine establishes that a husband and a wife dispose of the property, which is the subject of shared ownership of the spouses, by mutual consent. Consequently, when concluding contracts, one of the spouses is considered to be acting with the consent of the other spouse (Part 2 of Article 65 of the FC of Ukraine). These norms almost exactly coincide with the provisions of Part 1 and 2 of Art. 369 of the CC of Ukraine on the exercise of the right of shared ownership, but the main difference is that, as set out in Part 2 of Art. 68 of the FC of Ukraine, the disposal of property that is the subject of the right of shared ownership, is carried out by the co-owners

¹ Family Code of Ukraine. (2020, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/2947-14>

only by mutual consent, in accordance with the Civil Code of Ukraine *after a divorce*. Thus, the provisions of Art. 369 of the Civil Code of Ukraine cannot be applied to relations concerning the exercise of the right of shared ownership of spouses.

On this basis, the FC of Ukraine and the CC of Ukraine establish different legal grounds for invalidation of contracts for disposal of property, which is the subject of shared ownership. Thus, if according to Part 4 of Art. 369 of the Civil Code of Ukraine a transaction concerning the disposal of joint property, made by one of the co-owners, may be declared invalid by the court upon the claim of the other co-owner in the absence of the co-owner who has performed the necessary powers, then according to Part 2 of Art. 65 UK of Ukraine, wife, husband has the right to go to court with a claim to declare the contract void as such, concluded by the other spouse without her, his consent, if this agreement goes beyond the limits of a small household. Thus, the ground for invalidation of a contract for the disposal of property that is the subject of shared ownership rights concluded by one spouse is the *absence of consent* of the other spouse.

This fact is not taken into account not only in jurisprudence but also in scientific research. Thus, N.A. Dyachkova and F.A. Tuchin consider that the provision that a transaction concluded by one spouse without the consent of the other cannot be challenged in court (since in Part 2 of Article 65 of the FC such the opportunity is given only for transactions that go beyond the limits of a small households), contrary to Part 2 of Art. 4 of the CPC of Ukraine (an obvious mistake here, since Article 4 of the CPC of Ukraine does not contain part 2). Accordingly, the authors believe that even a small household transaction made by one spouse without the consent of the other can also be challenged in court [7]. The author of this paper believes that this conclusion of the authors can be extended to small household contracts concluded by one spouse, but the reason for their invalidation will be not the absence of consent of the other spouse, but other grounds provided by the CC of Ukraine.

Without prejudice to the question of the form and notarisation of such consent (Part 3 of Article 65 of the Criminal Code of Ukraine), although they are important enough for the observance of property rights of spouses, it is worth noting that if the definition of small household contract can be used by analogy of law the concept of small household transactions, placed in Part 1 of Art. 31 of the CC of Ukraine, then the question what contract can be considered as an agreement on valuable property, are not answered by either the CC of Ukraine nor the FC of Ukraine. Case law, ignoring the direct reference in Part 2 of Art. 65 of the UK of Ukraine on the invalidation of a contract concluded by one spouse without the consent of the other, proceeds from the fact that “the disposal of joint property without the consent of the other spouse can be a ground for invalidation of such a contract only if the court finds that those of the spouse who entered into the joint property agreement and the third party contracting party under such agreement acted in bad faith, in particular that the third party knew or could not have known, under the circumstances of the case, that the property was owned by the spouse under the shared ownership right, and a spouse who concluded a contract, has not received the consent of the other spouse”.

Thus, the appeal of the Supreme Court of Ukraine to the principle of integrity in considering cases of invalidation of contracts concluded without the consent of another spouse, is characteristic of a number of its resolutions (of 07.10.2015, of 30.03.2016, of 07.09.2016, of 22.02.2017 etc.).

The author believes that the reasons given by the court in these and other decrees are based on the statement made by Yu.S. Chervonyi about the possibility of invalidating a transaction, if it is proved that the other party to the transaction acted in bad faith, that is, knew or should have known of the absence of consent to the exercise such transaction by other co-owners or one of them [8], cannot be applied for recognition as invalid contracts concluded by one spouse without the consent of the other. It is quite clear that a spouse who concludes a contract without the consent of the other spouse can no longer act in good faith. Regarding the behaviour of a contractor under a contract, the legislator does not take it into account at all when determining the basis for the contract's invalidation in accordance with Art. 65 of the FC of Ukraine. It is only about relationships between spouses. Therefore, the court's reference to good faith, as one of the principles of civil law (although such a provision under Article 7 of the CC of Ukraine is also inherent in family law), according to which the parties to a contract should act, in this case is groundless.

Today, such erroneous practice has been altered by the legal opinion of the Grand Chamber of the Supreme Court of November 21, 2018 in case No. 372/504/17 [9], which was reflected in the following practice (Supreme Court's Order of 30 January 2019 in case no. 552/17826/16-c [10], of February 11, 2019 in Case No. 308/2205/16-c [11], etc.). Courts now proceed from the fact that the law does not link the presence or absence of consent of the co-owner to conclude a contract with good faith of the spouse who concluded the joint property contract or of the third contracting party under such agreement and does not raise the issue of the appeal of a contract in dependence on good faith of the parties to a contract. True, there is some doubt as to the reference of the courts in the above cases to Articles 369 and 215 of the Civil Code of Ukraine in the presence of a special provision established by Part 2 of Art. 65 IC of Ukraine.

2.2 Rights of a spouse for allowance

An important aspect in the context of problems in the exercise of property rights of spouses is the issue of legal regulation of maintenance. As Part 1 of Art. 75 of the FC of Ukraine established, wife, husband should financially support each other. Maintenance relations are regulated, in particular, by the rules of Chapter 9 of the FC of Ukraine, entitled "Rights and Obligations of Spouses", although in reality the provisions of this Chapter regulate not only the rights and duties of the spouse, but also the right of a person to be supported after a divorce (Article 76 of the FC of Ukraine) and the right to support women and men who are not married to each other (Article 91 of the Civil Code of Ukraine).

Given that the FC of Ukraine has for the first time settled the property relations of a woman and a man who live in the same family but are not married to each other or in any other marriage, the author considers it appropriate to supplement the FC of Ukraine with Chapter 9-1, to which, in particular, include Article 74, which, in author's view, is unreasonably set out in Chapter 8, "The right of shared ownership of spouses", and Article 91 of the FC of Ukraine on the right to retain these persons, as well as to better regulate property relations between these persons [12-14]. As the existing title of Chapter 9 of the FC of Ukraine contains different rights and obligations – "right to withhold" and "duty to withhold", and the chapter itself regulates the relationship of maintenance both between spouses and between former spouses, it seems that such corresponding to the content of the norms contained therein after the implementation of the above amendments (regarding

Chapter 8-1) would be another title of Chapter 9, namely: “Rights and Obligations of Spouses and Former Spouses”.

It should be noted that the term “former spouses” is used in the Principles of European Family Law governing divorces and allowances between former spouses¹ (hereinafter referred to as “Principles”), and the very principles of retention between former spouses are enshrined in Part II. However, the Principles do not contain provisions governing the relationship between a spouse or a wife and husband who are not married.

The CC of Ukraine establishes *general* (Article 75) and *special* (Articles 84, 86, 88) grounds for the acquisition of the right of allowance and conditions for its implementation. Thus, according to Part 2 of Art. 75 of the FC of Ukraine the right to allowance (alimony) has those of the spouse who: a) is incapacitated, b) needs financial assistance, provided that the other spouse can provide financial assistance. In this case, a spouse who has reached the retirement age, established by law, or is a person with a disability of group I, II or III (Part 3 of Article 75 of the Insurance Code of Ukraine) is considered incapacitated. One spouse is in need of financial assistance if his salary, pension, income from the use of his property, other income do not provide him with the subsistence minimum required by law. For example, having considered a statement of PERSON_1 on the Supreme Court of Ukraine's review of the Supreme Specialised Court of Ukraine's decision on civil and criminal cases of October 15, 2015 in a case against PERSON_1 to PERSON_2 about recovering alimony from a disabled wife, the Court Chamber of Ukraine on the Resolution of April 13, 2016, in Case No. 6-3066ts15 stated, in particular, that the materials of the case indicate that the amount of the pension of the claimant as a disabled person of group I is 1 149 hryvnas 72 kopecks.

Article 7 of the Law of Ukraine “On the State Budget of Ukraine for 2015”² stipulates for 2015 the living wage for persons with disabilities from January 1, 2015 – UAH 949, from September 1 – UAH 1,074. Therefore, PERSON_1 receives a disability pension in the amount that provides its subsistence minimum, established by law for persons who have lost their ability to work, and therefore cannot be considered as a person in need of financial assistance in the sense of Article 75 Part 4 of the Criminal Code of Ukraine. Taking into account the established circumstances, the court of cassation in the case being reviewed reasonably agreed with the court of appeal of the refusal to satisfy the claims of PERSON_1 on the recovery of alimony for her allowance as a disabled wife³.

Due to changes in the current legislation concerning the setting of minimum social standards for which the minimum wage exceeds the living wage per person (see, for example, Law of Ukraine of November 14, 2019 No. 294-IX “On The State Budget of Ukraine for 2020”⁴), obviously, one should expect a decrease in the number of people in need of financial assistance, but this does not solve other problems of support. For

¹ Principles of European Family Law regarding divorce and maintenance between former spouses. Retrieved from <http://ceflonline.net/wp-content/uploads/Principles-English.pdf>

² Law of Ukraine “On the State Budget of Ukraine for 2015”. (2015, December). Retrieved from <https://zakon.rada.gov.ua/laws/main/294-IX>

³ Resolution of the Supreme Court of Ukraine in Case No. 6-3066css15 (2016, April). Unified State Register of Judgments. Retrieved from <http://www.reyestr.court.gov.ua/>

⁴ Law of Ukraine “On the State Budget of Ukraine for 2020”. (2019, November). Retrieved from <https://zakon.rada.gov.ua/laws/main/294-IX>

example, a systematic analysis of the above provisions of Art. 75 of the FC of Ukraine¹ on the one hand, and Art. 55 of the Criminal Code of Ukraine (concerning the obligation of the wife and husband to jointly care for the financial support of the family), Art. 60 of the Criminal Code of Ukraine (concerning the right of shared ownership of property acquired by the couple during the marriage) and Art. 63 of the Civil Code of Ukraine (concerning the equality of the rights of the wife and the husband in the exercise of the spouses shared ownership rights) – on the other indicates that the legislator unjustifiably not included in the grounds for acquiring the right to withhold *the refusal of one spouse in material support of the other* (as it was established by Part 1 Art. 32 of the Code on Marriage and Family of Ukraine), since according to part 1 of Art. 75 of the FK of Ukraine, wife, husband should financially support each other.

The current Ukrainian Family Code does not contain a rule that a spouse who requires such maintenance has the right to go to court, although a similar provision was contained in Part 1 of Art. 32 of the Marriage and Family Code of Ukraine. On this basis, the author proposes to formulate part 2 of Art. 75 of the FC of Ukraine in the following wording: “2. In case of refusal of such support, the spouse who is incapacitated, needs financial assistance, has the right to allowance, provided that the other spouse can provide financial assistance, has the right to go to court to request allowance.” Thus, in author’s view, the spouses will be better informed about the possibility of protecting their violated right [15; 16]. The above grounds for the occurrence and conditions for the exercise of the right of spouses to allowance are established by law. At the same time, expanding the dispositive principles of regulation of family relations in general (Part 2 of Article 7, Part 1 of Article 9 of the FC of Ukraine), and relations of spouses, in particular (Article 64 of the FC of Ukraine), created the possibility of contractual regulation of the relationship of spouses on allowance both in the marriage contract and in the spousal contract. Thus, according to Art. 99 of the FC of Ukraine, the parties may agree to grant allowance to one spouse regardless of disability and the need for financial assistance on the terms stipulated in the marriage contract.

If the marriage contract specifies the terms, amount and terms of payment of alimony, then in case of failure of one of the spouses to fulfil their obligations under the contract, alimony may be charged on the basis of a notary's executive inscription. The marriage contract may stipulate the possibility of termination of the right to support one of the spouses in connection with the receipt of property (monetary) compensation. The marriage contract may stipulate the possibility of termination of the right to support one of the spouses in connection with the receipt of property (monetary) compensation. In addition, in accordance with Art. 78 of the FC of Ukraine spouses have the right to enter into an agreement for the maintenance of one of them, in which to determine the terms, amount and terms of payment of alimony. The contract is made in writing and notarised. In case of failure of one of the spouses to fulfil their obligations under the maintenance agreement, alimony may be charged on the basis of a notary's executive inscription. In this case, the execution of executive inscriptions by a notary shall be governed by the provisions of Chapter 14 of the Law of Ukraine of September 2, 1993 “On Notary”²,

¹ Family Code of Ukraine. (2020, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/2947-14>

² Law of Ukraine "On Notary" of September 2, 1993. Retrieved from <http://zakon3.rada.gov.ua/laws/show/3425-12>

Chapter 16 of the Procedure for Notary Acts by Notaries of February 22, 2012¹, and Clause 1 of the List of Documents on which indebtedness is enforced indisputably on the basis of executive notaries dated June 29, 1999².

Having established the right to allowance after the dissolution of marriage (Article 76 of the Criminal Code of Ukraine)³, the legislator did not foresee the possibility of concluding a contract of allowance between them. Instead, the Principles (Principle 2:10) stipulate that the spouses should be able to enter into a post-divorce custody agreement, which may specify the amount of the allowance, the order of exercise, the duration and conditions of termination of the allowance obligation and the possible waiver of the application for the allowance. Such an agreement must be in writing.

In view of this, the author considers it expedient to provide in the FC of Ukraine the right of spouses to conclude a contract for their maintenance not only during marriage but also after divorce, for which to exclude from the name of Art. 78 of the Criminal Code of Ukraine the word “spouses” and add part 1 after the first sentence with the sentence of the following content: “The former spouse has the right to enter into such a contract even after the divorce”. In author’s view, making the proposed changes will allow a claimant to meet his or her needs, at the expense of a person who has the ability to satisfy them, not only during marriage but also after divorce. It is also advisable to grant the right to conclude an allowance contract to a woman and a man who are not married (Article 91 of the Criminal Code of Ukraine). Some special features characterise the special grounds for acquiring the right to allowance and the conditions for its implementation.

1. Thus, according to Art. 84 of the FC of Ukraine, the wife has the right to be supported by her husband during pregnancy, and the wife with whom the child resides – from the husband-father of the child – until the child is three years old. However, if the child has a physical or mental disability, the term increases to six years.

2. The man with whom the child lives has, according to Art. 86 of the FC of Ukraine, the right to be supported by the wife-mother of the child until the child is three years old, and in the case of the child's physical or mental development – until the child is six years old.

3. If one of the spouses, including the able-bodied, lives with a child with a disability, who cannot cope without permanent care of a third party, he or she is entitled to allowance (Part 1 of Article 88 of the Criminal Code of Ukraine).

In spite of different subject composition and different grounds for holding the right to withhold, all three cases share the following characteristics:

- a) a person has the right to allowance irrespective of his financial position;
- b) the condition for the exercise of the right to allowance is the ability of a husband (wife, spouse) to provide financial assistance.

It should be noted that Art. 84 and Art.86 of the Criminal Code of Ukraine stipulate that a pregnant wife, the wife with whom the child resides, the husband with whom the

¹ Order of the Ministry of Justice of Ukraine "Procedure for Notary Acts by Notaries of Ukraine". (2012, February). Retrieved from <http://zakon2.rada.gov.ua/laws/show/z0282-12>

² List of documents on which indebtedness is enforced indisputably on the basis of executive notaries: Decree of the Cabinet of Ministers of Ukraine. (1999, June). Retrieved from <http://zakon3.rada.gov.ua/laws/show/1172-99-п/ed20150407>

³ Family Code of Ukraine. (2020, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/2947-14>

child resides, have the right to maintenance even after the divorce. Art. 88 of the Criminal Code of Ukraine does not contain such a rule, but some scholars suggest that the right to maintain the spouse with whom the disabled child lives: a) is not terminated in the event of divorce; b) may occur after divorce [17; 18]. Since this is merely an assumption that is not based on law, it would be advisable to supplement Art. 88 of the Criminal Code of Ukraine part 3 as follows: “3. The spouse with whom the child with a disability resides has the right to maintenance even after divorce.”

2.3 Division of property of spouses

According to the general rule established by Part 3 of Art. 368 of the Civil Code of Ukraine¹, property acquired by spouses during marriage is their joint compatible property, unless otherwise stipulated by the contract or law. This provision of the CC of Ukraine was developed in Part 1 of Art. 60 of the FC of Ukraine², according to which the property acquired by the spouses during the marriage, belongs to the wife and husband on the right of shared ownership, regardless of the fact that one of them did not have for a valid reason (study, housekeeping, child care, illness, etc.) self-employment (income). In practice, often the question arises which rules of the codes – the CC of Ukraine, or the FC of Ukraine – should be used in deciding whether to divide the property of a former spouse? Relationships regarding the division of jointly owned property are regulated by Art. 372 of the CC of Ukraine, according to which: jointly owned property may be shared between co-owners by agreement between them, except in cases established by law (Part 1 of Article 372). In the case of division of jointly owned property, it is considered that the shares of the co-owners in the common joint ownership are equal, unless otherwise agreed by the agreement between them or the law (Part 2 of Article 372).

“Other”, relating to the determination of the size of the shares of co-owners in the right of shared ownership, is established by Part 1 of Art. 70 of the FC of Ukraine, which regulates relations regarding the division of property of spouses. The author believes that this rule also applies to the division of property of a former spouses, since even after the divorce, the property acquired during the marriage is owned by the former spouse on the right of shared ownership. As noted in Part 1 of Art. 70 of the FC of Ukraine, in the case of division of property subject to shared ownership of the spouses, the shares of property of the wife and husband are equal, unless otherwise determined by the agreement between them or the marriage contract (note the incorrect use of the terms “agreement” in this case and “marriage contract” because the latter is also an agreement).

Thus, both civil and family law presuppose the equality of shares in the property of the spouse, which is joint property. Exceptions to this rule may be established by an agreement between the co-owners or the law (Part 2 of Article 372 of the Civil Code of Ukraine), or an agreement between the wife and the husband (including the marriage contract), as stipulated by Part 1 Art. 70 of the FC of Ukraine. Thus, the spouses can deviate from the principle of equality of shares in the right of shared ownership by entering into an agreement. However, in the case of a dispute over the division of property belonging to the co-owners of the shared ownership, the share of the co-owner may be increased or reduced by the court decision, taking into account the circumstances that are significant

¹ Civil Code of Ukraine. (2020, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/435-15>

² Family Code of Ukraine. (2020, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/2947-14>

(par. 2 p. 2 Article 372 of the CC of Ukraine). However, the CC of Ukraine does not disclose the content of the concept of “circumstances that are of significant importance”. Obviously, this shortcoming is appropriate to remedy in the process of updating civil law by defining in the code an approximate list of these circumstances.

Unlike the CC of Ukraine, Part 2 of Art. 70 of the FC of Ukraine, states that in resolving a dispute over the division of property, the court may deviate from the principle of equality of spouses in circumstances of significant importance, in particular if one of them did not care for the financial support of the family, evaded participation in child support (children), hiding, destroying or damaging common property, spending it to the detriment of the family. In other words, the norm of using the word “in particular” lists an approximate list of circumstances to reduce the share of one of the spouses in shared ownership. Thus, the court, when deciding the issue of separation of property, may take into account, in particular, the following circumstances, which are essential: the evasion of one spouse from the support of the child; fulfilment by one of the spouses of obligations to pay the loan under the loan agreement by transferring the money earned by it; failure to fulfil and/or improper performance by one of the spouses of the obligation to repay the funds obtained under the loan agreement, although in accordance with Part 4 of Art. 65 of the FC of Ukraine, a contract concluded by one of the spouses for the benefit of the family creates obligations for the other spouse if the property acquired under the contract is used for the benefit of the family. In addition to the grounds for reducing the share of one of the spouses, the FC of Ukraine (Part 3, Art. 70) provides that by the decision of the court the share of the property of the wife, the husband may be increased if the children, as well as the incapacitated adult son, daughter, reside with him/her, provided that the amount of alimony they receive is insufficient to support their physical, spiritual development and treatment [19]. In deciding which code – the Civil or Family Code – should be followed in the division of property of a former spouse, in author’s view, it is necessary to take into account the jurisprudence, in particular, the practice of the Supreme Court.

Thus, in the decision of May 24, 2017, in the case No. 6-843ts17, the Supreme Court of Ukraine applied the rules of the FC of Ukraine regarding the division of property belonging to a former spouse on the right of shared ownership. The Supreme Court of Ukraine noted that in order to settle disputes arising from property relations between spouses, including the former, they are subject to the application of the rules of the Family Code of Ukraine. The position regarding the application the rules of the FC of Ukraine to the division of the former spouses’ property belonging to them on the right of shared ownership is confirmed also by the content of the decision of the Supreme Court of January 31, 2019, in case No. 686/23104/17 [20]. It should be noted that according to the provisions of family law, only the following property is divided: a) acquired during the marriage; b) that is the subject of the shared ownership of spouses. Property which is the personal private property of a wife, a husband, is not subject to division between them.

Types of property, which is the personal private property of a wife, husband, defined by parts 1-5 of Art. 57 of the FC of Ukraine. The court may also recognise the private property of a wife, a husband acquired by her/him during their separate residence in connection with the actual termination of a marriage (Part 6 of Art. 57 of the FC of Ukraine). For the application of the provisions of Part 6 of Art. 57 of the FC of Ukraine presence of at least the following facts is required: 1) separate residence of husband and

wife; 2) acquisition of property by the wife during separate residence; 3) the actual termination of a marriage. These facts can be confirmed, in particular, by a court decision in another case. In case if in property was invested, in addition to common funds, funds belonging to one of the spouses, the share in this property, according to the size of his/her contribution, is its personal private property (Part 7 of Art. 57 of the FC of Ukraine).

CONCLUSIONS

Thus, the study allows to formulate some conclusions. The right of shared ownership of spouses should be implemented in accordance with the requirements of Art. 65 of the FC of Ukraine, not Art. 369 of the FC of Ukraine, and therefore case law in cases of invalidation of contracts concluded by one spouse without the consent of the other, requires compliance with the provisions of family law. This conclusion also applies to the exercise of right to shared ownership of property acquired during the cohabitation of a man and a woman who live in the same family but are not married to each other or to any other marriage. Husband and wife, though, are considered co-owners of property acquired by them during the marriage, in the sense of Part 2 of Art. 372 of the CC of Ukraine, however, the provisions of Art. 70 of FC of Ukraine should be applied to property division, considering that the legal regime of their property acquired during the marriage period has not changed after the termination of the said marriage. In general, the issues raised in this article require further in-depth research in order to formulate proposals to improve the existing civil and family law and to ensure consistent case law.

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Suggested Citation: Bodnar, T.V. (2020). Some problem aspects of implementation and protection of property rights of spouses. *Journal of the National Academy of Legal Sciences of Ukraine*, 27(1), 26-38.

Submitted: 29/08/2019

Revised: 10/12/2019

Accepted: 30/01/2020