Artículo de investigación

Constitutional guarantee of the right to judicial protection in disputes concerning the invalidity of a will as grounds for the acquisition of property rights in Ukraine

Конституційна гарантія права на судовий захист у спорах щодо недійсності заповіту як підстави набуття права власності в Україні

Garantía constitucional del derecho a la protección judicial en disputas relacionadas con la invalidez de un testamento como base para la adquisición de derechos de propiedad en Ucrania

Recibido: 25 de julio del 2019 Aceptado: 22 de agosto del 2019

Written by:
Iryna Drobush[344]
https://orcid.org/0000-0002-0006-8676
Olena Olkina[345]
https://orcid.org/0000-0002-2508-1869
Tetiana Vodopian[346]
https://orcid.org/0000-0002-7482-5477
Illia But[347]
https://orcid.org/0000-0001-7887-3504

Abstract

The authors of the article have carried out research in the field of ensuring the constitutional guarantees of the right to judicial protection in disputes concerning the invalidity of a will as a basis for acquiring property rights in Ukraine. The object of the study was the public relations that result from the recognition of a valid covenant. The subject of the study was the domestic regulations that provide the rights to judicial protection in disputes about the invalidity of the will. Constitution as the main law of Ukraine in Art. 3 establishes a guarantee under which the state is charged with the duty to assert and uphold human rights and freedoms, which is its primary duty. In case of violation, non-recognition or contestation human rights, the right to protection by a court is guaranteed by the Constitution. According to Art. 55 of the Constitution, the court protects human rights and freedoms.

According to the results of the study, it was concluded that the norms of the Constitution,

Анотація

Автори статті сдійснили дослідження в сфері забезпечення конституційних гарантій права на судовий захист у спорах щодо недійсності заповіту як підстави набуття права власності в Україні. Об'єктом дослідження виступили суспільні відносини, які виникать внаслідок визнання надійсним заповіту. Предметом дослідження виступили вітчизнянні нормативно-правові акти, які забезпечують права на судовий захист у спорах щодо недійсності заповіту. Конституція як основний закон України в ст. 3 закріплює гарантію, згідно з якою на державу покладається обов'язок утвердження і забезпечення прав і свобод людини, що є її головним обов'язком. У випадку порушення, невизнання або оспорювання прав Конституцією гарантується право на захист судом. Відповідно до ст. 55 основного закону нашої держави судом захищаються права і свободи людини

[344] Doctor of Jurispridence, Associate Professor, Head of Department of State and Legal Disciplines of the National University of Ostroh Academy
[345] Ph. D., Associate Professor of Department of Constitutional Law of National University «Odesa Law Academy»
[346] Ph. D., Associate Professor of Department of Constitutional Law and Law Brunch Disciplines National University of Water and Nature Resources Use
[347] Ph. D., Associate Professor of Department of Civil Procudure of National University «Odesa Law Academy»

civil law and civil procedural legislation of Ukraine serve as the basis for a well-established generalization of jurisprudence in disputes about the invalidity of a will as a basis for acquiring property rights in Ukraine. However, the individual cases of individual courts of the national judicial system of Ukraine do not allow to claim the existence of a unified algorithm for the application of law-enforcement practice, agreed and recommended by the Supreme Court of Ukraine, which indicates the existence of possible controversial situations to resolve the problem further.

Keywords: Constitutional guarantees, judicial protection, invalid will, property right.

За результатами дослідження був зроблений висновок, що норми Конституції, цивільного та цивільного процесуального законодавства України слугують фундаментом усталеного узагальнення судової практики у спорах щодо недійсності заповіту як підстави набуття права власності в Україні. Разом із тим, поодинокі випадки судової практики окремих судів національної судової системи України не дають можливості стверджувати про існування єдиного алгоритму застосування правозастосовної практики, узгодженої і рекомендованої Верховним Судом України, що в свою чергу, свідчить про існування можливих спірних ситуацій щодо вирішення окресленої проблеми дослідження в подальшому.

Ключові слова: конституційні гарантії, судовий захист, недійсний заповіт, право власн

Resumen

Los autores del artículo han llevado a cabo investigaciones en el campo de garantizar las garantías constitucionales del derecho a la protección judicial en disputas relacionadas con la invalidez de un testamento como base para adquirir derechos de propiedad en Ucrania. El objeto del estudio fueron las relaciones públicas que resultan del reconocimiento de un pacto válido. El tema del estudio fueron las reglamentaciones nacionales que otorgan los derechos a la protección judicial en disputas sobre la invalidez del testamento. Constitución como la ley principal de Ucrania en el art. 3 establece una garantía bajo la cual el estado tiene la obligación de hacer valer y defender los derechos humanos y las libertades, que es su deber principal. En caso de violación, no reconocimiento o impugnación de los derechos humanos, el derecho a la protección de un tribunal está garantizado por la Constitución. Según el art. 55 de la Constitución, el tribunal protege los derechos humanos y las libertades. Según los resultados del estudio, se concluyó que las normas de la Constitución, el derecho civil y la legislación procesal civil de Ucrania sirven como base para una generalización bien establecida de la jurisprudencia en disputas sobre la invalidez de un testamento como base para adquiriendo derechos de propiedad en Ucrania. Sin embargo, los casos individuales de los tribunales individuales del sistema judicial nacional de Ucrania no permiten reclamar la existencia de un algoritmo unificado para la aplicación de la práctica policial, acordado y recomendado por la Corte Suprema de Ucrania, que indica la existencia de posibles situaciones controvertidas para resolver el problema aún más.

Palabras clave: Garantías constitucionales, protección judicial, testamento inválido, derecho de propiedad. ості.

Introduction

Property as an economic category accompanies human society throughout its history, except for those stages where man has not yet separated himself from nature and fulfilled his needs through simple means of possession and use. The very existence of the property, that is, the presence of a person of any property led to the need to resolve his fate after the death of the owner. Thus, there was a need to give birth to the Institute of Inheritance, which is one of the oldest institutions of civil law.

The basis for the formation of an institution of inheritance existed in the time of the original organization of society. The transfer of the deceased person's property was based on centuries-old customs and ethnic traditions that existed in the inhabitants of certain territories. The emergence of law as a regulator of relations

created the basis for consolidating the provisions on the transfer of property, property rights and obligations of the deceased to the heirs.

At various times, the law has undergone numerous modifications concerning the development of morality, society, and statehood. In the last five years, there have been significant changes in the political vector of its development in Ukraine. Moreover, consequently, these changes, in the first place, affected the demographic and economic state of our country's society. The decrease in the population of Ukraine and its impoverishment contradict the expectations of the majority of Ukrainians who have chosen the European direction of the further functioning of their country. This state of affairs is contrary to the basic task of our state, envisaged by the Constitution of Ukraine (hereinafter - the Constitution) (1994) as its basic law, which is to ensure respect for human rights. After all, every member of society must be guaranteed the opportunity to live, work, accumulate property with the idea that in the event of his death, everything acquired will go to his relatives following his will or under the law.

One of the tasks of the pro-European integration of any of the states, which now expresses the desire for EU membership, is the task of further building and strengthening the state as a legal and social one. The fundamental principles of the EU supranational legal system are the rule of law and, of course, the observance of human rights and freedoms. Therefore, the study of the constitutional guarantee of the right to judicial protection in disputes concerning the invalidity (invalidity) of a will as a basis for acquiring property rights in Ukraine in the current conditions of its functioning in the political, legal and social dimensions is certainly relevant and does not cause any doubt.

Methodology

The methodology of the study that was used in the article includes general scientific as well as special researched methods.

First of all, the dialectical allows studying judicial protection in disputes concerning the invalidity of a will.

Moreover, in the research, the method of system analysis was used. This method helps to study the issue of judicial protection in disputes concerning the invalidity of a will concerning different approached.

In addition, the comparative-legal method shows foreign experience in the provision of the constitutional guarantee of the right to judicial protection in disputes concerning the invalidity of a will.

analysis of recent research

There are many works in the field of scientific research that analyze similar relationships, but most of them relate to other constitutional principles in the hereditary law of Ukraine, such as Nelin, O. (2014), Oksanyuk, N. (2016), Pysaryeva, E. (2008), Zhelinkova, I. (2000) and others. However, as already noted, no scientific analysis of the identified problem was conducted.

Presentation of key research findings

The purpose of this article is to investigate the constitutional guarantee of the right to judicial protection in disputes concerning the invalidity of a will as a basis for acquiring property rights in Ukraine.

To achieve this goal, the following tasks were set:

- To investigate and analyze the norms of the current legislation regarding the implementation of the constitutional guarantee of the right to judicial protection in disputes concerning the invalidity of a will as a basis for acquiring property rights in Ukraine;
- Determine the specifics and procedure of implementation of this guarantee in the system of national law of Ukraine;
- To identify, on the basis of case law analysis, the current state of the problem of research in Ukraine.

Constitution as the main law of Ukraine in Art. 3 establishes a guarantee under which the state is charged with the duty to assert and uphold human rights and freedoms, which is its primary duty. The constitutional norms that provide fundamental rights and freedoms are detailed in the national legislation. And in case of violation, non-recognition or contestation human rights, the right to protection by a court is guaranteed by the Constitution. Thus, according to Art. 55 of the Constitution the court protects human rights and freedoms (1996). In addition, the contents of the above article were clarified by the Constitutional

Court of Ukraine in the decision in the case of the constitutional appeal of citizens of Protsenko Raisa Nikolaevna, Polina Petrovna Jaroshenko and other citizens regarding the official interpretation of Articles 55, 64, 124 of the Constitution of December 25, 1997 No. 9- sn. For example, one of the conclusions stated that a court cannot refuse justice if a citizen of Ukraine, a foreigner, a stateless person believes that their rights and freedoms are violated or violated, created or created obstacles to their implementation or other infringement of rights and freedoms. It is also worth noting that this right is not subject to restriction even in conditions of martial law or emergency (Article 64 of the Constitution).

As for the constitutional guarantee of the right to judicial protection in disputes concerning the invalidity of a will as a basis for acquiring property rights in Ukraine, it is, first of all, advisable to note that the principle of priority of succession by will is in force in Ukraine's succession law. This means that the inheritance by will is in the leading position, and only in its absence is it possible to inherit by law.

The significance of the transition of ownership in the manner of inheritance has been manifested in the normative legal acts that regulate relations within its boundaries. The main normative legal acts are: Constitution (1996), Family Code of Ukraine (2002), Civil Code of Ukraine (hereinafter - the CC of Ukraine) (2003), Code of Civil Procedure of Ukraine (hereinafter - CCP of Ukraine) (2004), Law of Ukraine "On Private International Law" (2005), Resolution of the Plenary Session of the Supreme Court of Ukraine No. 7 of May 30, 2008, "On jurisprudence in matters of inheritance" (hereinafter - RPSCU No. 7) (2008).

The current European integration processes in Ukraine are accompanied by the adherence to a large number of international legal instruments, including those related to inheritance, including the Conflict of Laws Regarding Forms of Wills and EU Regulation No. 650/2012 "On competence, applicable law, recognition and enforcement of decisions, adoption and enforcement of authentic inheritance documents, and the creation of a European Certificate of Succession".

According to Art. 1216 of the Civil Code of Ukraine (2004) is the inheritance of the transfer of rights and duties (inheritance) from the deceased individual (heir) to other persons (heirs). It is worth noting that a person's life is always accompanied by the existence of civil rights and obligations, both personal and property. As non-property rights are inalienable, they are terminated with the death of the person, while property rights and obligations can change their subject matter, including through inheritance.

One of the basic property rights of a person who is part of the inheritance should be considered property rights (Part 1 of Article 316 of the Civil Code of Ukraine (2003)). However, Chapter 24 of the Civil Code of Ukraine (2003) does not contain inheritance instructions as a separate way of acquiring property rights, which is a mere omission of the legislator. In this case, Part 1 of Art. 328 of the Civil Code of Ukraine (2003) establishes that ownership is acquired on grounds not prohibited by law. Since, after the death of a person, the ownership of the property that belonged to him during his life passes to other persons in the inheritance order, that is, the heirs receive the right of ownership of such property, inheritance in its essence is a way of acquiring ownership.

In the theory of civil law, the methods of acquiring property rights are divided into primary and secondary, given the nature of the emergence of such a right. The primary way, for example, is to create things.

Inheritance should be attributed to secondary (derivative) ways of acquiring ownership, the signs of which are:

- The will of the previous owner to transfer ownership of the property;
- The transfer of his duties related to this property.

This fact confirms that in the case of inheritance as a secondary way of acquiring ownership, the heir, by making a will, shows his will to transfer certain property to a particular person. In the absence of a will, the principle of inheritance enters into force as the principle of taking into account the true and permissible will of the testator (Oksanyuk, 2016). The fact is that the existence of the order of inheritance by law, which is conditioned by family ties, presupposes the permissible will of the testator to transfer his property in the event of death to those persons. Refusal to write a will, invalidate it or leave some of the property outside the testamentary orders indicate that the heir agrees to transfer the rights to his property to the heirs designated by the state in civil law, that is, to the heirs by law, or if they

do not exist – to the territorial community in order to recognize the heritage of the dead.

Inheritance, while at the same time being the basis for the acquisition of property rights for heirs, is the realization of the power to dispose of the heir, which is manifested in the decision of the further fate of property (things).

The original way of acquiring ownership is characteristic of property that is not newly created, "clean", that is, in one way or another it is accompanied by certain rights related to the ownership that have arisen from the previous owner and pass to the next. Part 4 of Art. 319 of the CC of Ukraine establishes that the property obliges. Therefore, the duty to respect the boundaries and limitations of property rights are unconditionally transferred by succession.

Inheritance by will is directly based on the prescription of the Constitution (Part 1 of Article 41), according to which everyone has the right to own, use and dispose of his property, the results of his intellectual, creative activity.

The will is the order of an individual in the event of his death (Art. 1233 of the CC of Ukraine). A person has the right to inherit the rights and obligations that belong to this person at the time of making the will, as well as those rights and obligations that may belong to him in the future. The validity of the will is determined on the day the inheritance is opened (Pysaryeva, 2008).

A will is inherently a one-sided transaction, that is, an action taken by a testator to arise between him and the heirs of a hereditary relationship. One-sided, this is because only one party is burdened with rights and obligations, while the other can only either accept the offer or become the subject of the hereditary relationship. A one-sided transaction may create obligations for other persons only in cases established by law or by agreement with these persons (paragraph 3 of part 3 of article 202 of the CC of Ukraine). The will remain a one-sided transaction even if it establishes a testamentary refusal or bequest.

As mentioned earlier, only an individual with full civilian capacity can be the testator. The experience of developed foreign countries, which differently interpret the age requirement of active testability is interesting. In Germany, 16-year-olds have the right to make a will. In France, except for adults, a testament can be made by minors who have reached the age of 16 but only about half of their property. In Georgia (USA), 14-year-olds have the right to make a will (Nelin, 2014).

There is no single scientific approach to addressing the age-old criterion of active testability. Thus, I. Zhelinkova notes that if minors have the right to dispose of their earnings, scholarships and other income, then, accordingly, the transfer of such property on will is one of the ways of such disposal (Zhelinkova, 2000).

Ukraine is in the right position, linking active testamentary capacity not with age, but with the capacity of a person. However, there are problems with the identification of persons who are disabled or incapacitated, so the Ukrainian legislator should consider creating a register of disabled persons and incapacitated persons, or separately in the electronic Register of court decisions to develop the possibility to find the necessary court decisions regarding the limitation or deprivation of information. At the same time, access to such registers should be allowed only to a certain category of persons, first of all, notaries. Fixing the status of disabled or incapacitated persons will save time and material resources in witnessing the will, and will also reduce the possibility of questioning its validity.

Inheritance by will as a means of acquiring ownership is possible only if the internal and external requirements of the will are met. The internal ones include the legality of the content of the will, that is, the testamentary orders and the external ones include the observance of the established form and the availability of testability.

According to Art. 1247 of the CC of Ukraine, the will must be made in writing, indicating the place and time of its drafting.

In addition, the will must be personally signed by the testator or, in the case of illness or physical disability, by another person, on his or her behalf, certified by a notary or other authorized person, and registered in the Hereditary Register.

Cases, where the will is certified by another person, are provided by the CC of Ukraine (Articles 1251, 1252 of the CC of Ukraine).

The obligatory procedure of registration of a will, which is certified by an authorized person, except for the notary and the official of the local self-government body, is his / her witness certificate.

The property of the heirs under the will is questioned if there are grounds for the invalidity of the will or grounds for its invalidation, since such cases are equated with the absence of a testamentary order, and therefore a groundless acquisition of ownership.

A will drawn up by a person who did not have the right to do so, as well as a will made in violation of the requirements regarding its form and certificate, is void (Part 1 of Article 1257 of the CC of Ukraine).

The Ukrainian legislator does not specify the cases when the will is void, therefore, analyzing the mentioned provisions, we can conclude that the will is invalid:

- Made by a person under 18 years of age or not emancipated;
- Drawn up by a disabled or incapacitated person;
- Made through a representative;
- Is not done in writing;
- Does not contain instructions on the time and place of the act
- Without the personal signature of the testator or in established cases without the signature of the proxy;
- Certified by a person without authority;
- Certified by an authorized person with a violation of the order.

On the claim of the interested person, the court will invalidate the will if it is established that the will of the testator was not free and did not correspond to his will (Part 2 of Art. 1257 of the CC of Ukraine).

As evidenced by the case law, the most common grounds for appealing to a court for recognition of a will are a violation of the rules of the current legislation on the procedure for drawing up and certifying a will. In this case, the right to file a lawsuit is seen as a subjective right of citizens, which directly follows from the law, to apply to the court for protection of the violated, disputed right. It is worth noting that the claim as a means of judicial protection of subjective rights and legitimate interests belongs to the number of fundamental categories of the Ukrainian legal system. The right to file a claim is specified in the rules of the CPC of Ukraine. According to pp. 1, 2 art. 4 of the CPC of Ukraine, every person has the right, following the procedure established by this Code, to appeal to the court for the protection of their violated, unrecognized or disputed rights, freedoms or legitimate interests.

The analysis of the case-law cited below on the topic of research indicates the ambiguous nature of its application by the courts in our country. Thus, the person filed a claim for recognition of the will void, alleging that such a will was certified by the acting notary public office, that is, a person who is not explicitly specified in the legislation as having the right to certify the will. The decision of the Primorsky District Court of Odessa denied the plaintiff the satisfaction of the claim since the acting notary public office notary receives all the rights and obligations of the notary in the presence of a certificate of his right to engage in such activities (Decision № 75389717 of the Primorsky District Court of Odessa of July 11, 2018, 2018).

The wills are void even after the death of the person who made them under art. 17 of RPSCU No. 7, but there are exceptions to the general rule. The case law contains the case when the wife filed a lawsuit against her husband for declaring their joint marriage covenant null and void, as the notary refused to cancel the said covenant, alleging that the will incorrectly state the identification number according to the state register of individual taxpayers of the taxpayers who signed the will. From the plaintiff's point of view, the will is executed in violation of the current legislation, so it must be declared void. By the decision of the Kozyatynsky District Court of Vinnytsia region of 22.12.14, on the above grounds, referring to Art. 1257 of the Civil Code of Ukraine, was declared void by the spouses for the lives of both of the spouses who made it.

Conclusions

Thus, as for today, the norms of the Constitution, civil legislation and civil procedural legislation of Ukraine serve as the basis for a well-established generalization of jurisprudence in disputes concerning the invalidity of a will as a basis for acquiring property rights in Ukraine. This is reflected in PSPSU № 7, the guidelines of which were examined above, which provide for the right of heirs, as well as any interested person to file a suit in civil proceedings in court for the protection of their violated or disputed rights. However, such an appeal is possible only after the death of the testator. However, the individual cases of individual courts of the national judicial system of Ukraine do not allow to confirm the existence of a unified algorithm for the application of law enforcement practice, agreed and recommended by the Supreme Court of Ukraine. And this, in turn, indicates the

existence of possible controversial situations to solve the identified problem of the study in the future.

References

Civil Code of Ukraine. (2003). *Verkhovna Rada of Ukraine.* Retrieved from http://zakon4.rada.gov.ua/laws/show/435-15.

Civil Procedure Code of Ukraine. (2004). *Verkhovna Rada of Ukraine.* Retrieved from https://zakon.rada.gov.ua/laws/show/1618-15.

Constitution of Ukraine. (1996). *Verkhovna Rada of Ukraine*. Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80.

Decision № 42069908 of Koziatyn City District Court of Vinnytsia Region of December 22, 2014, in Case No. 133/3583/14-c. (2014). *The united state register of court decisions.* Retrieved from http://www.reyestr.court.gov.ua/Review/42069908.

Decision № 75389717 of the Primorsky District Court of Odessa of July 11, 2018 in Case No. 522/11272/16. (2018). *The united state register of court decisions.* Retrieved from http://www.reyestr.court.gov.ua/Review/75389717.

Decisions of the Constitutional Court of Ukraine in the case of the constitutional petition of citizens of Protsenko Raisa Nikolaevna, Yaroshenko Polina Petrovna and other citizens regarding the official interpretation of Articles 55, 64, 124 of the Constitution of Ukraine (the case of appeals of residents of the city of Zhovti Vody) (1997). *Verkhovna Rada of Ukraine*. Retrieved from https://zakon3.rada.gov.ua/laws/show/v009p710-97.

Family Code of Ukraine. (2002). *Verkhovna Rada of Ukraine.* Retrieved from https://zakon.rada.gov.ua/laws/show/2947-14.

Law of Ukraine "On Private International Law". (2005). *Verkhovna Rada of Ukraine.* Retrieved from https://zakon.rada.gov.ua/laws/show/2709-15.

Nelin, O. (2014). Features of inheritance in Ukraine during the stay in the Russian and Austro-Hungarian empires in the XIX-early XX centuries: historical and legal aspect. Legal Ukraine, 9, 4-9.

Oksanyuk, N. (2016). *Principles of Inheritance in Civil Law of Ukraine*. Khmelnitsky.

Pysaryeva, E. (2008). Testament as the basis for the relationship between the testator and the heirs: some aspects of legal regulation. Law Forum, 2, 399-404. Retrieved from http://www.irbis-nbuv.gov.ua/cgi-bin/irbis_nbuv/cgiirbis_64.exe?I21DBN=LINK&P21DBN=UJRN&Z21ID=&S21REF=10&S21CNR=20&S21STN=1&S21FMT=ASP_meta&C21COM=S&2_S21P03=FILA=&2_S21STR=FP_index.htm_2008_2_55.

Resolution of the Plenary Session of the Supreme Court of Ukraine No. 7 of May 30, 2008, "On jurisprudence in matters of inheritance". (2008). *Verkhovna Rada of Ukraine.* Retrieved from https://zakon.rada.gov.ua/laws/show/v0007700-08.

Zhelinkova, I. (2000). *Problems of legal regime of property of family members.* Kharkiv: Yaroslav Mudryi National Law University.