

Protection in Inheritance Relationships: Theoretical Issue

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This article explores the theoretical construction of civil rights protection in hereditary legal relations. Authors substantiate the use of both general and special ways of protection in the field of inheritance. Taking into account the requirements of judicial practice, the peculiarities of general protection methods in their extrapolation to inheritance law (recognition of rights, vindication of inherited property, etc.).

Keywords: inheritance law; protection of civil rights; ways of protection; hereditary relationship; heirs; invalidity of the will; theory of hereditary legal relations; methodology.

Paveldėjimo santykių apsauga: teoriniai iššūkiai

Straipsnyje nagrinėjami teoriniai civilinių teisių apsaugos aspektai paveldėjimo teisiniuose santykiuose. Autoriai pagrindžia bendrųjų ir specialiųjų gynybos būdų taikymą paveldėjimo srityje. Atsižvelgiama į teismų praktikos reikalavimus, bendrųjų gynybos būdų ypatumus juos taikant paveldėjimo teisės kontekste (teisių pripažinimas, paveldėto turto vindikacija ir kt.).

Pagrindiniai žodžiai: paveldėjimo teisė; civilinių teisių apsauga; gynybos būdai; paveldėjimo santykiai; įpėdiniai; testamentas negaliojimas; paveldėjimo teisių santykių teorija; metodologija.

Introduction

Every participant of civil relations has the opportunity to protect their rights by appealing to the court or other jurisdictional bodies as well as resorting to other means of protection, including self-protection. Thus, we consider the right to judicial protection to be merely an element of the generic category of the

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right to defense. The basis and guarantee of such right is the Constitution of Ukraine, first of all Art. 55, which contains a general rule about the right of everyone to appeal to the court, if his rights or freedoms are violated or infringed, obstacles to their realization are created or there is any other infringement of rights and freedoms. At the same time, general constitutional norms on the right to protection are in a logical connection with the substantive (Article 1.138 of the Civil Code of the Republic of Lithuania, Article 16 of the Civil Code of Ukraine) and procedural norms, which predetermines the distinction between substantive and procedural aspects of protection. The legislative model of protection of subjective rights, contains the grounds, methods and forms of protection. The constructions of the Ukrainian and Lithuanian legislation are quite similar, have a common orientation and purpose, and the list of methods of protection of civil rights determined by them is not exhaustive. The specificity of such general methods is primarily in the fact that on its basis detailed methods are formed in certain areas of civil law, including inheritance law. The theoretical construction of the mechanism of protection of civil rights and interests should include in addition to the general methods of protection also special methods, the application of which is conditioned by the specifics of a particular sub-branch of civil law.

Analyzed protection methods in the scope of other civil relations (obligation, corporative, property, intellectual property, exclusive rights, etc.) in certain moments bypass the heirs as participants in inherited legal relations, and this area in general. In some cases, the legislator deprives persons to use certain methods of protecting civil rights, which indicates the truncated nature of the right to protection in the area of inheritance. Of course, the mentioned subjects can use the same means of protection as participants of other types of civil-law relations, but for effective protection this is not always enough. In addition, there are frequent situations where the ability of heirs to use certain methods of protection is limited by both the prescriptions of legal norms and the legal constructions of the relevant methods. At the same time, protection in inheritance legal relations is essential. As Friedstein wrote: «In the institute of inheritance the right of private property is manifested in the most vivid way; it is there that it receives its most consistent and complete realization» (Friedstein, 1903, p. 3–5). Therefore, protection of inheritance rights in its value and significance is the protection of the ownership right. But it is not possible to apply methods of protection of the ownership rights to inheritance legal relations to the full extent.

It is possible to speak about protection in inheritance legal relations only from the moment of their occurrence, which is connected with the legal fact of the inheritance opening.

From the moment of the inheritance opening, heirs as subjects of inheritance legal relations and bearers of the relevant subjective right acquire the right to protection, which is realized within the framework of inheritance legal relations. Opening of inheritance gives rise to inheritance legal relations, leads to the emergence of rights to inheritance, in the first place the right to accept or refuse acceptance of inheritance, and as noted by researchers, it means that to the rights and obligations of the testator the rules of inheritance law apply. From this follows the existence of the right to protection of inheritance rights.

Professor L. N. Zagurskiy, a famous representative of the Kharkiv civilistic school, wrote about the legal fiction of inheritance acquisition (Zagurskiy, 1899, p. 140). The heir “is a representative of the legal property personality of the deceased testator from the moment of the latter’s death, even if the heir acquired it later; in the latter case the inheritance itself represents the personality of the testator before the moment of its acquisition by the heir” (Zagurskiy, 1899, p. 133–134). As a consequence of such a fiction the heir is endowed with ways of protection of his inheritance right which are realized in corresponding lawsuits. Realization of protection in inheritance legal relations is possible in three directions:

1. Protection of inherited property rights, when third parties, while recognizing inheritance rights, nevertheless deny their possession of the thing which is part of the inheritance, or their debt to the testator.
2. As a representative of the property personality of the testator, the heir defends the property rights inherited by him, on the same grounds as his own rights, if the third person recognizes the inherited rights of the plaintiff, but does not recognize his possession of the thing belonging to the inheritance, or his debt to the testator.
3. Heir's right to file inheritance lawsuits, including petitioner's and possessory lawsuits, by which he protects his rights to the entire inheritance, if the third party does not recognize inheritance rights, therefore not returning the thing which is part of the estate, or not paying his debts, without denying either his possession or his debt. This group includes property claims for recovery of inheritance, by which the plaintiff seeks recognition of his right to the whole inheritance, if he is the sole heir, or to a part of it, if there are coheirs, and thereupon demands that his inheritance or part of it, or things held by the defendant, be returned to him, and is brought against him who disputes his right of succession, holding things as heir or without any title (Zagursky, 1899, p. 140). In the first place there are property claims for vindication of inheritance (*hereditatis petitio*) from unlawful possession. The plaintiff is the heir, the defendant is the one who attributes to himself the right of inheritance or owns without indicating any basis for his possession (Grimm, 2003, p. 203). It is characteristic that the subject of the lawsuit was the whole inheritance or part of it, but not the individual items included in the inheritance. This not only emphasizes the special legal position of the inheritance but also makes it possible to see the difference between *hereditatis petitio* and the vindication claim.
4. The heir has other post-association means of protecting his or her provisional right of inheritance. These claims provided an opportunity to protect possession, obviously from the moment of acceptance of the inheritance and until the registration of inheritance rights.

As we see, civil science has outlined a wide range of application of the mechanism of protection in inheritance legal relations.

It is impossible to deny the effectiveness of such an approach in modern realities.

It appears that depending on the subjective composition, protection in inheritance relations involves the separation of protection of the rights of heirs and protection of the rights and interests of other persons (creditors, transferees, etc.).

Analysis of the mechanism for protecting the rights of inheritance legal relations may be conducted in at least three directions:

- Differentiation the subject of protection the rights of heirs and other persons;
- Determination the specifics of general protection methods as applied to the subjects of inheritance legal relations;
- Special ways of protecting the rights of heirs.

The subject of protection is a property or non-property right in the event of its violation, non-recognition or contestation or an interest that does not contradict the general principles of civil law. At the same time, heirs as subjects of inheritance legal relations may protect both rights and legally protected interests.

Means of protection should be considered legally enshrined substantive legal measures through which the restoration (recognition) of violated or contested rights, as well as the impact on the property and nonproperty sphere of the person who allowed the violation.

The heir as a subject of the right to protection, determines his behavior in the exercise of this right independently, but cannot ignore the content of legal relations, their dynamics, the state of subjective

right or interest as the subject of protection. Based on these criteria, the specified person determines the content of his actions, that is, selects a method of protection.

Assessment of the legal list as exhaustive or no exhaustive is ambiguous. There are several approaches to this issue in judicial practice – from the „liberal“ one, which allows the no exhaustive nature of the list and the possibility of choosing (establishing) a method of protection at the discretion of the participants of legal relations, to the „conservative“ one, according to which the protection of civil rights by the court is carried out only by the method established by the Civil Code or directly provided by law. There is no reason to talk about an exhaustive list of methods of protection of subjective rights. The specified list is not exhaustive and the Civil Code of Ukraine allows the use of other methods of protection stipulated by law or by contract (part 2 of Article 16 of the Civil Code of Ukraine), with the possibility of adjusting the method of protection by the court in accordance with the stated claims.

It appears that by establishing a list of ways to protect civil rights and interests, the legislator sought to create not a monolithic legal construction, but rather a general model, the contours of the mechanism of protection.

In inheritance legal relations the range of methods of protection is quite broad and due to various factors. First of all we should name the peculiarities of inheritance legal relations themselves – its continuing nature, the stage-by-stage dynamics, the time-limited nature of the status of its participants – heirs, etc.

Depending on the specific stage of the inheritance legal relations dynamics, there are protection methods that are applied before the heirs accept the inheritance and after the fact. So, at the first stage heirs are entitled to apply such methods that are aimed at protecting the inheritance, in particular the adoption of measures to protect the inherited property (Art. 1283 Civil Code of Ukraine), the management of it (Art. 1285 Civil Code of Ukraine), etc. At the same stage the admissible means of protection carried out by:

- A) the recognition of the heirs;
- B) the removal of the right of inheritance of other persons (Art. 1224 Civil Code of Ukraine);
- C) changing the order of succession by law (Art. 1259 Civil Code of Ukraine), etc.

After the acceptance of the inheritance the heir has the right to submit claims for protection of his rights to inheritance, registration of inheritance rights. For example, the heir who accepted the inheritance, but not having the opportunity to formalize inheritance rights notarially, may, after the expiration of the period for its acceptance, claim for recognition of ownership rights by inheritance. Although the rules of the Civil Code do not mention such a method of acquisition of inheritance, but in practice such a method is widely used. Recently, there is a tendency when the judicial practice expands the use of recognition of right as a method of protection in inheritance legal relations, allowing recognition of the right of lifetime inheritable possession of a land plot (decision of the Grand Chamber of the Supreme Court of 20.11.2019 on case # 368/54/17), recognition of the right to complete the privatization of land plot (share) by inheritance (decision of the Supreme Court of 30.06.2020 on case # 623/633/17). Hence, there is a question about the grounds and limits of application as recognition of the right, as applied to inherited legal relations, which requires additional study.

There should also be identified methods of protection, and the possibility of use is conditioned by the type of inheritance – by will or by law. Thus, the heirs under the will may demand the interpretation of the will by the court in the presence of a dispute between the heirs (Art. 1256 Civil Code of Ukraine), the heirs under the law may apply to the court to change the priority of inheritance rights (Part 2 of Art. 1259 Civil Code).

Widely applicable in the sphere of hereditary legal relations is such a method of protection as the recognition of invalidity (transactions, actions, documents of right, etc.). So, the heirs of both the law and the will can go to court with claims for invalid wills (Art. 1257 Civil Code of Ukraine) and testamentary dispositions of the bank (financial institution), certificates of right to inheritance (Art. 1301 Civil Code of Ukraine), unilateral transactions in respect of the inheritance performed by other heirs – applications for acceptance of the inheritance (Part 5 of Art. 1268, 1269 Civil Code of Ukraine), the withdrawal of the application for acceptance of the inheritance (Part 5 of Art. 1269 Civil Code of Ukraine), the withdrawal of the refusal to accept the inheritance (Part 5 Art. 1274 Civil Code of Ukraine). The Lithuanian Civil Code, in contrast to the Ukrainian Civil Code, outlines a special set of subjects of lawsuits for recognition of the will as invalid – such claims may be filed only by the heirs under law or the heirs under the will, who would have the right to inherit if the will or its separate parts were declared invalid. This provision emphasizes the peculiarities of invalidity as a method of protection in hereditary legal relations.

In judicial practice on inheritance cases there are often disputes about the invalidation of wills due to defects or lack of wills, including cases where the will is signed by another person, both with and without legal grounds (functions of the hand-applicant). In practice, this creates problems, there is a need for post-mortem forensic handwriting expertise on the authenticity of the signature of the testator on the will. Under the conditions of digital dominance it is rather difficult to get free samples of testator's handwriting, people stopped writing letters, rarely keep diaries, signatures on payrolls and pensions are in the past. Naturally, under the conditions of hostilities in Ukraine, the situation is complicated many times over. Of course, school notebooks or love letters can be found, but they are not suitable for expert examination because of their age. Therefore, the problem of personal writing and signing a will (and any other civil law document, including the contract) requires a solution. For example, article 490 of the new Civil Code of China (in effect since January 1, 2021) stipulates that signing a contract can be done by putting a fingerprint on it. The Civil Code of China provides that a contract in the form of a separate written document is concluded from the moment of signing, stamping or fingerprinting by the parties. Three options are allowed – seal, signature, fingerprint, each of which is possible for the conclusion of a contract. This method of identifying the signatory is generally noteworthy, although there may be some reservations. For example, is it acceptable to use an artificial hand to sign? And it is not a prosthetic, scientists in Italy and Sweden have developed a robotic artificial hand capable of „feeling“. The first patient who lost his right hand due to illness can now control the movements of the mechanical fingers and feel the reaction of the object. The finger movements are controlled consciously, the movements of the mechanical fingers are transmitted to the patient's brain, so that he feels them and receives a feedback signal (Kaku, 2019, p. 216–217). As we can see, the form of the will, its digital format, acts in connection with the identification of the testator's identity.

The subject of invalidity may be agreements concluded by heirs, in particular agreements on changing the order of succession by law (part 1 of Art. 1259 of the Civil Code of Ukraine), changing the size of the share of heirs in the inheritance estate (parts 2, 3 of Art. 1267 of the Civil Code of Ukraine), on division of inheritance, on the allocation of the heir's share in kind, on management of inheritance (Art. 1285 of the Civil Code). The subject of invalidity may be the agreed actions of the heirs, which are not contracts. For example, the consent of the heirs who accepted the inheritance, the heirs who missed the relevant period, to submit an application for acceptance of the inheritance (part 2 of Art. 1272 of the Civil Code of Ukraine).

At the same time in judicial practice on cases of inheritance the recognition of a transaction as invalid competes with other methods of protection of rights, in particular with a vindication claim. If

we proceed from the fact that plaintiffs in a vindication claim may be not only owners, but also persons who consider themselves owners, the question arises about the protection of heirs' rights to inheritance from the claims of other persons. Can the heirs who accepted the inheritance be vindicants? So B., being single, left a will for her own apartment in favor of his girlfriend C. The latter, having accepted the inheritance in the prescribed manner, went to the notary for registration of inheritance rights, but was denied. The notary's decision was based on the fact that B. had disposed of the apartment during her lifetime by signing a sales contract with M., who in turn sold the apartment to T. K. went to court, which found that the power of attorney was not issued on behalf of B., and had been forged by unidentified persons. That is, the alienation of the disputed apartment was made by a nonowner. However, the Court rejected the claim of the heiress to seize the apartment from illegal ownership, because under the law (Art. 387 of the Civil Code of Ukraine), the right to bring vindication claims has only the owner, and V. did not become the owner of the apartment. The appellate court also agreed with this decision. We think this approach is wrong, because the claim for seizure of property may be protected not only by the right of ownership but also by another right, including the right to inheritance. All the more so, as we have already indicated, lawsuits by heirs for the return of inheritance were known even in Roman law.

The rights of heirs may also be protected by means changes such as in legal relations. This protection is realized in claims for the elimination of the right to inherit (Art. 1224 Civil Code of Ukraine), a change in the priority of inheritance by law (Art. 1259 Civil Code of Ukraine), reduction by the court the size of the mandatory portion (paragraph 2 part 1 of Art. 1241 Civil Code of Ukraine), etc.

Civil legislation of Ukraine contains a rule, according to which the accepted inheritance is recognized to belong to the heir from the day of opening of the inheritance, regardless of the time of its acceptance (part 5 of Art. 1268 Civil Code of Ukraine). It is obvious that we are talking about the emergence of the heir's subjective right to inherit, but the content of this right the legislator does not disclose. It seems to us that the right of the heirs who accepted the inheritance has a proprietary nature, close in content to the possession, but not identical to the right of ownership. The right of heirs to inheritance is certainly subject to protection in case of violation, contestation or nonrecognition. However, the legislator does not specify the ways to protect this right, which causes certain difficulties in practice.

Ukrainian legislation gives priority rights to certain categories of heirs to the inherited property, such as the preferential right to the allocation in kind of the usual household items (Art. 1279 Civil Code of Ukraine).

However, the civil legislation does not provide any ways in which the heir's preemptive right can be protected. Obviously, this can only be about compensation for losses caused to the heir, which somewhat restricts the ability of subjects to protect their preferential rights, which have an organizational component.

Heirs and other persons have the right to apply to a notary public with a statement to take measures to protect their inheritance rights by implementing actions to protect the inherited property (Art. 1283 Civil Code of Ukraine). Failure to take appropriate measures by the notary, and in localities where there are no notaries – by the local authorities, may result in violation of the rights of individual heirs, the loss of inherited property. In particular, heirs who have the right to a compulsory share in the inheritance may suffer. It should be noted that legislation unreasonably narrows the scope of application of measures to protect the inherited property. Thus, according to Art. 1283 Civil Code of Ukraine protection of inherited property continues only until the expiration of the period specified for acceptance of the inheritance. We think such restrictions are unreasonable, protection of inherited property may continue until the registration of inheritance rights. In addition, the legislator does not provide a possibility of appealing against the refusal of the notary public to take measures to protect the inherited property,

which is also not entirely correct. In general it should be noted that the potential of the notary public in terms of protection of inheritance rights and inheritance is not used to the fullest extent.

The mass of inheritance, as an object of universal succession, includes both rights and obligations of the testator. Rights form an asset, and obligations form a liability. Accordingly, inheritance means simultaneous succession in all rights and all obligations or (if there are several heirs) succession in a certain part of rights and in the corresponding share of obligations.

The focus of inheritance on expanding the material base of heirs predetermines the civil law provision that an heir cannot acquire obligations greater than those that can be fulfilled at the expense of the value of inherited property. The legislative embodiment of this provision was the rule of Part 1 of Art. 1282 of the Civil Code of Ukraine under which the heirs are obliged to satisfy the claims of creditors in full, but within the value of the property received by inheritance. This responsibility of the heirs of the Civil Code of Ukraine is not joint and several. When imposing liability on the heirs of the obligations of the testator, the legislator allowed the use of both the general method of protection – collection of debt from the heirs of the creditor, and a special way – foreclosure on the property which was transferred to the heirs in kind (Clause 2 para. 2 of Art. 1282 Civil Code of Ukraine). At the same time, in judicial practice the approach has been established that the choice of method of protection is at the discretion of the creditor.

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Protection in Inheritance Relationships: Theoretical Issue

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S u m m a r y

The article discusses the general and special remedies in inheritance relations. The authors categorise these remedies according to the particularities of their implementation. The article further demonstrates the distinction between the subject matter of protection of the rights of heirs and that of other persons, identifies the specifics of the general methods of protection applicable to the subjects of legal relations of inheritance, and distinguishes the special methods of protection of the rights of heirs. The authors point out that the continuing nature of the inheritance relationship, the acceptance of the inheritance, the temporal limitation of the legal status of the heirs and other features of the inheritance relationship imply specific features of the application of the above-mentioned remedies. Accordingly, a brief discussion is given to some of the particular problems of these remedies, such as the use of vindication actions in the context of succession, the validity of wills, and other issues.

Paveldėjimo santykių apsauga: teoriniai iššūkiai

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S a n t r a u k a

Straipsnyje aptariami bendrieji ir specialieji teisių gynimo būdai paveldėjimo santykiuose. Autoriai išskiria šių teisių gynimo būdų kategorijas ir jas suskirsto pagal teisių gynimo būdų įgyvendinimo ypatumus. Straipsnyje apibūdinama atskirtis tarp paveldėtojų ir kitų asmenų teisių apsaugos dalyko, nustatoma bendrųjų apsaugos būdų, taikomų paveldėjimo teisinių santykių subjektams, specifika ir išskiriami specialūs ipėdinių teisių apsaugos būdai. Autoriai nurodo, kad tęstinis paveldėjimo santykių pobūdis, palikimo priėmimas, paveldėtojų teisinio statuso ribotumas laiko atžvilgiu ir kiti paveldėjimo santykiams būdingi požymiai suponuoja minėtų teisių gynimo būdų taikymo ypatumus. Atitinkamai trumpai aptariamoms tam tikros šių teisių gynimo būdų problemoms, kaip antai vindikacinio ieškinio naudojimas esant paveldėjimo santykiams, testamento galiojimo klausimai ir kita.

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