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Tamara Kashperska,
Candidate of Juridical Sciences, Judge at the Kyiv Court of Appeal, 2A, Solomianska street, Kyiv, Ukraine, postal code 03110, cesarevna@ukr.net
ORCID: *orcid.org/0000-0002-6104-3632*

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SUBJECT-MATTER JURISDICTION AND COGNISANCE OF APPLICATIONS FOR ESTABLISHING FACTS RELEVANT TO PROTECTION OF FAMILY RIGHTS AND INTERESTS

Abstract. ***Purpose.*** The purpose of the article is to clarify the subject-matter jurisdiction and cognisance of applications for establishing facts relevant to the protection of family rights and interests. ***Results.*** It is emphasised that cases of establishing facts relevant to the protection of family rights and interests are under the civil jurisdiction of the court on the ground of a direct indication of the law. However, unlike other cases of separate proceedings, such as recognition of a natural person as missing or declaration of his/her death, recognition of a natural person as incapacitated or partially incapacitated, etc., which are within the exclusive civil jurisdiction of the court, cases on establishing legally relevant facts are considered in court, provided that the law does not determine another procedure for their establishment. This is due to the lack of the judicial or administrative procedure, directly provided by law, for establishing all legal facts in the absence or impossibility of obtaining the necessary documents. There are no conditions for consideration in civil proceedings of cases on establishing the fact of a single household of a man and a woman without marriage, on establishing the fact of kinship between natural persons, on establishing the fact of paternity (maternity) by the civil procedure and family legislation of Ukraine, as well as no other bodies authorised to consider such cases. Therefore, the consideration of these cases is the exclusive civil jurisdiction of the court. ***Conclusions.*** It is concluded that the consideration of applications for establishing facts relevant to the protection of family rights and interests is the exclusive civil jurisdiction of the court, except for applications for establishing the facts of registration of marriage, divorce, adoption, which are under the subject-matter jurisdiction of the court in compliance with the conditions specified in the law. At the same time, a specific court authorised to consider applications for establishing facts relevant to the protection of family rights and interests is determined according to the rules of exclusive territorial cognisance, and in the presence of the conditions provided for in Part 2 of Article 257 of the Civil Procedure Code of Ukraine – cognisance by the decision of a higher court.

Key words: family rights and interests, subject-matter jurisdiction, court jurisdiction.

1. Introduction

According to Article 124 of the Constitution of Ukraine, justice in Ukraine shall be administered exclusively by the courts: Constitutional Court of Ukraine and courts of general jurisdiction. The jurisdiction of the courts shall extend to all legal disputes arising in the state. There are no questions about the scope of powers of the Constitutional Court of Ukraine, as it is the only body of constitutional jurisdiction in our country and decides on the compliance of laws and other legal regulations with the Constitution of Ukraine, gives official interpretation of its provisions and laws of Ukraine. The system of courts of general jurisdiction is quite extensive and is based on the principles of territoriality, specialisation and instance. It consists of local courts, courts of appeal, high specialised courts and the Supreme Court of Ukraine) (Bychkova, 2013).

Due to the branching of the judicial system of Ukraine, as well as the specifics of consideration and resolution of certain categories of civil cases, which include, inter alia, cases on the establishment of facts relevant to the protection of family rights and interests, the legislation provides for special rules that determine

the civil jurisdiction and cognisance of such cases.

2. The importance of civil jurisdiction

The concept of 'jurisdiction' comes from the Latin *jurisdictio*, which literally means 'one who speaks about law' (Yefimov, 2015).

According to O. Yefimov, the essence of this concept is not in the literal translation, but in the meaning it has received in the course of human development: 'the one who is allowed to speak about the law'. That is, this is the person authorised by law to apply the provisions of law to resolve certain issues (Yefimov, 2015).

In the legal literature, judicial jurisdiction is considered in a narrow and broad sense.

D.M. Shadura, advocating the perspective of V.V. Komarov (Komarov, Tertyshnikov, Barankova, 2008), considers judicial jurisdiction in a broad sense as a system of four constituent elements: functions of the judiciary; subject matter of jurisdiction; legal powers; procedural nature of judicial activity. The scientists argue that criteria for delimitation of judicial jurisdiction are: a) the nature of disputed legal relations (subject criterion) and b) their legal competence (Shadura, 2008).

Furthermore, the term *pidvidomchict* 'subject-matter jurisdiction,' which has the Russian origin, is more often used in legal regulations. For example, A. O. Vlasov, pointing to the Russian origin of this term, believes that it means 'to bring under *vidomstvo* 'jurisdiction'', i.e., to introduce a legal issue (case) into the system of institutions serving a certain state branch (Vlasov, Artamonova, Vlasova, 2003).

On this basis, some authors equate civil jurisdiction and subject-matter jurisdiction cognisance of civil cases (Yefimov, 2015), some, on the contrary, advocate the perspective according to which civil jurisdiction and subject-matter jurisdiction of civil cases are different legal categories (Bychkova, Biriukov, Bobryk, 2009).

Regarding the correlation of civil jurisdiction and subject-matter jurisdiction of civil cases, we advocate the perspective of S.S. Bychkova, according to which, if judicial jurisdiction helps delimit the subject-matter competence between different courts and sections of the judicial system, then subject-matter jurisdiction determines the property of a court case to fall under the jurisdiction of the court, and not another jurisdictional body (Bychkova, 2013).

Therefore, the importance of civil jurisdiction is that it helps the state perform its tasks and functions through the system of bodies established for this purpose, the totality of which for a certain type of activity is called a branch. The provisions of civil jurisdiction are designed not only to delimit the powers of different jurisdictional bodies, but also to determine the very procedure for exercising these powers (Yefimov, 2015).

It should be noted that cases of establishing facts relevant to the protection of family rights and interests are under the civil jurisdiction of the court on the ground of a direct indication of the law (Part 1 of Article 256 of the Civil Procedure Code of Ukraine). However, unlike other cases of separate proceedings, such as recognition of a natural person as missing or declaration of his/her death, recognition of a natural person as incapacitated or partially incapacitated, etc., which are within the exclusive civil jurisdiction of the court, cases on establishing legally relevant facts are considered in court, provided that the law does not determine another procedure for their establishment. This is due to the lack of the judicial or administrative procedure, directly provided by law, for establishing all legal facts in the absence or impossibility of obtaining the necessary documents.

3. Features of civil proceedings

Depending on the possibility established by law to consider and resolve a particular civil case by only one jurisdictional body or several ones, a distinction is made between exclusive (exclusive, single, peremptory) and multiple (numerous) subject-matter jurisdiction of civil cases (Bychkova, Biriukov, Bobryk, 2009).

In case of exclusive subject-matter jurisdiction, the consideration and resolution of a separate civil case falls within the competence of only one jurisdictional body.

There are no conditions for consideration in civil proceedings of cases on establishing the fact of a single household of a man and a woman without marriage, on establishing the fact of kinship between natural persons, on establishing the fact of paternity (maternity) by the civil procedure and family legislation of Ukraine, as well as no other bodies authorised to consider such cases. Therefore, the consideration of these cases is the exclusive civil jurisdiction of the court.

In case of multiple subject-matter jurisdiction, the consideration and resolution of individual civil cases falls within the competence of several jurisdictional bodies. In turn, depending on the method of choosing the jurisdictional body that shall resolve a civil case, multiple subject-matter jurisdiction is divided into contractual, alternative and conditional (Bychkova, Biriukov, Bobryk, 2009).

The contractual subject-matter jurisdiction determines that the choice of the jurisdictional body that shall consider the case is due to mutual agreement of the parties. For example, this is the subject-matter jurisdiction of civil disputes referred to arbitration courts (Article 17

of the Civil Procedure Code of Ukraine; Part 2 of Article 1 of the Law of Ukraine 'On Arbitration Courts').

Proceeding from the fact that cases on establishing facts legally relevant to the protection of family rights and interests are considered in a separate proceeding, one of the specificities of the procedural form thereof is the prohibition to transfer the case to the arbitration court (Part 5 of Article 235 of the Civil Procedure Code of Ukraine), there is no possibility to choose the appropriate jurisdictional body that will consider such an application according to the rules of contractual jurisdiction.

In addition, due to the absence of a legislative alternative, it is impossible to choose the jurisdictional body that will consider the case according to the rules of *alternative subject-matter jurisdiction*.

Conditional subject-matter jurisdiction implies that a certain civil case falls under the jurisdiction of the relevant jurisdictional body provided the conditions stipulated by law are met.

For example, applications for establishing the facts of registration of marriage, divorce, adoption are considered by the court, provided that the relevant record has not been preserved by the State Civil Registry Offices, has been refused to restore or can be restored only on the ground of a court decision to establish the fact of registration of the civil status. Therefore, in this case, the rules of conditional civil jurisdiction apply, according to which, under conditions, specified in the law, this case may be under the jurisdiction of either the court or the State Civil Registry Office.

According to the rules of conditional civil jurisdiction, competence is delimitated between different jurisdictional bodies in cases on establishing the fact of birth of a person at a certain time. As a rule, the establishment of the fact of birth of a person at a certain time is established by the State Civil Registry Office, and in case of impossibility of registration by the State Civil Registry Office of the relevant fact, the consideration of such a case falls under the civil jurisdiction of the court.

After the court determines that the establishment of a fact legally relevant to the protection of family rights and interests falls under the civil jurisdiction of the court, it faces another issue on which the opening of proceedings depends: this is the issue of determining the scope of the competence of the court to consider and resolve the case (Yefimov, 2015), that is, determining cognisance.

In the legal literature, cognisance is understood as a property of civil cases by means of which their consideration and resolution are assigned by law to the competence of the relevant court (Bychkova, Biriukov, Bobryk, 2009).

The significance of cognisance is that it helps to delimit the competence to consider and resolve civil cases under jurisdiction of court within the system of courts civil jurisdiction: both between courts of different branches and between courts of the same branch (Churpita, 2015).

Different criteria are used to classify cognisance. The current civil procedure law of Ukraine classifies cognisance depending on the functions performed by the courts, and the territory covered by the activities of a particular court. Depending on these two criteria, the competence of different courts within the system of courts of general jurisdiction is determined, and cognisance is classified into functional and territorial (Yefimov, 2015).

Functional cognisance determines the competence of certain branches of the judicial system of Ukraine based on the functions they perform. At the same time, territorial cognisance distributes the competence to consider and resolve civil cases among the courts of the same branch depending on the territory covered by their powers. The importance of territorial jurisdiction is due to its rules that help determine which court of the branch of the judicial system is authorised to consider and resolve a particular civil case (Churpita, 2015).

Functional cognisance of cases on establishing facts relevant to the protection of family rights and interests is defined in Article 107 of the Civil Procedure Code of Ukraine, according to which all cases to be considered and resolved in civil proceedings are considered by district, local district, city and city district courts, which are courts of first instance.

Regarding *territorial cognisance*, civil procedure legislation and procedure study distinguish its several types: general territorial cognisance (Article 109 of the Civil Procedure Code of Ukraine), cognisance by a decision of a higher court (Articles 108, 111 of the Civil Procedure Code of Ukraine), alternative cognisance (Article 110 of the Civil Procedure Code of Ukraine), cognisance of several related claims (Article 113 of the Civil Procedure Code of Ukraine) and exclusive cognisance (Article 114 of the Civil Procedure Code of Ukraine).

The content of Article 257 of the Civil Procedural Code of Ukraine enables to state that applications for establishing facts relevant to the protection of family rights and interests are submitted to the court under the rules of exclusive territorial cognisance, as well as cognisance by a decision of a higher court.

In the legal literature, exclusive territorial cognisance is referred to as cognisance, which is determined by the legislator's instruction to consider and resolve certain categories of civil cases only by specific courts directly provided for by law, that is, some applications shall be addressed to a court clearly established by law. Such cognisance is called exclusive because it excludes the possibility of applying rules of territorial cognisance other than those established by law for this category of cases (Bychkova, Biriukov, Bobryk, 2009).

Exclusive territorial cognisance shall be established to ensure better conditions for fair, impartial and timely consideration and resolution of civil cases, as well as enforcement of the decision taken as a result of their consideration. Due to the peculiarities of individual claims, it is easier and faster to find out the circumstances relevant to the case at the location of the material subject matter of the dispute, the majority of evidence, and the main procedural actions (Bychkova, Biriukov, Bobryk, 2009).

The rule of exclusive territorial cognisance is enshrined in Part 1 of Article 257 of the Civil Procedure Code of Ukraine, according to which the application of a physical person to establish a legally relevant fact shall be submitted to the court at the place of his/her residence.

Therefore, in accordance with Part 1 of Article 257 of the Civil Procedure Code of Ukraine, applications in cases on establishing facts relevant to the protection of family rights and interests, in particular, the establishment of: the fact of kinship between natural persons (paragraph 1 of Part 1 of Article 256 of the Civil Procedure Code of Ukraine), the facts of registration of marriage, divorce, adoption (paragraph 4 of Part 1 of Article 256 of the Civil Procedure Code of Ukraine), the fact of paternity (maternity) (Article 135 of the Family Code of Ukraine), the fact of a single household of a man and a woman without marriage (paragraph 5 of Part 1 of Article 256 of the Civil Procedure Code of Ukraine), the fact of birth of a person at a certain time (paragraph 7 of Part 1 of Article 256 of the Civil Procedure Code of Ukraine), are filed to the court according to the rules of exclusive territorial cognisance, that is, at the place of residence of the applicant.

4. Judicial practice of establishing legally relevant facts

The court practice provides some clarifications on the issues of determining the place of residence of a natural person. In accordance with paragraph 5 of Resolution 2 of the Plenum of the Supreme Court of Ukraine of June 12, 2009 'On the application of civil procedure law in the consideration of cases in the court of first instance' the place of residence of a natural person is determined in accordance with the provisions of Article 29 of the Civil Code of Ukraine (Civil Code of Ukraine, 2008) and Article 3 of the Law of Ukraine 'On Freedom of Movement and Free Choice of Residence in Ukraine' (Law of Ukraine On Freedom of Movement and Free Choice of Residence in Ukraine, 2003), and the location of a legal entity is determined in accordance with the provisions of Article 93 of the Civil Code of Ukraine.

According to Article 3 of the Law of Ukraine 'On Freedom of Movement and Free Choice of Place of Residence in Ukraine', the place of residence of a natural person is a dwelling located in the territory of an administrative-territorial unit in which such person resides permanently or temporarily, and the place of stay of a natural person is an administrative-territorial unit in which the person resides for less than six months a year.

When resolving these issues, the courts shall also consider the clarifications contained in Decision No. 15-rp/2001 of the Constitutional Court of Ukraine of November 14, 2001 (registration case) (The decision of the Constitutional Court of Ukraine in the case based on the constitutional submission of 48 People's Deputies of Ukraine regarding compliance with the Constitution of Ukraine (constitutionality) of the provisions of subsection 1 of paragraph 4 of the Regulation on the passport service of internal affairs bodies, approved by the resolution of the Cabinet of Ministers of Ukraine (registration case), 2001). The place where a person is in custody in the form of a preventive measure, the place where a person is serving a sentence of imprisonment under a court verdict, the place where a person is undergoing inpatient treatment are not the place of residence of a natural person.

As noted above, the second type of cognisance, according to the rules of which applications for establishing facts relevant to the protection of family rights and interests are submitted to the court, is the cognisance by a decision of a higher court.

It should be noted that the introduction of this type of cognisance ensures the principle of independence of judges and their obedience only to the law (Article 126 of the Constitution of Ukraine), eliminating the possibility of direct or indirect influence on the judge of the local court that will consider the case, as well as doubts about the impartiality of judges (Komarov, Bihun, Barankova, 2011).

The rule of cognisance by a decision of a higher court is enshrined in Part 2 of Article 257 of the Civil Procedure Code of Ukraine. According to the rule, cognisance of cases upon

the application of a citizen of Ukraine residing abroad to establish a fact of legal significance, including for the purpose of protecting family rights and interests, is determined by a decision of a judge of the Supreme Court of Ukraine upon his/her request.

Allowing for sub-paragraph 2 of Clause 'c' of paragraph 14.1.213 of Article 14 of the Tax Code of Ukraine (Tax Code of Ukraine, 2010), a natural person shall be considered to reside outside Ukraine if he/she stays in Ukraine for less than 183 days (including the day of arrival and departure) during the year.

5. Conclusions

Therefore, it can be argued that the consideration of applications for establishing facts relevant to the protection of family rights and interests is the exclusive civil jurisdiction of the court, except for applications for establishing the facts of registration of marriage, divorce, adoption, which are under the subject-matter jurisdiction of the court in compliance with the conditions specified in the law. At the same time, a specific court authorised to consider applications for establishing facts relevant to the protection of family rights and interests is determined according to the rules of exclusive territorial cognisance, and in the presence of the conditions provided for in Part 2 of Article 257 of the Civil Procedure Code of Ukraine – cognisance by the decision of a higher court.

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Тамара Кашперська,
кандидат юридичних наук, суддя, Київський апеляційний суд, вулиця Солом'янська, 2А, Київ, Україна, індекс 03110, cesarevna@ukr.net
ORCID: *orcid.org/0000-0002-6104-3632*

ПІДВІДОМЧІСТЬ ТА ПІДСУДНІСТЬ ЗАЯВ ПРО ВСТАНОВЛЕННЯ ФАКТІВ, ЩО МАЮТЬ ЗНАЧЕННЯ ДЛЯ ОХОРОНИ СІМЕЙНИХ ПРАВ ТА ІНТЕРЕСІВ

Анотація. ***Метою*** статті є з'ясування підвідомчість та підсудність заяв про встановлення фактів, що мають значення для охорони сімейних прав та інтересів. ***Результати.*** Наголошено, що справи про встановлення фактів, які мають юридичне значення для охорони сімейних прав та інтересів, підпадають під цивільну юрисдикцію суду на підставі прямої вказівки закону. Проте, на відміну від інших справ окремого провадження, таких, наприклад, як визнання фізичної особи безвісно відсутньою або оголошення її померлою, визнання фізичної особи недієздатною чи обмежено дієздатною тощо, які віднесені до виключної цивільної юрисдикції суду, справи про встановлення фактів, що мають юридичне значення, розглядаються в суді за умови, що законом не визначено іншого порядку їх встановлення. Це пояснюється тим, що не для всіх юридичних фактів в законі прямо передбачений судовий чи адміністративний порядок їх встановлення у випадку відсутності чи неможливості отримання необхідних документів. Для розгляду в порядку цивільного судочинства справ про встановлення факту проживання однією сім'єю чоловіка та жінки без шлюбу, про встановлення факту родинних відносин між фізичними особами, а також встановлення факту батьківства (материнства) цивільним процесуальним та сімейним законодавством України не передбачено жодних умов, а також не визначено інших органів, уповноважених розглядати такі справи. Відтак розгляд зазначених справ є винятковою цивільною юрисдикцією суду. ***Висновки.*** Зроблено висновок, що розгляд заяв про встановлення фактів, що мають значення для охорони сімейних прав та інтересів, є виключною цивільною юрисдикцією суду, за винятком заяв про встановлення фактів реєстрації шлюбу, розірвання шлюбу, усиновлення, які підвідомчі суду при дотриманні визначених у законі умов. Разом із цим встановлення конкретного суду, уповноваженого розглядати заяви про встановлення фактів, що мають значення для охорони сімейних прав та інтересів, здійснюється за правилами виключної територіальної підсудності, а за наявності умов, передбачених у ч. 2 ст. 257 Цивільного процесуального кодексу України, – підсудності за ухвалою суду вищої інстанції.

Ключові слова: сімейні права та інтереси, підвідомчість, підсудність.

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