

The concept and peculiarities of actual marital relations under Ukrainian legislation

Поняття й ознаки фактичних шлюбних відносин за законодавством України

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marriage, actual marital relations, spouses, property rights, personal non-property rights, inheritance.

Ключові слова:

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Introduction and problem statement. Along with the existence of an institution of marriage (in its conventional meaning) in Ukraine, to date, a tendency of increasing popularity of the model of a couple's residing as one family without official registration of the fact of marriage entry has been observed.

In contrast to a large number of states, in which such a type of couples' marital relations has been already formalized on a legislative level on equal terms with marriage, and despite the considerable spread of actual marital relations in the society, Ukrainian legislation has not still provided sufficient legal regulation of these relations. Besides, the doctrine of national law does not provide satisfactory clarifications of the differences between the two above-mentioned law institutions. Accordingly, a wide range of problems which need legal formalization determines the **relevance of the research**.

Literature review. Challenges associated with the marriage registration and its legal consequences, as well as problems arising in relations between a man and a woman residing as one family and maintaining common household etc. have been in focus of interest of researchers since ancient times. It is worth saying that such issues have not lost their relevance yet, since they constitute "eternal" questions studied in context of various areas of law.

Particular legal aspects of marriage and actual marital relations were covered in the studies by N. Andreev, I. Apopia, O. Grichuk, M. Dyakovich, O. Mytrofanova, Yu. Pilipenko etc. At the same time, it should be noted that the above-mentioned researches have not provided the solution to a number of problems related to practical implementation, inter alia, of concepts and definitions comprehensively explaining the meaning of such notions as "marriage" and "actual marital relations" etc. Therefore, a thorough comparative legal study of these two law institutions in the Ukrainian legal doctrine is still relevant.

The **research objective** is to study common and distinctive features of the institutions of marriage and actual marriage relations as stipulated by current Ukrainian legislation.

Discussion. According to the current Ukrainian legislation, neither legal definition nor peculiarities of "actual marital relations" are defined. The review of certain studies on the issue concerned by local researchers has revealed the following. When referring to the phenomenon of a couple residing as one family without official registration of their relations, a wide range of terms is used in the legal literature, such as but not limited to "common law marriage", "actual marriage", "marriage in fact", "informal marriage", "unsolemnized marriage", "de facto marriage", "actual marital relations", "common marriage", "civil marriage", "de facto relationship", "extramarital relationship", "concubinate", "cohabitation" etc.

According to the Family Code of Ukraine, marriage is defined as a family union between a woman and a man, duly registered by a public civil status act registration authority¹. Based on the official definition of marriage, the following characteristics of marriage shall be distinguished: 1) the fact of marriage causes creation of a family; 2) opposite-sex relationship (the law provides the possibility to marry a person of an opposite sex only); 3) registration of marriage due to the special procedure laid down by the law, namely by the Family Code of Ukraine².

¹ Сімейний кодекс України від 10 січня 2002 року [Електронний ресурс]. – Режим доступу : <http://www.rada.gov.ua>.

² Андрєєва Н.С. Правовий режим майна жінки та чоловіка, які перебувають у фактичних шлюбних відносинах / Н.С. Андрєєва, Л.В. Красицька // Вісник студентського наукового товариства ДонНУ. – 2014. – Том 1. – № 6. – Електронний ресурс]. – Режим доступу : jvestnik-sss.donnu.edu.ua/article/download/816/834.

From the scientific and practical point of view it can be observed that the current Ukrainian legislation does not provide a precise definition of the notion "actual marital relations". Conceptually, it can be defined as a union of a woman and a man who are not married neither each other nor any other person, which is characterized by their constant cohabitation, a common household maintained, mutual financial support provided and care fostered, publicity and intention to establish long-lasting relationship, similar to marriage.

As far as Ukrainian legal doctrine is concerned, the following characteristics of actual marital relations shall be identified: 1) opposite-sex relationship (actual marital relations shall be constituted by two persons of different sex); 2) the absence of fact of marriage duly registered by a public civil status act registration authority neither between a "de facto couple" nor between one of them with any other third person; 3) intention of a woman and a man to establish a stable family relationship, similar to marriage; 4) permanent common cohabitation of a couple; 5) a common household; 6) mutual financial support and care; 7) non-anonymity (publicity) of a relationship, declaration thereof in front of third parties³.

It derives from the above that the institution of actual marital relations is characterized by an overwhelming majority of features assigned to marriage per se stipulated by the Family Code of Ukraine. However, the peculiarities of actual marital relations lack one key constitutive element – namely, the registration of such relations via a specific procedure by a responsible authority as laid down by the Family Code of Ukraine. In other words, they lack the official registration and recognition accordingly of such relations by the state. This shortcoming consequently leads to non-emergence of mutual rights and responsibilities of the spouses based on marriage.

The Family Code of Ukraine does not hold a clear position regarding the status of actual marital relations.: On the one hand, it does not recognize actual marital relations as a family union alternative to marriage and does not establish a sufficient legislative regulation of this kind of family relations of a couple. On the other hand, it fragmentarily regulates some legal consequences of actual marital relations. In terms of law enforcement practice, this leads to a variable understanding and different casuistic interpretation of actual marital relations by courts while resolving disputes⁴.

It is of fundamental importance that even if a court recognizes the fact of a couple's residing as one family without official registration, such a court decision does not automatically grant the couple a full scope of mutual rights and responsibilities (including as far as property is concerned) possessed by the persons the marriage officially registered⁵.

Despite a number of positive points which are legally embedded in the Family Code of Ukraine, numerous unsettled issues make actual marital relations inferior to the officially registered marriage in terms of the scope of mutual legal guarantees provided by the current national legislation. To this end, for instance, the Article 1241 of the Civil Code of Ukraine states that irrespective of the will, a testator's disabled widow (widower) shall inherit half of the share that would belong to him or her in case of legal succession (compulsory portion). In contrast, even if a court recognizes the fact of a person's being in the actual marital relationship with the testator before his death, such a person, unlike an official widow / widower, does not possess a right to a mandatory share in the inheritance irrespective of the will. This is explicated by existence of a succession order to the condition of the disabled person's being in officially registered marriage with the deceased one as imperatively fixed by law⁶.

A similar situation arises in case of inheritance by law. Basically, a person who has cohabited with the testator as one family is ascribed to the fourth priority turn of legal heirs. Moreover, the law establishes a five-year period of such a cohabitation without marriage as a condition for the de facto spouse to acquire the right to inherit. The complexity of proving both the fact of residing of de facto spouses as one family without official registration of marriage and the fact of duration thereof, as well as the presence of legatees of three previous turns, in most cases makes it impossible for a de facto spouse to inherit the property of the partner in actual marital relations. The situation is diametrically different in case of the officially registered marriage. In this regard, an of-

³ Андреева Н.С. Поняття та ознаки фактичних шлюбних відносин Андреева // Європейські перспективи. – 2014. – № 3. – С. 177–181. – Електронний ресурс]. – Режим доступу : [file:///C:/Users/User/Downloads/evpe_2014_3_31%20\(2\).pdf](file:///C:/Users/User/Downloads/evpe_2014_3_31%20(2).pdf).

⁴ Андреева Н.С. Правовий режим майна жінки та чоловіка, які перебувають у фактичних шлюбних відносинах / Н.С. Андреева, Л.В. Красицька // Вісник студентського наукового товариства ДонНУ. – 2014. – Том 1. – № 6. – С. 11–15. – [Електронний ресурс]. – Режим доступу : [jvestnik-sss.donnu.edu.ua/article/download/816/834](http://vestnik-sss.donnu.edu.ua/article/download/816/834).

⁵ Пилипенко Ю.О. Процесуальні особливості розгляду судами справ про встановлення фактичних шлюбних відносин / Ю.О. Пилипенко // Науковий вісник Міжнародного гуманітарного університету. Серія «Юриспруденція». – 2015. – № 13. – Т. 2. – С. 43.

⁶ Цивільний кодекс України від 16 січня 2003 року [Електронний ресурс]. – Режим доступу : <http://www.rada.gov.ua>.

ficial spouse is included to the first priority turn of legal heirs along with parents and children of the legator, factually, this means that such a widower or a widow almost guaranteedly receives her/his own inheritance share.

Conclusion. All the above, the Ukrainian legislation on the institution of actual marital relations requires comprehensive revision and significant improvement. At the same time, the current state of the national legal framework serves as a stimulating factor for couples to enter into marriage due to the official procedure as prescribed by law and accordingly prevents the institution of marriage in its conventional understanding from being absolutely ignored in the Ukrainian society.

Summary

The article provides a comparative analysis of legal definitions, key characteristics, common and distinctive features of the institutions of marriage and actual marital relations. The main problems of regulation of actual marital relations in Ukrainian legislation are highlighted and discussed.

Анотація

У статті в порівняльно-правовому аспекті розглянуто визначення понять, основні ознаки, спільні та відмінні риси інституту шлюбу й фактичних шлюбних відносин, висвітлено головні проблеми законодавчого регулювання фактичного шлюбу в Україні.

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