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Peculiarities of proof in cases of division of joint marital property

Abstract: The division of the joint property of spouses is always a relevant issue, which has many aspects depending on the type of property to be divided, the method and procedure for division, the features of recognising the property as joint property in the event of its registration under one of the spouses. It is worth noting that the spouses can choose the method of dividing the joint property by concluding a corresponding agreement and its notarial certification. However, this option is possible only if there is no dispute between the spouses. In the event of a dispute about the division of the joint property of the spouses, such a dispute can only be resolved in court. Our study will cover the features of proving the division of certain types of joint property of the spouses. Thus, with developing scientific and technological progress, social networks, and artificial intelligence, new types of civil legal relations appear and, accordingly, new objects of civil ties, which, among other things, can be objects of the right of joint property of the spouses. We will consider the features of the division: credit obligations for loans paid during the marriage, concluded by one of the spouses before the marriage, a car, and real estate that is not registered in the manner prescribed by law. It is also worth noting that dividing the joint property of spouses is always relevant, given the variability of the legal positions of the Supreme Court regarding the division of individual objects of joint property of spouses, which will be discussed in our study. The study object is peculiarities of presenting evidence in cases of division of joint property of spouses, namely, the features of division: credit obligations under loans paid during marriage, concluded by one of the spouses before marriage, a car, real estate that is not registered in the manner prescribed by law will be the object of our study. The study aims to analyse the features of presenting evidence in cases of division of joint property of spouses using the example of individual objects of its division. The task of our study: to determine what evidence is appropriate, admissible, reliable and sufficient for the division of credit obligations under loans paid during marriage, concluded by one of the spouses before marriage, a car, real estate that is not registered in the manner prescribed by law, considering the requirements of procedural legislation and current judicial practice. The methodological basis of the conducted study was general scientific and unique legal methods of cognition. The issue of the specifics of proof in cases of division of joint property of spouses, namely – credit obligations for loans paid during the marriage, concluded by one of the spouses before the marriage, a car, real estate that is not registered in the manner prescribed by law, is poorly studied from a scientific point of view. Regulatory legal acts and judicial practice cover most aspects that reveal this issue. The author concludes that the norms of family law establish the principle of equality of rights and obligations of spouses, in particular, equality of rights in the case of division of marital property and declaration of such division in equal shares. At the same time, based on the principles of reasonableness and justice and to effectively protect the rights of each spouse, modern judicial practice offers us specific options for dividing individual objects of the right of joint property of spouses. The features of the division of credit obligations for loans paid during marriage, concluded by one of the spouses before marriage, a car, or real estate that is not registered in the manner

prescribed by law, which we have analysed, give grounds to conclude that the proposed methods of division are effective and aimed at ensuring the interests of each spouse.

Keywords: joint property of spouses, division, evidence, case law.

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Особливості доказування у справах про поділ спільного сумісного майна подружжя

Анотація: Поділ спільного сумісного майна подружжя в усі часи є актуальним питанням, яке має безліч аспектів в залежності від виду майна, що підлягає поділу, способу та порядку поділу, особливостей визнання майна спільним сумісним у випадку його реєстрації за одним з подружжя. Слід зазначити, що подружжя може обрати спосіб поділу спільного сумісного майна шляхом укладення відповідного договору та його нотаріального посвідчення. Разом з тим, такий варіант є можливим лише, якщо між подружжям відсутній спір. У випадку наявності спору про поділ спільного сумісного майна подружжя, вирішити такий спір можливо лише в судовому порядку. Наше дослідження охопить особливості доказування щодо поділу певних видів спільного сумісного майна подружжя. Так, з розвитком науково-технічного прогресу, соціальних мереж, штучного інтелекту з'являються нові види цивільно-правових відносин і, відповідно, нові об'єкти цивільних відносин, які, в тому числі, можуть бути об'єктами права спільної сумісної власності подружжя. Нами будуть розглянуто особливості поділу: кредитних зобов'язань за виплаченими під час шлюбу кредитами, що уклалися одним з подружжя до шлюбу, автомобіля, нерухомості, що не зареєстрована у встановленому законом порядку. Слід також зазначити, що тема поділу спільного сумісного майна подружжя завжди є актуальною, з огляду на мінливість правових позицій Верховного Суду щодо поділу окремих об'єктів спільної сумісної власності подружжя, про які буде йти мова у нашому дослідженні. *Об'єкт дослідження.* Особливості подання доказів у справах про поділ спільного сумісного майна подружжя, а саме особливості поділу: кредитних зобов'язань за виплаченими під час шлюбу кредитами, що уклалися одним з подружжя до шлюбу, автомобіля, нерухомості, що не зареєстрована у встановленому законом порядку будуть об'єктом нашого дослідження. *Метою дослідження* є аналіз особливостей подання доказів у справах про поділ спільного сумісного майна подружжя на прикладі окремих об'єктів його поділу. Завдання нашого дослідження: визначити, які саме докази є належними, допустимими, достовірними та достатніми щодо поділу кредитних зобов'язань за виплаченими під час шлюбу кредитами, що уклалися одним з подружжя до шлюбу, автомобіля, нерухомості, що не зареєстрована у встановленому законом порядку з урахуванням вимог процесуального законодавства та актуальної судової практики. *Методологічною основою* проведеного дослідження стали загальнонаукові та спеціально-юридичні методи пізнання. *Стан наукового дослідження.* Питання щодо особливостей доказування у справах про поділ спільного сумісного майна подружжя, а саме – кредитних зобов'язань за виплаченими під час шлюбу кредитами, що уклалися одним з подружжя до шлюбу, автомобіля, нерухомості, що не зареєстрована у встановленому законом порядку є малодослідженим, з точки зору науки. Більшість аспектів, що розкривають це питання висвітлені в нормативно-правових актах та судовій практиці. *Результати.* Норми сімейного законодавства закріплюють принцип рівності прав та обов'язків подружжя, зокрема, рівності прав у випадку поділу майна подружжя та декларування такого поділу в рівних частках. Разом з тим, виходячи з принципів розумності, справедливості та з метою реального захисту прав кожного з подружжя, сучасна судова практика пропонує нам певні варіанти поділу

окремих об'єктів права спільної сумісної власності подружжя. Проаналізовані нами особливості поділу кредитних зобов'язань за виплаченими під час шлюбу кредитами, що уклалися одним з подружжя до шлюбу, автомобіля, нерухомості, що не зареєстрована у встановленому законом порядку дають підстави дійти висновку, що запропоновані способи поділу є ефективними та такими, що спрямовані на забезпечення інтересів кожного з подружжя.

Ключові слова: спільне сумісне майно подружжя, поділ, докази, судова практика.

Abbreviations:

CCC is Civil Court of Cassation of Ukraine,

CPC is Civil Procedure Code of Ukraine,

FC is Family Code of Ukraine,

GC is the Grand Chamber of the Supreme Court,

SC is the Supreme Court.

Introduction

The FC (*Family Code of Ukraine, 2002*) defines that the property acquired by the spouses during the marriage is the common joint property of the spouses and can be divided at any time, even during the period of being in the marriage, and not only in the event of its dissolution. It is also worth noting that the legislation establishes the presumption of equal shares of spouses in common joint ownership. However, one of the spouses did not work because he was engaged in everyday life, took care of children, studied, etc. The legislation also contains provisions that in the event of a significant increase in the value of the property of spouses acquired before marriage due to joint investments in marriage, such property can also be recognised as an object of the right of common joint ownership in court. In our study, the author will consider problematic aspects of proof in cases of separation of individual objects of the right of common joint property of spouses in court, namely credit obligations for loans paid during marriage, concluded by one of the spouses before marriage, a car, real estate that is not registered according to the procedure established by law. The CPC (*Civil Procedure Code of Ukraine, 2004*) defines the requirements for evidence: reliability, admissibility, sufficiency and belonging. Thus, we will analyse which evidence will meet the specified criteria if the right to divide individual objects of the right of common joint property of the spouses mentioned above is proved.

Results

Credit obligations on loans paid during marriage that were concluded by one of the spouses before marriage

It is worth noting that this issue is quite relevant precisely concerning the division of real estate purchased on credit. For example, a person receives a loan before marriage and buys an apartment or other real estate but pays this loan after the marriage is registered.

Recently, the SC, in its decision No. 712/8602/19 dated June 12, 2023 (proceedings 61-14809svo21) (*Resolution..., 2023b*) formed the following legal opinion on the above, namely, “in the case of entering into a loan agreement and receiving money for the purchase of real estate by one of the spouses before marriage, subject to further fulfilment of the loan obligation by the

spouses during marriage, the spouse who did not enter into a loan agreement, after the dissolution of the marriage, is entitled to compensation for half of the amounts that were paid for the fulfilment of the loan obligation.”

Accordingly, when making claims concerning real estate purchased before marriage on credit, but the credit obligations are fulfilled during the period of marriage, the party that concluded the loan agreement should remember that it does not have the right to make claims for recognition of such real estate as an object of the right of common joint property of the spouses and recognition of ownership of half of such real estate. In this case, the proper way to protect the rights of such a person is to file a claim for recovery from the other spouse of compensation for half of the amounts paid for repayment of the loan.

Proper evidence in such a case can be receipts, payment orders for depositing funds, and certificates from the bank on loan repayment indicating the exact amounts and repayment periods. Suppose the plaintiff is deprived of the opportunity to obtain such evidence in a pre-trial procedure, considering the presumption of the principle of bank secrecy. In that case, the latter can apply to the court for secure evidence or request evidence.

Thus, it can be concluded that real estate purchased on credit before marriage by one of the spouses is not the common joint property of the spouses. However, the funds deposited by the spouses, already during the marriage, to repay the loan obligation received by one of the spouses before the marriage for the purchase of real estate must be compensated to the other spouse for half of the total amount paid. In our opinion, the above position is logical and fair since the funds of the spouses earned in marriage are common, respectively, in the case of division of property, so half of the paid amount should be returned from the spouses who did not apply for a loan.

Division of the car as a common joint property of the spouses

A car purchased in marriage is the common joint property of the spouses and is subject to Division, regardless of who has registered ownership of such a car. At the same time, the vehicle is indivisible, and it is impossible to divide it in kind. Therefore, the spouses' car can either be sold, and the funds between the spouses are divided by ½ each, or one of the spouses owns the vehicle, and the other receives half of its market value. It is the second method of separation that we have analysed.

The GC of the SC in its decision No. 209/3085/20 dated February 08, 2022 (proceedings No. 14-182tss2) (*Resolution...*, 2022) considered the correct conclusion of the courts that the claims for recognition of the defendant's ownership of the car and recovery in favour of the plaintiff of the corresponding monetary compensation is worth considering as a claim for the division of this indivisible thing by allocating it to the defendant's property and collecting compensation from him instead of the plaintiff's share in the right of common joint ownership of the car. In addition, the GC of the SC stated that as a result of its allocation to the ownership of the defendant and such recovery, the right of common joint ownership of the car is terminated. Therefore, a separate requirement to terminate the right of common joint ownership is an ineffective way of protection.

The GC of the SC concluded that the requirements of Parts 4 and 5 of Article 71 of the Criminal Code of Ukraine and Article 365 of the Civil Code of Ukraine, considering the principle of reasonableness, are worth understanding as follows:

- (a) the rules on the need for preliminary deposit of funds to the court's deposit account relate to those cases when the plaintiff (one of the spouses or ex-husband, ex-wife) filed a claim for termination of the defendant's right to a share in common ownership (such funds ensure that the defendant receives monetary compensation);
- (b) if the plaintiff (one of the spouses or ex-husband, ex-wife) has not made such a claim (but demands, for example, to divide an indivisible thing by allocating it to the defendant's property and collecting monetary compensation from him instead of the plaintiff's share in the right of common joint ownership of this thing), then there are no grounds for depositing the corresponding amount of funds to the court's deposit account.

The plaintiff did not claim to keep the car for herself, terminating the defendant's right to a share in the right of common joint ownership with compensation to him for this share. On the contrary, she agreed to receive monetary compensation for her share in the right of common joint ownership of the car from the defendant. Therefore, the claim to recover such compensation does not give rise to the defendant's obligation to deposit the corresponding amount in advance to the court's deposit account. The legislation of Ukraine does not require confirmation of the solvency of such a defendant. The fact that the defendant does not have the means to pay compensation to the plaintiff at the same time cannot by itself be a sign of the excess burden of such payment.

The defendant's consent to pay monetary compensation to the plaintiff, whose ownership right to a share in the right of common joint ownership is terminated, is not mandatory. According to the content of Part 4 of Article 71 of the CPC, consent to receive such compensation instead of a share in the right of common joint ownership of property upon its division must be provided by the spouse in whose favour the court awards such compensation. This prescription is consistent with the prescription of Part 2 of Article 364 of the CPC, according to which it is the co-owner who wishes to allocate must consent to receive monetary compensation from other co-owners for the value of his share in an indivisible thing.

The GC of the SC deviated from the conclusion formulated, in particular, in the decisions of the SC of Ukraine No. 6-2811cs15 dated March 30, 2016 ([Resolution..., 2016a](#)) and the SC No. 559/609/15 dated June 16, 2021, that the court must determine the ideal shares of co-owners in an indivisible thing without its real division and leave the corresponding property in common shared ownership if the defendant has not previously deposited funds to the court's deposit account for the plaintiff's share in the right of common joint ownership of an indivisible thing, and the latter cannot be divided in kind according to shares.

In addition, the GC of the SC deviated from the conclusion formulated, in particular, in the decisions of the SC No. 6-2925tss15 dated January 13, 2016 ([Resolution..., 2016b](#)) and the CCC of the SC No. 371/1369/15-C dated August 29, 2019, ([Resolution..., 2019](#)) that to resolve the issue of applying Part 2 of Article 364 of the CPC, the legal significance is whether the co-owner-defendant, who owns and uses common property, pays material compensation to the plaintiff for such possession and use according to Part 3 of art. 358 of the CPC, whether the co-owner-

defendant can pay monetary compensation to the co-owner-plaintiff for the value of his share and whether such payment will not be an excessive burden.

Thus, the division of the car as an object of the right of common joint ownership of the spouses in kind is impossible. Instead, the vehicle can be left in the ownership of one of the spouses, and half of its market value must be collected in favour of the other. Proper evidence confirming the actual market value of a car will be a report on determining the market value of a particular vehicle performed by an expert or expert institution on the order of one of the participants in the case or based on a court order.

Real estate that is not registered according to the procedure established by law as an object of division of common joint property of spouses

Quite commonly, private houses are built on land plots that citizens own without appropriate permits, the so-called unauthorised construction. At the same time, when the spouses diverge and want to divide such a house and other common property, many problems arise. Such a house is not in the State Register of Fundamental Rights to immovable property, i.e., the right of ownership to it is not registered, and, accordingly, it is impossible to recognise it as the object of the right of common joint property of spouses, to divide, to recognise for each of the spouses the right of private ownership to a share of such a house. In 2023, the SC ended this issue and established a mechanism for separating such an object.

In decision No. 511/2303/19 dated April 12, 2023 ([Resolution..., 2023a](#)), the GC of the SC formed the following legal position:

- before the acceptance of newly created real estate into operation and its state registration, the right of ownership to this newly created real estate as an object of civil turnover does not arise; in this case, the person is the owner of only materials, equipment that was used in the process of this construction (creation of property);
- if it is impossible to separate an unfinished building, the court may recognise the right of the parties to the dispute to the building materials and structural elements of the house or, considering specific circumstances, leave it to one of the parties and award compensation to the other;
- while recognising the ownership of the materials or equipment, the court must specify (name) these materials or equipment in its decision.

At the same time, in this decision, the Supreme Court of Ukraine deviated from the conclusion of the Supreme Court of Ukraine, expressed in the decision No. 6-47tss16 dated September 7, 2016 ([Resolution..., 2016c](#)) that:

- since the disputed object of unfinished construction was built during the marriage for the common funds of the spouses and is the object of common joint property of the spouses,
- its construction is completed, and it is operated for its functional purpose, but is not accepted for operation, and the ownership right to it is not issued due to the fault of the defendant;
- the plaintiff is deprived of the opportunity to perform these actions, which prevents her from exercising her right to divide the specified property acquired during the marriage; there

are grounds for recognising the plaintiff's right to a part of the disputed object under construction.

Thus, dividing an object under construction between spouses as real estate is impossible. The court may recognise the parties' ownership of building materials and structural elements of the house or award one of the parties' monetary compensations for half of such building materials, structural elements and equipment. It is worth noting that the cost of building materials, structural elements and equipment can be determined by conducting an expert study and providing such an opinion to the court by one of the parties to the case or performing an expert examination by a specialist institution based on a court order.

Conclusion

Having analysed the above provisions of the legislation and judicial practice regarding the division of individual objects of the right of common joint property of spouses, we came to the following conclusions:

- (1) Immovable property acquired on credit before marriage by one of the spouses is not the common joint property of the spouses. However, the funds deposited by the spouses, already during the marriage, to repay the loan obligation received by one of the spouses before the marriage for the purchase of real estate must be compensated to the other spouse for half of the total amount paid. The above position, in our opinion, is logical and fair since the funds of the spouses earned in marriage are common, respectively, in the case of division of property, so half of the paid amount should be returned from the spouses who did not apply for a loan;
- (2) The Division of the car as an object of the right of common joint ownership of the spouses in kind is impossible. Instead, the vehicle can be left in the ownership of one of the spouses, and half of its market value must be collected in favour of the other. Proper evidence confirming the actual market value of a car will be a report on determining the market value of a particular vehicle, performed by an expert or expert institution on the order of one of the participants in the case or based on a court order;
- (3) Dividing an object under construction between spouses as real estate is impossible. The court may recognise the parties' ownership of building materials and structural elements of the house or award one of the parties' monetary compensations for half of such building materials, structural elements and equipment. It is worth noting that the cost of building materials, structural elements and equipment can be determined by conducting an expert study and providing such an opinion to the court by one of the parties to the case or performing an expert examination by a specialist institution based on a court order.

Conflict of interest

The author declares that there is no conflict of interest.

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