

PROCEDURAL PECULIARITIES OF COURT PROCEEDINGS IN CASES OF ABSENCE AND DEATH DECLARATION

Iryna TATULYCH*

Abstract

The article focuses on the procedural peculiarities of court investigations in cases of missing persons and death declarations. The jurisdiction of such cases has been determined. The criteria and the arguments for declaring a person missing or deceased were singled out. The procedural status of the applicant and the person concerned was analyzed. The necessity to expand the range of case participants has been proved. Special attention has been paid to the court claim requirements. The article also examines the problem of object of proof and the process of filing the evidence to court in order to justify the applicant's claim. The paper reveals the issue of court judgements and the proceedings for its renewal. It also reveals the consequences in case such court statements are satisfied. The author examines the academic positions of those scholars who researched such institutes in civil procedure perspective as well as the case law.

Keywords: special procedure, missing person, death declaration, applicant, person concerned

Introduction

The morning of January 24th, 2022 has marked the beginning of the full-scale war of Russia against Ukraine. In fact, it is a part of Russian-Ukrainian war which started back in 2014. Unfortunately, due to the bloody fightings, both servicemen and civilians have gone missing. Because of this many people died. Part of them either hasn't been identified as deceased or their death wasn't properly determined. Consequently, the relatives don't have any death certificates or even don't know whether their family member is still alive.

At the same time this problem is becoming more and more topical in Ukraine and globally not only due to armed conflicts and military actions but also natural and man made disasters causing multiple deaths. Despite the humanitarian problems

* Iryna TATULYCH is Candidate of Law, Associate Professor, Yuriy Fedkovych Chernivtsi National University, Ukraine, e-mail: i.tatulych@chnu.edu.ua.

related to the search and social protection of people in need, there may be issues associated with the legal status of missing persons and the legal regulations of identification and registration of such people.

The long term absence from the place of residence may originate some uncertainty regarding the rights and duties of the missing persons and the people legally related to him/her. It may have some negative consequences both for other people (relatives) and the assets the missing person possesses. Such uncertainty complicates and interferes with exercising the rights, freedoms and legal obligations.

The relatives and the close people are primarily interested to eliminate such uncertainties because they cannot inherit assets and estate possessed by the missing person, get a pension as a dependent or exercise the subjective rights (such as the right to receive alimony or insurance coverage). In case a missing person is connected with lenders, then their demands for the assets cannot be relieved. In order to prevent such consequences, the Civil Code of Ukraine prescribes persons concerned the right to declare a person deceased or missing. The above mentioned predetermines a detailed legislative consolidation of the proceedings regarding a person's legal status change.

1. Analysis of cases on a person's legal status change.

Nowadays there are several mechanisms to determine the fact of death or to determine a person missing. The procedures regulating such proceedings are reflected in the norms of substantive and procedural law: court establishment of the fact of death (article 315, 317, Civil Procedural Code of Ukraine); court's declaration of a person's death and absence (article 43,46, Civil Code of Ukraine, 2003; article 305-309, Civil Procedural Code of Ukraine, 2004). Each of these legal recourses has its reasons and terms.

Numerous academic papers from various fields of knowledge are dedicated to this issue. Scientists investigated the substantive and procedural aspects of such cases. For instance, Zinovieva, the author of "A missing person: substantial and procedural aspects" highlights that: "despite a great number of theoretical studies in this field, in practice there are still many problems related to the acceptance and interpretation or a "missing person" term" (Zinovieva, 2011, p. 1).

In situations when the Civil Registry Office is not able to register the death, such cases go to court in the status of a separate proceeding in accordance to article 315 of the Civil Procedural Code of Ukraine. Hence it belongs to the facts with legal significance. Such a provision of law gives court grounds at a specific time and under certain circumstances to declare a person deceased. This may happen provided the Civil Registry Office rejected such a registration due to the absence or insufficient number of documents. For example, in a separate proceeding a death of a person in a natural disaster was confirmed, however the body was not found, hence the death certificate cannot be issued. The applicant has to justify his/her statement by

referring to this fact as a piece of evidence which indicates the person's death at a specific time and under certain circumstances.

According to Komarov *et al.* (2011), a declaration of death, unlike the fact of death, which is determined by court with the help of evidence that this incident occurred at a specific time and under certain circumstances. This evidence is based on the probable assumption without providing any proof of death. Thus, the declaration of death is a court's judgement is based on the fact of death and is not based on the actual fact of death but on the highly probable assumption of death.

As explained by Clause 13 of the Supreme Court Resolution dated March 31, 1995, No. 5 "On litigation in cases establishing the facts with legal value". The trial has to differentiate between the declaration of death from establishing the fact of death. Declaration of death is a court's judgement of the assumption of death i.e. a statement of high degree of death probability. Thus, declaration of death has to eliminate uncertainty formed up around a person who is unavailable for unknown reasons at the place of residence and his/her whereabouts are unknown. The reasons to declare a person deceased are not the facts confirming the person's death, but the circumstances giving the grounds to assume the probable death.

According to article 9 of the Law of Ukraine "On the legal status of missing persons" a person becomes missing when an applicant files an application of absence and search, or the court rules a corresponding decision. The application of a missing person is to be filed to the local office of the National Police of Ukraine. After that the court passes a judgement indicating that a person is missing (Law of Ukraine, 2018).

1.1. Reasons and terms to declare a person missing or deceased.

A person can be declared missing by court in case there was no information about his/her whereabouts at the place of the residence for one year (article 43, Civil Code of Ukraine). Unlike the declaration of absence, the declaration of death is possible if the whereabouts are unknown for three years. Though there are circumstances under which it is possible to do this in short terms. In particular when a person was found missing under the death threatening circumstances or such circumstances give rise to suppose the death by accident. In this case the terms are shortened to six months. When a person's death is caused by a lethal accident or other natural or man-made disaster, then within one month after a special committee on natural and man made disasters has finished its work. A natural person who is missing due to military actions, can be declared deceased within two years after the military actions are terminated (article 46, Civil Code of Ukraine, 2003)¹.

¹ Supreme Court Resolution of Ukraine, dated September 5, 2018. Case No. 706/1355/16-ц. Procedure No 61-36425cb18 (retrieved from <https://zakononline.com.ua/court-decisions/show/76350060>).

Taking into account different circumstances, the court can also declare a person deceased by the end of the above-mentioned term, but not earlier than six months. For example, if a person went into a fight or a reconnoiter but didn't come back, then this person can be declared deceased after six months but not earlier than that. By analogy the court may also review other conditions (bomb, missile and artillery strike on the village/city, terrorist act, natural disaster, car crash etc.) when based on the articles of clothing or shoes, debris of transport and buildings we can suggest that the person was in the epicenter of the tragedy (Bryskovsjka, 2015, p. 53).

On the basis of explanations provided in Clause 13 of the Resolution of Plenum of Supreme Court of Ukraine dated March 13, 1995 - "On Litigation in Cases of Establishing the Facts with Legal Value"-, a person can be declared deceased by court in situations when the fact of death is impossible to established by court provided with proper evidence. Another important aspect is that "lack of communication" between persons can not be used as proof of absence or a reasons to declare him/her deceased².

When a legislator analyses such cases of procedural legislation, he/she indicates the lack of such cases. Unlike other cases of separate proceedings with exclusive jurisdiction, such cases are characterized by territorial alternative jurisdiction because the statement of absence or declaration of deceased is submitted to court depending on the applicant's place of residence, the absentee's last place of residence or his/her estate location (article 305 Civil Procedural Code of Ukraine, 2004).

The survey of civil law literature reveals the following features of a missing person: 1. absence from the place of residence; 2. unknown whereabouts; 3. long term absence; 4. inability to overcome the unknown (Romovsjka, 2009, p.13).

Jasynok highlights that "the declaration of absence or death has its legal embodiment in substantial law, however this law does not change the person's legal status. The persons concerned have a legal right to go to court in such cases. Their interest is linked to material and non-material constituents. The material one lies in determining the missing person's property right, whereas the latter one has its role to determine the final social status" (Jasynok, 2011, p.17).

The arguments to declare a natural person missing are the set of legal facts i.e. a legal structure encompassing: a) lack on information about a person's whereabouts in the place of residence which is regulated by article 29 of the Civil Code of Ukraine, article 3 of Law of Ukraine "On Freedom of Movement and Free Choice of Residence in Ukraine"; b) lack of information about actual stay of a person and inability to get such information; c) an expiration of one year time limit from the date or receipt of the last information about a person's whereabouts or from the date regulated by part 2, article 43 of the Civil Code of Ukraine; d) an applicant's interest

² The Resolution of Supreme Court of Ukraine. Dated November 14, 2018. case #397/712/17-ii. proceeding No. 61-30574cb18. (retrieved from <https://zakononline.com.ua/court-decisions/show/78215129>.)

to solve the issue of a missing person i.e. there is a civil or other legal relationship between the applicant and the missing person which took place earlier (contracts, alimony etc.).

It is important to draw attention to a fact that on November 22, 2018 the Supreme Council with a part of the panel of judges of the Second Judicial Chamber of the Civil Court of Cassation has confirmed the legal view to declare a natural person missing in a case No. 225/882/17, proceeding No. 61-34068cb18 (USRCD of Ukraine No. 78044509). In particular, the resolution of the Supreme Court (with a part of the panel of judges of the Second Judicial Chamber of the Civil Court of Cassation) dated May 7, 2018 in a case No. 225/1297/17 tells us that a missing person notification is a court acknowledgment of a long term absence from a place of residence provided the person's whereabouts were not identified.

The court experience on cases of death declaration is based on two points: a) long term absence i.e. there is no information about a person's whereabouts for three consecutive years b) a natural person is found missing under the death threatening circumstances or under conditions presuming a person's death due to an accident, or natural disaster (earthquake, flood, avalanche, military actions etc.).

Such cases are quite special because when a court declares a person deceased it proceeds from a so-called "death presumption" term. Here we have to agree with M. Mamchur's and A. Novosad's points of view which lie in "an applicant's use of legal presumption is determined by the fact that the applicant has no evidence and as a rule can not have such evidence to prove a person's death. That's why such facts can not be confirmed in a court of law" (Mamchur *et al.*, 2018, p. 43).

A court declaration of a natural persons deceased (article 43, Civil Code of Ukraine) does not certify a person's death, but it does not exclude its possibility. Consequently, there are two mutually exclusive assumptions of a missing person's living condition (a person is alive or deceased) (a resolution of the Supreme Court with a part of the panel of judges of the Second Judicial Chamber of the Civil Court of Cassation, dated February 28, 2018 in a case No. 317/3139/15-ц, proceeding No. 61-4241cb18, USRCD of Ukraine No. 72641734).

1.2. Parties in cases on missing persons and death declarations.

In such cases the parties are applicants and persons concerned. However, the current legislation does not define them in legal terms. Unlike other cases in separate proceedings, the Civil Procedural Code of Ukraine does not list persons legible to apply to court in cases of missing persons and death declarations. Therefore, this should be guided by article 4 of the Civil Procedural Code of Ukraine which states that every person has a right to apply to court in order to protect his/her violated, unrecognized or disputed rights, freedoms and legal interests. For this matter an applicant has to prove a subjective legal interest. It is conditioned by those legal consequences that originate the acknowledgment of a missing person or death.

According to the national legislation the change of a person's legal status can cause a number of legal consequences, such as: a right to get a divorce with a missing person by allying a simplified procedure at a Civil Registry Office; a right to terminate a marriage with a person declared deceased by court; get a pension provide the breadwinner was lost; take custody of the missing person's assets; obtain the missing person's assets; initiate an inheritance process provided a missing person was declared deceased; a right to inherit the deceased person's assets; a lender's right to require a missing person's debt repayments; terminate a warrant etc.

According to Fursa "a court has to consider that this fact will cause legal consequences to an applicant. Otherwise such a case will not fall under the court's jurisdiction in a form of a separate proceeding. When determining a person concerned, a court should be aware that this person is a legal subject and court can influence its rights and duties" (Fursa, 2006, p. 244).

Any person interested in a missing person's legal status change can apply to court in order to protect the rights and interests. To confirm this an applicant has to prove the legal relationship between him/her and a missing or a deceased person. Otherwise the applicant has to specify the details that an absence of a person hinders the applicant to exercise the subjective rights and perform the duties. Thus, most often individuals may be applicants such as spouses, parents, relatives, offsprings, next of kin, heirs as well as custody and guardianship authorities assigned to protect missing person's assets, public authorities and bodies of local self-government assigned to protect the rights and interests of minors. Legal entities (banks and other financial institutions provided there is a long term loan absence) can also be applicant to the case if they possess a legitimate goal to obtain a court's judgement.

We would like to stress that national police or recruiting office (in order to remove a person from the military registry) can no act as an applicant because according to law they are not allowed to protect the rights of people in a civil process. It is noteworthy to consider Bobko's point of view that "the bodies of inner affairs cannot be applicants in such cases. Such bodies have no material or legal interest. Moreover, the law does not grant them the right to appeal to court on behalf of other persons. In addition, the search belongs to the duties of the police. Therefore, the internal affairs bodies cannot be applicants on behalf of their own interests" (Bobko, 2006, p. 14).

When reading legal papers we can come across a view that a public prosecutor can also serve as an applicant. The current Civil Procedural Code of Ukraine does not provide a public prosecutor takes part in such cases. However, considering the issue of parties in a legal case, in our opinion it is important to enlarge the scope of subjects whose participation is vital for the further proceedings. Moreover, a similar approach when a public prosecutor took part in the proceedings has been already applied. It occurred once when a person was forced to take psychiatric care (article 341, Civil Procedural Code of Ukraine). Both scientists and practitioners believe it is quite reasonable. Of course, there is no need to prove the fact that according to

Ukrainian Constitution³ (clause 3, article 131-1) a public prosecutor represents the state in a court of law. However, according to article 23 of the Law of Ukraine “On Public Prosecutor’s Office” a public prosecutor represents person’s and state’s interests in court performs procedural and other actions aiming to protect person’s and state’s interest prescribed by law. A public prosecutor represents citizen’s (Ukrainian citizen, foreigner or stateless person) interests in court provided a person can not do it by her/himself. A public prosecutor may also be involved in cases when a person is unable to protect his/her violated or disputed rights or to realize the procedural rights due to being a minor, fully or partially incapacitated or when legal representatives or appointed by state bodies do not protect the rights, freedoms and interests properly. Besides, the Civil Procedural Code of Ukraine also allows certain bodies and persons to take part in the civil process. Such bodies and persons are granted the right to protect the rights, freedoms and interests of other parties (Article 56-57, Civil Procedural Code of Ukraine, 2004). However, given a public prosecutor’s legal status at a legislative level, we believe that one should engage a prosecutor as a party but not as an applicant in the above-mentioned cases. In our opinion, it will ensure: the compliance with the main principles of civil litigation during the trial by court and parties; collegiate trial of the case by one judge and two jurors; an effective implementation of rules of material and procedural law by litigants; timely and impartial trial which will contribute to the full and comprehensive case review; involvement of all the parties and persons concerned; the application of the necessary procedural coercion for participants of the process; collection of evidence. A public prosecutor’s engagement will help to determine a possible conflict of interests between an applicant and a person concerned as a result of a person’s legal status change. A special emphasis must be placed on the status of a missing or allegedly deceased person’s assets, since as legal practice shows, in the last years there was an increase in the number of abuse cases of the institute of a missing person announcement and death declaration i.e. unwarranted breach or prolongation of contracts; missing person’s property management to one’s advantage; appointment of an estate trustee who acts against the will and interest of a missing person; unjustified sale of a missing person’s property etc. Besides, we have already proved by analysing other separate proceedings that it is necessary to engage a public prosecutor into the parties to the case (Tatulych, 2021a, p. 162; 2021b, p. 375; 2021c, p. 99).

The role of the concerned persons can be performed by persons joining the legal process to protect their own interests which can be violated. Such persons may know the whereabouts of a missing person and may report it to the court. That’s why their participation is vital to ensure a fair and impartial trial. It should be noted that such persons cannot be involved as witnesses if they have some personal interest in

³ Ukrainian Constitution (1996) (retrieved from <https://rm.coe.int/constitution-of-ukraine/168071f58b>).

the trial. For example, the role of the persons concerned can be performed by applicant's members of the family or other persons entitled to receive pension due to the loss of a breadwinner (if the case was initiated for this reason), social security authorities etc.

1.3. An application is made of initiating a court case on declaring a person missing or deceased

One way to initiate a case is to file an application. Its content and general requirements is analogical to a petition in a litigation (enshrined in articles 175-177 of the Civil Procedural Code of Ukraine). Besides, a litigator establishes certain requirements to every application in cases of separate proceedings. One of these special requirements to such applications is to indicate a purpose i.e. why an applicant needs to change a legal status or establish a legal fact. That's why if such a requirement was violated, then a judge in a similar way with a petition will decide to leave the application without motion, giving the applicant time to correct the mistakes (article 185 of the Civil Procedural Code of Ukraine).

As a rule, most often the applications may include the following purposes: the purpose of divorce; receipt of pension due to the loss of the breadwinner; claims of debt payment; loss of the right for living space due to the declaration of a missing person etc.

An introduction of a purpose into an application assists the court in establishing a circle of all interested parties, the existence of necessary evidence to be submitted to the court, which, in turn, will ensure compliance with the tasks of civil proceedings and this will promote the effectiveness of trial as well as the adoption of a legal and reasonable decision.

In addition to the purpose, an application also includes the circumstances that confirm the absence of a person, or the circumstances that were death-threatening for the missing person; the circumstances that give reasons to suppose his/her death due to a certain accident. Proceeding from the provisions of the Civil Code of Ukraine, the following circumstances should be mentioned in the application: the date on which the applicant receives the latest information on the place of stay of the long term absentee; after one year period (in order to declare a person missing), after three month, six month, one year period since the latest information about the missing person (in order to declare a person deceased); absence in the place of residence of the missing person, lack of information about a person's whereabouts (Civil Procedural Law of Ukraine, 2020, p. 564).

If an person's declaration of death is connected with certain circumstances, which give grounds for the death of the person, the applicant must indicate it in the content of the application. For example, the circumstances that can be death threatening to the person are attributed to such natural disasters as flood, earthquake, forest fires, snow avalanche, etc. Other circumstances that give grounds to assume a

person's death from a certain accident are: air disasters, car crashes, military actions, armed conflicts, etc.

If a person's declaration of death is connected with his/her participation in military actions, the application should state: a date of the end of hostilities; circumstances that confirm the absence of information about a person who was found missing in connection with military activities at the place of his/her permanent residence within two years from the date of the end of hostilities. Regarding the military officers or other persons who were missing due to military activities, the application should indicate the date of the end of hostilities.

A separate requirement to the applications is a mention of legal relations between the applicant and an allegedly missing or deceased person (civil, family, land, housing, financial).

When declaring absence of death, the applicant must provide evidence to the court that she/he has the legal purpose of applying for judicial protection.

One of the characteristic feature of cases of declaration of absence or death is the fact that the subject of proving such cases is based on presumptions. Most scientists believe that a special procedural rule of assumption about the existence or absence of a legally significant circumstance, which redistributes the evidence of the participants of the process, should be understood under the presumption. The content of the presumptions is probable data, which generally allows for its simplification in a particular case. In other words, the presumptions can be simplified (Shyshka, 2007, p. 57).

According to Vasyliev, „the subject of evidence in cases of absence and death declaration are the following facts: 1. absence of a person; 2. the legal interest of the applicant and the existence of material and legal relations between the applicant and the person concerned with the issue of declaration of absence: divorce (article 107, Family Code of Ukraine), child adoption (article 219, Family Code of Ukraine); 3. the applicant's measure to search for a person; 4. inability to determine the person's location; 5. death threatening circumstances for the missing person; 6. the circumstances that give grounds to suppose a person's death from a certain accident; 7. the circumstances that give grounds to believe that a person can be hiding: he/she is in search and/or does not want to pay alimony or perform other court decisions, etc. ; 8. no dispute about the right” (Vasyljjev, 2019, p. 339-340).

Continuing the issue of evidence in the cases of absence and death declaration Shimanovich points out that “the necessary evidence in these cases is written proof (certificate of residence; certificate of employment, etc. or witnesses statement (a missing person's family, relatives, colleagues, neighbours)). The author includes the following facts to the object of proof: establishment of the place of residence of the person in respect of whom the case is brought; absence of the person in the place of residence within three years from the date of receipt of the latest information about his/her stay; death threatening circumstances for the missing person or the circumstances that give grounds to suppose a person's death from a certain accident;

the end of hostilities for servicemen or other persons found missing due to military actions; the applicant's measures to search for a person" (Shimanovich, 2010, p. 89-90).

The subject of proof in cases of absence and death declaration is the set of material and legal facts (circumstances), with which the norms of civil law relate to the appearance in the court a legal presumption of the absence of a person or the presumption of the death of a missing person. One peculiarity of the subject of proof in cases of absence or death declaration is the fact that it may include well-known facts. They may be circumstances that give grounds to assume a person's death (the fact of an accident) (Bobko *et al.*, 2018, p. 52).

Reviewing the process of proving in such cases, an opinion of a Ukrainian scholar Yasyuka deserves attention. Having analysed evidence in a separate proceeding, he believes that "the process of providing proof can be divided into two periods – pre-procedural and procedural. Such division is logical and natural, as the process of proof has its initial stage. This can be a person's decision to go to court. This decision is logically determined by the person by the following: What evidence can he/she provide to the court in confirmation of the subject matter? What evidence does this person have and what evidence is to be collected? Which proof needs to file a petition in order to be requested? What facts do not need to be proved due to their general availability, etc.? The procedural part of the evidence provides for the procedure of judicial investigation of evidence" (Jasynok, 2021, p. 384).

Thus, applying to the court with the above mentioned application, the applicant should give the court as much evidence of a person's death or absence of as possible. The evidence of these facts may be: death certificates or death report drafted by witnesses, military; photo of the body or a burial place; an extract taken from the Unified Register of Pre-trial Investigations concerning the registration of a crime application on the missing or deceased person; photo, video, articles of mass media concerning shooting during the death of a person; kidnapping; witness testimony of a missing or deceased person who will be able to present their testimony in court, etc. However, in the event of difficulties in the process of evidence-taking and filing, the applicant will be able to submit applications on procedural issues to the court independently or through his representative on the following issues: discovery of evidence by the court; providing evidence; summoning of witnesses; appointment of examination; on spot examination of evidence, submission of court order, etc. The court, in its turn, to ensure the authenticity, validity, reliability and sufficiency of evidence, will decide which piece of evidence will satisfy the demands of applicants and their representatives, if their norms of the current legislation are met. Taking part in the process together with his/her representative, who in the civil process can be represented by a lawyer, one should not forget about another effective instrument of collecting evidence - a lawyer's request, which is quite often realized by lawyers during the collection of the evidence in cases of continuous and separate proceedings.

At the same time, we should pay attention to the fact that the systematic analysis of the part 1 article 46-47 of the Civil Code of Ukraine and article 306 the Civil Procedural Code of Ukraine allows us to reach the conclusion that by itself, the lack of information about the place of stay of a person for three years in the place of his/her permanent residence cannot serve as a sufficient reason for declaring this person deceased. The court should have sufficient proper and admissible evidence to establish the circumstances on which it is possible to make a credible assumption of a person's death. That is, the specifics of this category of cases is that the court's finding on declaration of absence or death is based on the legal assumption of the person's death (legal presumption). Therefore, the applicant must be given all appropriate and admissible evidence to establish the circumstances on which it would be possible to make a credible assumption of the person's death and not only to state the fact of absence of any communication with the person, lack of information on the posts whereabouts, but also to prove possible assumptions about his/her death. A striking example of this is the Supreme Court's decision in the case of a separate proceeding. Thus, on July 7, 2021, the Supreme Court with a part of the panel of judges of First Judicial Chamber of the Civil Court of Cassation in case No. 390/1443/19-ii refused to satisfy the appeal of an applicant, who did not provide evidence to establish the circumstances on which it would be possible to make a credible assumption of his/her brother's death.

1.4. Trial and litigation stages in cases of absence and death declaration.

Having received a duly executed application, the judge checks: its compliance with the requirements of the Civil procedural Code of Ukraine; payment of a judicial fee by the applicant; submissions of a copy of the application and other requirements; a purpose mentioned in the application. This requirement is quite essential because if the court, proceeding from the stated purpose, establishes that it does not create any legal consequences for the applicant or persons in the interests of which the application is filed. If the court finds an applicant having no legal interest, then it is obliged to refuse to initiate proceedings in the case on the grounds of absence of legal interest.

After the case is initiated p, the court will proceed to the next stage – preparation for the trial. Unlike other cases of separate proceedings in this case, the lawmaker will reveal the court's actions when preparing the case for trial. Thus, the court before the trial determines the persons who can provide some evidence of an individual, and also asks the relevant organizations at the last place of absentee's residence and at his/her last place of work about the possible whereabouts of the missing person. At the same time, the court takes measures through the bodies of care and custody to guard the missing person's assets (article 307, Civil Procedural Code of Ukraine). In addition, in our opinion, the court should draw attention to whether the applicant has applied for the search of a person to law enforcement

bodies. If no, then why? If yes, then what were the results of such search. The issues of freedom of movement and choice of residence are regulated by the Law of Ukraine “On freedom of movement and free choice of residence in Ukraine” dated December 11, 2003, No. 1382-4. The issues of registration of residence are regulated by the rules of registration of the place of residence approved by the Resolution of the Cabinet of Ministers of Ukraine dated March 2, 2016, No 207.

In addition to the above-mentioned issues, in the science of civil procedural law, the opinion was expressed concerning the expansion of the range of procedural actions of the judge at this stage. In particular, in order to prepare the case for trial, the judge should decide on the resolution concerning the investigation of the missing person and notify the mass media on the proceedings in the case of the missing or deceased person (Bobko *et al.*, 2018, p. 53). We agree with the given procedural actions of the judge. Moreover, such actions of the judge are already authorized to perform actions in another case of separate proceedings, namely, restoration of rights for lost securities and bonds (articles 322-323, Civil Procedural Code of Ukraine).

The case is considered collegially i.e. with the participation of one judge and two jury members, in an open court session with the participation of the applicant, witnesses, other participants of the trial and persons, whom the court itself finds necessary to be questioned. This category of cases shows the principle of court activity in the process, which is not the case in the competition process. Moreover, there is some limitation of the principle of competition, which is characteristic of cases of separate proceedings. This is justified by the fact that the court’s decision significantly affects the legal rights and interests of the missing person, whose procedural right to participate in the process cannot be realized (Shimanovich, 2010, p. 86).

According to the results of the case, the court makes a decision that satisfies the application or refuses to satisfy it. The court should refuse to satisfy the application if the place of stay of a person is known, or if the court revealed that the term of a person’s absence does not comply with the law.

The court’s decision on this issue is a legal fact. It causes the emergence, change or termination of legal relations connected with the protection and realization of personal and property rights of natural and legal entities. A person’s declaration of death is also the reason for the emergence of hereditary legal relations, divorces, legal relations of social security, etc. (Bobko, 2002, p. 12).

Therefore, in the case of the court ruling to satisfy the application, the following legal consequences apply to the applicants: 1. on the basis of the court’s decision to declare a person missing, the notary has to describe the property which belongs to him/her and has to put it into official care; 2. the dependents of this person have the right to a pension in case of loss of the breadwinner; 3. a spouse of this person has the right for a divorce by applying a simplified procedure in the Civil Registry Office; 4. the letters of attorney issued by this person and on its name shall cease.

The legal consequences of the declaration of death of are equal to the legal consequences of the actual death of a person. From the moment of the court judgement's entry into force, the rights to inheritance, pension, marriage, etc. arise for the persons concerned.

The peculiarity of these categories of cases is that the court's judgement on declaration of absence is based on the legal assumption of a person being alive, and the declaration of death is based on a legal presumption of death (Martynjuk and Doljuk, 2021, p. 136). Thus, material and legal basis of a court decision on declaration of person's absence or death is the presumption of a person being alive or deceased.

The current Civil Procedural Code of Ukraine clearly reveals the issue of implementation of the court's decision after its entry into force (part 2, article 308, Civil Procedural Code of Ukraine). The date of the probable death of a person is important to declare death. According to the general rule, such day is considered the day when the court passed a judgement to declare a person deceased. If a person has disappeared for the circumstances that threatened his/her death, or for the circumstances that give grounds to suppose the death from a certain accident, or due to military actions – from the day of her probable death (the day of the passenger plane crash, earthquake or other natural disaster) (clause 3, article 46, Civil Code of Ukraine).

We agree with the opinion of Korchak that „the analysis of the provisions of the Civil Legislation of Ukraine and the National Judicial Practice makes it possible to focus attention on the importance of the issue of determining the day of death. According to the author, it cannot be determined freely (at the request of persons concerned), because it causes the initiation of the inheritance, the time of divorce and other legal consequences connected with the declaration of death” (Korchak, 2017, p. 7-15).

The court's decision has specific characteristics, which relate to its cancellation in case a missing or deceased person was found or his/her whereabouts were identified. The procedural order of implementation of this procedure is clearly defined in article 309 of the Civil Procedural Code of Ukraine.

The doctrine of civil procedural law expressed the opinion that such a decision is subject to cancellation by means of revision of it under the newly revealed circumstances, since at the time when the case was considered in the court, this person was actually alive, but this fact was not known to the participants of the case or the court. In this case, as noted by Dzer, the court should be sure that the person was mistakenly declared deceased. For this purpose, the law prescribes that the case on judgement cancellation of declaration of death is reviewed in the presence of that person, although the application to cancel the judgement may be submitted not only by this person, but also by any other person concerned (Nikolajev, 2010, p. 734).

In addition to the above-mentioned consequences of the person being alive (judgement cancellation of the declaration of absence or death), there are also a

number of actual implications. The most important of them is renewal of a personal and legal status. Another concern is adopted children declared deceased or missing but turned out to be alive. The renewal of the personal non-proprietary rights of a person being declared deceased or missing but was proved be alive is another problematic issue. Therefore, if a person who was declared missing or deceased will prove respectful reasons for her/his absence, then the rights of this person should be renewed: the right to receive compensation for inflicted damage; the right for alimony, etc. If the person does not prove the respectful reasons, then the payment in his/her favour should not take place. The is also a central issue of the proprietary rights renewal of a person declared deceased or missing but proved to be alive. Problems also arise when there is a question about the legal future of the legal actions concluded in relation to the transfer of rights to the property of this person (deposit, lease, property management, etc.). Since such transaction were concluded by an illegal owner, there are all grounds for their recognition as invalid. These and other important issues will be the subject of discussion and detailed analysis in further research.

Conclusions

Unfortunately, the problem of missing persons is still topical not only in the judiciary, but also in the state as a whole. The geopolitical situation in the East of Ukraine in the context of Joint Task Forces prompts to reconsider the concept of declaration of absence and death in Ukraine. The relevance of this research topic is primarily caused by the entry into force the Law of Ukraine „On Legal Status of Missing Persons”, which defines the legal status of such persons. The declaration of absence or death as an important institute of civil legislation is aimed at protecting the rights and interests of people in connection with the suspension of civil legal relations. In legal practice, there are examples of situations when this institute of declaration of absence or death is used to eliminate uncertainty in civil legal relations. By using civil-law norms, persons concerned can appeal to court and attempt to refute the uncertainty in civil relations, or minimize the adverse effects of such uncertainty. That is, only on the basis of the court’s decision it is possible to change the legal status of the missing person. The legislation provides separate proceeding in civil court for such categories of cases. The applicant should apply to court with the purpose of establishing a person’s status or legal fact, without which the person can not exercise his/her rights. Scientific practices concerning the institute of declaration of absence and death were investigated by Ukrainian scientists from the positions of both material and procedural law. Preference was given to the procedural aspects.

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