

Case Note

REASONABLENESS OF NOTARIAL ACTS AS A COMPONENT OF ENSURING STANDARDS OF LATIN NOTARIES: THE EXPERIENCE OF UKRAINE

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Submitted on 03 Oct 2021 / Revised 27 Oct 2021 / Approved 13 Dec 2021

Published online: 15 Dec 2021 // Latest Published: 01 Feb 2022

Summary: 1. Introduction. – 2. The Content of the Principle of Reasonableness of Notarial Acts. – 3. Request of Evidence Documents by a Notary. – 4. Clarification of Expression of Will and Signing of Notarial Documents. – 5. Request of Evidence Documents. – 6. Conclusions.

Keywords: notary, notarial activity, notarial acts, notarial actions, rules of notarial actions

ABSTRACT

Background: *This article is devoted to the study of the rules of notarial acts, the observance of which ensures the reasonableness of notarial acts as exemplified by Ukraine as a state belonging to the countries with Latin notaries. At the same time, the standardisation of Latin notary standards in Ukrainian legislation is associated with certain problems that do not fully reveal the potential of the notary and its functions as a body of undisputed civil jurisdiction. In this regard,*

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Managing Editor – Dr. Serhii Kravtsov. **English editing** – Dr. Sarah White.

Competing interests: No competing interests were disclosed.

Grant information: The author declared that no grants were involved in supporting this work.

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How to cite: V Barankova 'Reasonableness of Notarial Acts as a Component of Ensuring Standards of Latin Notaries: The Experience of Ukraine' 2022 1(13) Access to Justice in Eastern Europe 178-192. DOI: <https://doi.org/10.33327/AJEE-18-5.1-n000095>

Disclaimer: The author declares that her opinion and views expressed in this article are free of any impact of any organizations.

Latest Published: 01 Feb 2022 (<https://doi.org/10.33327/AJEE-18-5.1-n0000951>)

the purpose of the work is to determine the components of the procedural mechanism to ensure the reasonableness of notarial acts, identify those shortcomings in their standardisation that lead to litigation, and formulate proposals for further improvement of notarial law on this basis.

Methods: *In the present research, we used the following methods: logical, systemic, specific sociological, hermeneutic, and modelling. It is established that the reasonableness of notarial acts is ensured by compliance with the rules on submission of evidence documents, requests for evidence documents by a notary, the signing of notarial documents, sending documents for examination, the compliance of documents submitted for notarial acts with statutory requests, and clarifying the will of the persons concerned.*

Results and Conclusions: *It is proved that a notarial act issued based on the actual circumstances established within the notarial case, confirmed by the relevant evidence provided by the notarial legislation, should be considered reasonable. The grounds for exercising the powers of a notary to demand documents are determined, and the need to differentiate the order of recovery depending on the subjects in which such information is requested is emphasised. The content of the notary's powers to request documents is clarified, and the conditions under which the exercise of such powers should be considered the notary's duty are determined.*

The necessity of extending the duties of a notary to establish the will and real intentions of the persons concerned to all notarial acts and, in this regard, the standardisation of such a duty as a general rule of notarial acts is substantiated.

It is concluded that the distinction between documents for which the originals are subject to preservation in the notarial file and those that are photocopied then returned to interested persons should be made, taking into account the loss or preservation of their validity and legal significance after said notarial action. The author determines the grounds and conditions for sending a document for examination, which is a procedural action of a notary that can be made only at the initiative or consent of the person who submitted the document. The proposals on the tendencies of standardisation of the content of the requirements of the validity of notarial acts and the consequences of their violation are formulated.

1 INTRODUCTION

Ukraine is one of the countries where a Latin notary has been formed to solve the problem of reducing the number of cases heard by courts and where the special importance of written evidence, which fixes the legal conditions for concluding various transactions, is recognised. In the system of Latin notaries, the resolution with the help of the judiciary of legal conflicts that arise after notarisation should be exceptions because, during the notarial activity, all the conditions for the proper realisation of the rights and interests of individuals and legal entities are created according to the law.

Notarial activity has a preventive character, protecting the rights and legitimate interests of subjects from possible violations in the future, giving notarial documents an indisputable character. As a result of notarisation, civil law relations are given a legal, stable, conflict-free, and predictable nature. The execution of the tasks and functions of a notary is possible only under the condition of a lawful and substantiated notarial act as a legal document that fixes the decision of the notary in a particular notarial case. Violation of the requirements of reasonableness undermines the validity of the notarial act, makes it impossible to protect the rights of interested persons, and entails the emergence of appropriate litigation.

The disposition of the notarial act is preceded by a set of procedural actions of the notary aimed at verifying the actual composition. These duties are performed by the notary within

the requirements of the notarial procedural form, which creates a specific legal mechanism that can guarantee the compliance of the conclusions enshrined in the notarial act – the true circumstances of the notarial case. The components of this mechanism are several rules of notarial acts provided by the Law of Ukraine ‘On Notaries’² (hereinafter – the Law), which has not yet received sufficient scientific attention in Ukrainian legal studies.

A significant problem of modern law enforcement is the lack of proper legal regulation of the concept and the content of the reasonableness of a notarial act in Ukraine, as well as insufficient legal regulation of rules concerning the requisition of documents by a notary and establishing the will and true intentions of notaries, for example. These rules, their interaction, and their interdependence are the object of this research.

The purpose of the work is to determine the components of the procedural mechanism used to ensure the validity of notarial acts, to identify shortcomings in their standardisation that lead to litigation, and, on this basis, to formulate proposals for further improvement of the notarial legislation of Ukraine.

The need to address this goal has led to the use of general scientific and special research methods. First of all, it is a question of applying the logical method, which allows us to analyse the essence and purpose of the rules being researched, along with their interrelation and interaction. In addition, the specific sociological method allowed us to substantiate scientific conclusions based on acquaintance with the case law, and the hermeneutic method and modelling method were used as a basis for formulating proposals for changes in notarial law.

2 THE CONTENT OF THE PRINCIPLE OF REASONABLENESS OF NOTARIAL ACTS

A clear division of functions between the participants in the notarial process and their public law nature necessitate delineating the actions taken during the consideration of a notarial case and its results. A notarial act-document is a legal form endowed with procedural decisions made by a notary in the exercise of his or her powers. A notarial act-document is a procedural decision of a notary on the application of law in a particular legal situation, with the participation of certain persons who are subject to the legal force of this act.³ Notarial act-documents are legally binding, as notaries act on behalf of the state. Only the court can cancel notarial acts. The official nature of these documents is due to the fact that they are issued by specially authorised entities, and their essence, structure, and details are enshrined in law.

When considering a notarial case, notaries and other persons authorised by law to perform notarial acts shall act within the framework of a notarial procedural form, compliance with the requirements of which ensures the issuance of lawful and reasonable notarial acts. Compliance with the requirement of reasonableness allows people in the future, outside the notarial case, to consider a notarial act as written evidence, created in advance in a calm atmosphere with the assistance of the parties.⁴

Notarial act-documents have the same legal value as a court decision, with the following differences. First, their legal effect is formed and distributed only in the field of undisputed legal relations. Therefore, they secure not the notary's instructions but the officiality and state recognition of the content of the will of the interested persons – participants in the notarial act, as given by the notary. Secondly, as a result, a notarial act-document has legal force and creates certain legal consequences until the interested parties take the initiative to change or

2 Law of Ukraine ‘On Notaries’, Bulletin of the Verkhovna Rada of Ukraine (VVR) (1993) No 39, 383.

3 VV Komarov, VV Barankova, Notary (Kharkiv Law 2019) 143.

4 J-F Piepu, ‘Professional notarial law’ in J-F Piepu, M Jagr (eds), Lawyer (Jurist 2001) 116.

cancel it. In this case, the decision of the notary is preceded by the establishment of the range of facts provided by the rule to be applied in the case; the collection, study, and evaluation of evidence documents in the case; checking the compliance of the performed actions with the requirements of the law and the actual intentions of the parties, etc. Despite these specifics, notarial act-documents, like court decisions, record the results of law enforcement, which, in turn, provides for the opportunity of the existence of the principle of reasonableness of notarial acts in the notarial process.⁵

The following proposals have been formulated in the literature to determine the main elements of the reasonableness of notarial acts: a notarial act is reasonable if the notary comprehensively, fully, objectively, and directly clarifies the actual circumstances of the notarial act, and its conclusions correspond to the actual relationship of the parties.⁶

We believe that the immediacy of the facts is part of the rules of another principle of the notarial process – the principle of immediacy, and within it, given the specifics of law enforcement in the notarial process, it is advisable to separate the requirements of the immediacy of evidence and establishing circumstances of legal significance. In addition, for a notarial act-document, the requirement of conformity of the notary's conclusions to the actual relationship of the parties is somewhat premature because within a notarial case (as opposed to civil litigation), legal relations of the parties do not exist – they only acquire a certain notarial document (for instance, a contract of sale). Thus, based on the specifics of the implementation of notarial powers and the scope of notarial jurisdiction, in the notarial process, the validity of notarial acts is that the notary's conclusions must correspond to the established circumstances, as well as the intentions and will of interested parties and not the relations between them, which do not exist at the time. It is the reasonableness of the notarial act that ensures its indisputable nature, as a result of which, as noted in the literature, it is much more difficult to refute its content than other actions committed in simple writing.⁷

The mechanism of implementation of the principle of reasonableness of notarial acts is provided by the need to comply with several general rules of notarial acts, which oblige the notary to verify the existence of certain facts for their commission and the issuance of a certain notarial act-documents. These, in our opinion, include: the submission of evidence documents (Part 1 of Art. 42 of the Law), the request of evidence documents by a notary (Art. 46 of the Law), the signing of notarial documents (Art. 45 of the Law), sending documents for examination (Part 2 of Art. 42 of the Law), establishing requirements for documents submitted for notarial acts (Art. 47 of the Law), clarifying the will of interested persons (Part 2 of Art. 54 of the Law, Chapter 6, Section 1 of the Procedure performance of notarial acts by notaries of Ukraine [hereinafter – the Procedure]). Identifying problematic aspects of their application will make it possible to formulate proposals for improving notarial legislation in this area.

3 REQUEST OF EVIDENCE DOCUMENTS BY A NOTARY

Submission by the interested person to the notary of all necessary documents for the performance of a notarial act is the most important condition for the correct resolution of

5 VV Komarov, 'Principles of the notarial process' (2003) 1 Small Encyclopedia of Notaries 6; IM Cherevatenko, 'The principle of legality and validity of notarial acts on the certification of undisputed rights' (2020) 1 Scientific Bulletin of Kherson State University 152; MS Dolynska, 'Basic principles of notarial procedural law of Ukraine' (2020) 4 Legal Scientific Electronic Journal 57.

6 LS Lysenko, 'Legality and validity of notarial acts' (2011) 1 (5) Bulletin of the High Council of Justice 177.

7 O Nelin, 'The legal nature of the notarial act in the latest paradigm of Ukrainian law' (2013) 11 Legal Ukraine 8.

the notarial case – one of the guarantees of the absence of errors on the part of the notary. The composition of the necessary evidence documents, the submission of which is necessary to confirm the presence (absence) of a certain legal fact to be established within a particular notarial case, usually defined in notarial law, is a general and specific rule of evidence in the notarial process.⁸ In this case, the notary or other person performing the notarial act shall not have the right to demand documents from the interested persons that do not relate to the essence of the performed notarial act, except as provided by law.

Art. 46 of the Law gives a notary or other official performing a notarial act the right to demand from individuals and legal entities the information and documents necessary for the performance of a notarial act. Relevant documents must be submitted within the period specified by the notary. This period may not exceed one month. Failure to submit information and documents at the request of a notary is grounds for postponement, the suspension of the notarial act, or refusal to perform it.

The implementation of these powers of the notary, which is part of the mechanism to ensure the principle of reasonableness of notarial acts, often acquires a debatable interpretation due to the imperfect wording of this article.

First of all, the current version of Art. 46 of the Law does not regulate the grounds for applying the powers of a notary to demand documents and does not differentiate the grounds and procedure for cases of such demand from different entities (interested persons who are participants in the notarial act and persons who do not participate in this notarial case). As a result, such powers are sometimes seen as a right and sometimes as a notary's duty in law enforcement practice. Due to this legal uncertainty regarding the grounds and procedure for applying the powers of the notary, the interested persons sometimes mistakenly believe that if the data provided by them are not enough to perform a notarial act, the notary should collect the necessary documents. Such a position in a notarial case cannot be considered legitimate, as the rules of Part 1 of Art. 42 of the Law 'On Notaries' clearly indicate that notarial acts are performed after their payment on the day of submission of all necessary documents, i.e., the obligation to provide documents for notarial acts is imposed on stakeholders by the law. Most scholars agree with this.⁹ We consider it expedient to enshrine in law the rule that the submission of evidence documents required to perform a notarial act is the responsibility of the persons concerned.

Such actions should not be considered as requiring documents in the sense of applying the rules of Art. 46 of the Law, since the notary exercises his or her powers in the field of undisputed civil jurisdiction, and the initiative and desire of the relevant stakeholders must always be expressed for the commission of a certain notarial act. Failure to submit documents by the interested participants in the notarial process is their failure to fulfil their procedural obligations under Part 1 of Art. 42 of the Law, and the consequence in this case can only be a refusal to perform a notarial act. Other legal sanctions cannot be applied to such entities.

In addition, there are cases when it is very difficult or simply impossible for the applicant to obtain some documents that are in the possession of other persons who may not even be involved in the notarial case. This situation may be due to subjective or objective grounds: illegal refusal of any official to issue such certificates, prolonged delay in obtaining them, prohibition of obtaining confidential information, information constituting medical secrecy, and so on. According to the current legislation, certain documents are issued only to a limited number of designated entities or are not issued at all without the request of the competent authorities (certificates of the registry office, medical certificates, information from electronic registers, information on contributions, etc.). It is in such cases that the

8 VV Barankova, 'Proof in the notarial process' (2000) 42 Problems of Legality 98.

9 LS Lysenko, 'Legality and validity of notarial acts' (n 6) 178.

notary must exercise their authority to demand the materials of the notarial file, if the person concerned takes the initiative, as this may involve the need for additional notarial costs.

A different kind of legal situation, when the notary has an obligation to request information, concerns the application of the rules of Art. 46-1 of the Law 'On Notaries', according to which a notary must use information from the unified and state registers by directly accessing them when performing notarial acts. Failure to comply with this obligation indicates a violation of the law by a notary. The Luhansk Court of Appeal proceeded to overturn the decision of the Severodonetsk City Court of Luhansk region of 8 October 2020 in the case of *Person 1 vs the Limited Liability Company 'Car Service and Commerce', the First Severodonetsk State Notary's Office* on declaring illegal and cancelling the decision to refuse to perform a notarial act. Thus, the Court of Appeal noted that the state notary refused to issue a certificate of the right to inheritance to Person 1 after the death of her husband (Person 4), citing the lack of right-establishing documents to the Limited Liability Company 'Car Service and Commerce'. However, the materials of the inheritance case show that the state notary did not use the information of the Unified State Register of Legal Entities, Private Entrepreneurs and Public Associations. In such circumstances, the court found that the state notary did not meet the requirements of the Law 'On Notaries', and the decision to refuse to issue a certificate of inheritance was illegal and subject to cancellation.¹⁰

In addition, the notary may have an obligation to request evidence documents in another case – when the evidence documents provided by interested parties contain contradictory data that prevents the establishment of the true circumstances of the notarial case. For example, in accordance with Part 3 of Art. 44 of the Law in case of doubt about the extent of the civil capacity of a natural person who applied for a notarial act, the notary is obliged to apply to the guardianship authority at the place of residence of the individual to establish the absence of guardianship or custody. Another example – the rules of Part 5 of Art. 44 of the Law: if a notary has doubts about the submitted documents to prove the civil capacity and legal capacity of a legal entity, they may require additional information or documents from this legal entity, state registrar and revenue, other bodies, entities, institutions, and individuals.

The exercise of the notary's powers to demand evidence documents in this case ensures the legality and validity of the notarial act and the performance of functions and tasks of notarial activities. The absence of parties with conflicting interests among the subjects of the notarial process or the absence of a dispute over the law makes it impossible to prove and establish the circumstances of the notarial case in the form of adversarial proceedings, and this requires specific powers of the notary as a law enforcement entity.

It should also be noted that Art. 46 of the Law stipulates the obligation to comply with the requirements of a notary to request documents but does not provide for legal sanctions for failure to comply with this obligation.

As already mentioned, the consequences of not submitting documents at the request of a notary should vary depending on the entity from which the documents were requested. In case of non-submission of documents by the interested persons, there is a refusal to perform a notarial act. If the notary's requisition for the provision of evidence has not been met by persons or bodies that are not participants in this notarial act, the law does not provide for the possibility of a notary to influence the behaviour of such persons. Unfortunately, the consequences of non-submission of documents in this case can only be applied by the court after consideration of the case on the claim of the interested person, in whose favour no notarial act can be performed due to non-submission of documents, to the person who did not provide these documents to the notary.

10 Resolution of the Luhansk Court of Appeal of 21 December 2020 <<https://reyestr.court.gov.ua/Review/93771236>> date accessed 27 October 2021.

An example of such a situation is the lawsuit filed by Person 1 to the Main Department of the Pension Fund of Ukraine in the Chernihiv region, with the participation as a third party of a private notary of Kozelets notarial district for recognition of illegal inaction and obligation to take certain actions. Declaring the refusal to provide the notary with a certificate of accrued but unpaid pension illegal, the court ordered the defendant to provide information to the notary within fourteen days after the decision entered into force.¹¹

Of course, the emergence of a lawsuit in this case is a justified and necessary step, but the task of the notary is still to reduce the burden on the judiciary and prevent litigation. In addition, a notary is a person authorised by the state (Part 1 of Art. 3 of the Law), and therefore we consider it appropriate to propose additions to the current version of Art. 46 of the Law, providing for the possibility of collecting a fine for failure to comply with the requisition of a notary. It would also be appropriate to provide for the suitable procedural registration of the procedural action of the notary to request documents.

Notaries are currently addressing the claimants with appropriate inquiry letters that have an arbitrary form and contain various details. We consider it expedient to provide for the need to issue a demand for evidence by a decision of a notary, which contains the following information: the date of the decision; the name of the notarial district and the address of the location of the workplace of a private notary or state notary office; last name, first name, patronymic of the notary; information about the subject from whom the information is requested; the content and form of presentation of the required information; deadline for submitting information to a notary; liability for non-compliance with the requisition of the notary (if established by law); signature and seal of the notary.

The next problem is that Part 3 of Art. 46 provides for the possibility of performing three different procedural actions due to failure to submit documents at the request of a notary: postponement, the suspension of the notarial act, and refusal to perform it. Yet, it does not specify the grounds on which each of these actions can be made, which is necessary because they are different in content and consequence.

The specification of the definition of such grounds is possible considering the requirements of Arts. 42 and 49 of the Law. Based on their content, we can conclude the following.

Failure to submit evidence documents at the request of a notary may entail the postponement of the notarial act when it is a temporary obstacle to its commission and must be removed within a specified period. Thus, Part 2 of Art. 42 of the Law stipulates that the performance of a notarial act may be postponed, in particular, if it is necessary to request additional information or documents from individuals and legal entities. The period for which the performance of a notarial act is postponed in such a case may not exceed one month. If the documents are not submitted within this period, the notarial act will be refused.

Thus, the current notarial legislation does not provide cases in which non-submission of evidence documents is fixed as the basis for suspension of notarial action. After all, the only basis for suspension according to Part 4 Art. 42 of the Law recognises the receipt in court of a statement of claim of a person disputing the right or fact, the certificate of which is requested by another interested person. Thus, the text of Part 3 of Art. 46 of the Law should exclude the assertion that failure to submit documents may be grounds for suspension of the notarial act.

Refusal to perform a notarial act occurs when the persons concerned have not submitted to the notary the documents necessary for the performance of the notarial act but require a decision of the notary on the impossibility of its performance, or when the notary is refused

11 Decision of the Chernihiv District Administrative Court of 30 January 2020. <<https://reyestr.court.gov.ua/Review/87353314>> date accessed 27 October 2021.

evidence documents by persons or bodies from which documents were required and which are not subjects of the notarial process.

4 CLARIFICATION OF EXPRESSION OF WILL AND SIGNING OF NOTARIAL DOCUMENTS

In accordance with Part 2 of Art. 54 of the Law and the rules of Ch. 6 of Section 1 of the Procedure, the notary is obliged to establish the will of the person who applied for a notarial act. The notary is obliged to establish the real intentions of each of the parties before the transaction, which he or she certifies, as well as the absence of objections of the parties to each of the terms of the transaction.

The establishment of the real intentions of each of the participants is carried out by the notary establishing the same understanding as the parties of the meaning, conditions, and legal consequences of the transaction for each of the parties. The establishment of the actual intentions of one of the parties to the transaction may be carried out by a notary in the absence of the other party.

Notarisation of the will of the persons concerned is one of the most important responsibilities, the performance of which ensures that the notary can perform their tasks and functions, as this rule protects the subjects of notarial acts from possible violations of their rights in the future. The mechanism of application of this rule allows for the implementation of one of the defining principles of the Latin notary, namely, that it is impossible to refute the observance of the order of notarial acts by the testimony of a witness who did not participate in it.¹²

For example, considering the appeal in the case of the claim of Person 1 to Person 2 for invalidation of agreements on a gift of real estate, the Kharkiv Court of Appeal confirmed the correctness of the Dzerzhinsky District Court of Kharkiv, which reasonably did not take into account the testimony of a witness (Person 5) concerning the deception by the defendant in concluding the disputed agreements, and assessed them critically, as the defendant's intention was known to the claimant from the words of the defendant. At the same time, the courts emphasised that the mentioned witness did not become acquainted with the content of the agreements during the signing.¹³

We note the fundamental significance of this court decision given the impossibility of proving the circumstances of the notarisation by the testimony of a person who was not a participant in the notarial act. Instead, the courts based their decisions on the observance of the procedure for performing a notarial act, in particular, the performance by the notary of the obligation to establish the will and intentions of the parties to the juristic act. In support of this fact, the courts examined the written evidence, namely, the texts of the agreements, which recorded the content of the actions committed during the certification of the contract, confirmed by the signatures of the parties. Thus, the validity of the identification inscriptions on the disputed agreements was conditioned by the signatures of the parties under the recording of the parties' assertions that at the time of concluding the agreements, they are aware of the consequences and understand the significance of their actions, confirm their intentions and manage them; do not act under duress, do not act under the influence of error, deception, or violence; entered into these agreements without intending to conceal other

12 V Komarov, V Barankova, 'Notary of Ukraine and prospects of its development' (2020) 9 Law of Ukraine 52.

13 Resolution of the Kharkiv Court of Appeal of 21 April 2021 <<https://reyestr.court.gov.ua/Review/96550108>> date accessed 27 October 2021.

transactions (actions); the contracts are not fictitious or fraudulent and do not contradict the rights and interests of underage, minors, and disabled persons.

In this regard, we note that in cases where the expression of will as a result of its challenge becomes the subject of judicial investigation, there are two ways to establish its authenticity: either the courts examine the circumstances that occurred outside the notarial process and indicate the existence of another intention than the one established by the notary, or, if such circumstances do not exist, the performance (non-performance) by the notary of the obligations to verify the conformity of intentions and expression of will is established.

In the first case, the behaviour of the notary is not discussed at all in court. In the second, the failure of the duty may indicate certain actions of the notary related to failure to ensure proper communication (or lack of such communication) with stakeholders, given that within the notarial process of expression of will must be direct.

Thus, in the case of the claim of Person 5 to Person 3 for invalidation of the will, the court found non-compliance with the rules of clarifying the will of the testator. Certification of a will due to the testator's illness took place at his home. At the same time, the secretary of Zelenogai village council of Novoselytsia district of Chernivtsi region, who certified this will, did not establish the testator's legal capacity before signing the will and did not check his real intentions by talking face-to-face, but immediately arrived with a printed will that was written based on an oral request of relatives of the testator. The court emphasised that the secretary could make a printed text of the will only after communicating with the testator.¹⁴ In another court case, the courts of first and appellate instances based their decisions on invalidation of the contract of gift, confirmed in court the arguments of the plaintiff about the distortion of his will due to the fact that he did not speak enough Ukrainian, and a certified translator of the notarial action was not involved.¹⁵

The signatures of the parties on the document acquiring the notarial certificate are most often considered in judicial practice as confirmation of observance by the notary of requirements of the law. At the same time, signatures must also be executed according to the rules of notarial procedural form; otherwise, independent grounds are formed for declaring a notarial act unfounded and a notarial act illegal.

Thus, the authenticity of the signature of the participant of the notarial act is verified by a notary under the rules of Art. 45 of the Law. Notarised acts, as well as applications and other documents, are signed in the presence of a notary. If the application or other document is signed in the absence of a notary, the person who applied for a notarial act must personally confirm that the document is signed by them.

If a natural person due to a physical defect or illness cannot personally sign the document, then on his or her behalf in his or her presence and in the presence of a notary, this document may be signed by another person. The reasons for which the natural person who applied for a notarial act could not sign the document are indicated in the identification inscription. An act for a person who cannot sign it cannot be signed by a person in whose favour or with whose participation it is certified.

An essential guarantee of ensuring the authenticity of the will and compliance with its intentions of the persons concerned is the duty of the notary to ensure their acquaintance with the contents of the document before signing (para. 3 of Chapter 9 of the Procedure).

14 Decision of the Novoselytsky District Court of the Chernivtsi Region of 12 December 2019 <<https://reyestr.court.gov.ua/Review/87011258>> date accessed 27 October 2021.

15 Resolution of the Kharkiv Court of Appeal of 8 June 2021 <<https://reyestr.court.gov.ua/Review/97558931>> date accessed 27 October 2021.

Judicial practice contains many court cases that show that non-compliance with the rules of affixing a signature inevitably entails the recognition of a notarial act as illegal and the invalidation of a notarised transaction with such violations. For example, the Babushkinsky District Court of Dnipropetrovsk, in its decision from 2 February 2021, declared a will that did not contain the testator's signature invalid.¹⁶ Sosnivskyi District Court of Cherkasy invalidated the power of attorney, finding that the private notary did not verify the authenticity of the authorising person's signature.¹⁷

Instead, compliance with the rules of signing notarised wills allows the court to recognise their legal validity and their legal consequences, even if the notarial authorities make minor technical errors.¹⁸

The current notarial legislation regulates the duties of the notary to establish the will and the actual intentions of the parties in a somewhat contradictory manner. Thus, Art. 54 of the Law provides for such obligations for a notary directly when certifying transactions, i.e., as special rules for performing this notarial act. The procedure for performing notarial acts by notaries of Ukraine, in turn, contains Chapter 6 of Section 1, the name and content of which necessitates the application of the rules of establishing the will for all notarial acts.

At the same time, the specific rules of notarial proceedings stipulate the need to clarify the will of even those who have not applied to a notary but whose rights may be affected by the commission of a notarial act. For example, a notary is obliged to verify the consent of the parent of the child to perform juristic acts in respect of vehicles and real estate by the other parent (para. 3.3. Chapter 1, Section II of the Procedure); with the consent of parents (adoptive parents) or guardians to certify transactions on behalf of minors or persons whose civil capacity is limited (para. 3.5. of Chapter 1, Section II of the Procedure); consent of the other spouse (para. 4.1. Chapter, 1 Section II of the Procedure); in ensuring the implementation of the pre-emptive right of purchase (para. 5 of Chapter 1, Section II of the Procedure), etc.

We consider it expedient to extend the duties of a notary to establish the will and actual intentions of the persons concerned to all notarial acts. In this regard, it is necessary to establish such an obligation as a general rule of notarial acts in Ch. 4 of the Law.

Analysis of case law shows that compliance with the rules for establishing the true intentions by convincing the notary in the same understanding of the meaning, conditions, and consequences of the transaction by the parties is not properly established by the current law. Therefore checking the due fulfilment of the notary's duties in the future, in case of dispute, is too problematic. It is seen that the solution to this problem could be a legally regulated *introduction of rules for recording the performance of a notarial act by means of video and audio recording*.

5 REQUEST OF EVIDENCE DOCUMENTS

According to the rules of Art. 42 of the Law, notarial acts are performed on the day of submission of all necessary documents. Failure to submit the relevant evidence documents, as already noted, makes it impossible to perform a notarial act. Judicial practice has repeatedly

16 Decision of the Babushkinsky District Court of Dnipropetrovsk dated 2 February 2021 <<https://reyestr.court.gov.ua/Review/95750362>> date accessed 27 October 2021.

17 Decision of the Sosnivsky District Court of Cherkasy of 29 March 2021 <<https://reyestr.court.gov.ua/Review/96015052>> date accessed 27 October 2021.

18 Decision of the Sumy District Court of the Sumy Region of 10 August 2020 <<https://reyestr.court.gov.ua/Review/90924726>> date accessed 27 October 2021; Decision of the Sumy District Court of the Sumy Region of 15 June 2021 <<https://reyestr.court.gov.ua/Review/97647740>> date accessed 27 October 2021.

confirmed the fact that the submission of evidence documents is the responsibility of interested persons who have applied for a notarial act. For example, the Chernihiv Court of Appeal, reviewing the decision to dismiss the claim to the Minsk District State Notary's Office to declare the decision to refuse to perform a notarial act illegal, upheld it, noting that the notary had reasonably refused to issue a certificate of inheritance due to failure of the claimant to submit the relevant documents required to perform this notarial act.¹⁹

At the same time, the peculiarity of the notarial procedural form and the process of proving in the notarial process should be considered the statutory requirements for documents submitted for notarial acts (Art. 47 of the Law, Ch. 7 and 8 of the Procedure). Failure of the interested person to comply with such requirements also entails a refusal to perform a notarial act on the grounds provided for in para. 1, Part 1 of Art. 49 of the Law. Of course, the refusal occurs only when the shortcomings of the documents submitted for the performance of a notarial act cannot be corrected within the framework of its performance.

For example, the Pechersk District Court of Kyiv denied the claim of Person 1 to a private notary to declare the refusal to perform a notarial act illegal. Confirming the correctness of the notary's actions, in support of its decision, the court noted that for the issuance of a certificate of inheritance, the plaintiff notary filed a will that did not meet the requirements of the law, namely, it was not registered in the Inheritance Register.²⁰ In another court case, the Kyiv Court of Appeal ruled that a notary's actions regarding the improper legal assessment of an evidence document submitted for a notarial act to confirm the consent of another spouse to the alienation of real estate were illegal. The application for consent to the alienation of property submitted to the notary stated a form of certification inscription No. 64 (instead of form No. 44), which does not require establishing the fact of registration of marriage and does not meet the requirements of Annex No. 25 to the Rules of Notarial Records. Thus, the court recognised that the notary performed a notarial act on the basis of a document that did not meet the requirements of applicable law and had to refuse to perform a notarial act.²¹

The validity of a notarial act not only means the official recognition of a certain legal fact but also excludes the existence of other facts that cannot occur simultaneously, i.e., the appointment of validity requirements should be considered in terms of legal certainty of specific circumstances and relationships. For example, the stay of a certain individual in a certain place excludes his simultaneous stay in another; the acceptance of sums of money and securities on deposit indicates the absence of debt; proof of the time of presentation of the document by a certain person means that the same document at the same time could not be in possession of another person; notarised ownership of a certain person (or persons in the case of joint ownership) of property makes it impossible for other owners of the same property to exist.

Ensuring such consequences of notarisation is provided through the implementation of specific rules of notarial proceedings not only on the requisition for the submitted documents but also on their inclusion in the materials of the notarial case after the notarial act. The procedure for performing notarial acts provides for two options: either the documents are attached to a copy of the juristic act, certificate, etc., which remains in the notary's office (para. 3 of Chapter 7, Section 1 of the Procedure), or the original documents are returned to those who submitted them, and the notary is left with their copies (photocopies) or extracts from such documents (para. 4 of Chapter 7, Section 1 of the Procedure). The Procedure

19 Resolution of the Chernihiv Court of Appeal of 16 February 2021 <<https://reyestr.court.gov.ua/Review/94957018>> date accessed 27 October 2021.

20 Decision of the Pechersk District Court of Kyiv of 22 April 2020 <<https://reyestr.court.gov.ua/Review/89204463>> date accessed 27 October 2021.

21 Resolution of the Kyiv Court of Appeal of 16 February 2021 <<https://reyestr.court.gov.ua/Review/94957018>> date accessed 27 October 2021.

contains only examples of documents, the originals of which are returned to interested parties (birth, marriage, death, constituent documents, etc.), and the grounds for applying the rules of preservation or return of documents are not specified. Unfortunately, such legal uncertainty gives rise to litigation.

Thus, the Ternopil Court of Appeal confirmed the correctness of the decision of the Zalishchyk District Court in the case of the claim of Person 1 to the Zalishchyk State Notary Office to cancel the decision of the state notary to refuse to issue a certificate of inheritance, referring to the following. Person 1, applying to the notary for the issuance of a certificate of inheritance left after the death of her mother, refused to provide the notary with the original title documents to the inherited real estate to attach them to the case file. The heiress assumed that these documents were the property of her late mother and, in addition, the first copy of the contract of lifelong use, certified by a notary on 22 April 1972, was in the notary office. The courts recognised that when filing inheritance cases on real estate for a new owner (heir), the notary is obliged to attach documents confirming the ownership of the testator's property on the inherited property to the materials of the inheritance. An exception to this rule is provided only in para. 3 of Chapter 7 Section 1 of the Procedure. Given that the plaintiff had the original legal documents necessary to perform a notarial act, but she flatly refused to provide them for inclusion in the inheritance case, the contested decision of the notary met the requirements of law, and the notary's refusal was lawful.²²

The distinction between documents subject to preservation in the materials of the notarial case and those that are photocopied and returned to interested persons should be made, taking into account the loss or preservation of their validity and legal value after the said notarial action.

Documents whose legal significance is lost should be withdrawn from legal circulation and kept in the relevant notarial files. For example, after the issuance of a certificate of inheritance, which confirms the transfer of ownership of the inherited property to the heir, the documents certifying the ownership of the property of the testator will no longer have any legal value. And precisely so that their possible use does not create legal uncertainty, their originals should be withdrawn from the interested persons and remain in the notary's files as proof of the validity of the relevant notarial act.

Documents that are valid and have legal significance in further legal relations with the participation of interested persons must be returned to them. For example, a birth or death certificate can be used repeatedly to confirm these facts in many legal relationships or legal cases. Thus, the above allows us to conclude that it is necessary to enshrine in law the relevant grounds for the notary to select the originals of the documents submitted to him or her or return them to interested parties.

The rules of examination of evidence documents provide for the need to convince the notary of their authenticity. In accordance with Part 2 of Art. 51 of the Law and item 2 of Chapter 15 Section 1 of the Procedure if the authenticity of the submitted document is in doubt, the notary has the right to leave this document and send it to the expert institution (expert) for examination.

We also have to mention the declarative nature of these rules and the complete lack of standardisation of the procedural order of their implementation. This shortcoming should be addressed with the following considerations in mind. Sending documents for examination is a notarial action that can be done only at the initiative or consent of the person concerned. First, the notarial act is performed on the initiative of the persons concerned, and, as already

22 Resolution of the Ternopil Court of Appeal of 24 December 2020 <<https://reyestr.court.gov.ua/Review/93922343>> date accessed 27 October 2021.

mentioned, they are responsible for proving and submitting evidence, and the examination is aimed at removing doubts about the authenticity of the document that has the value of evidence. Second, the examination is associated with the need to pay for it, which is also entrusted to the person concerned. If the interested person does not agree to the examination, and other evidence to confirm a certain fact, the establishment of which ensures the validity of the notarial act, does not exist, the notary must refuse to perform a notarial act on the basis of para. 2 Part 1 of Art. 49 of the Law.

Expert examination in notarial proceedings should be provided with the corresponding procedural registration. The decision of the notary to conduct an examination, in our opinion, should be recorded in a special procedural decision document to transfer the document for examination, which should contain the following details: surname, name, patronymic of the notary; notarial district and address of the notary's workplace; description of the document sent for examination; statement of the notary's doubts that need to be eliminated; questions about the authenticity of the document; date of the resolution; signature and seal of the notary.

6 CONCLUSIONS

In the notarial process, the validity of notarial acts is based on the fact that the notary's conclusions must correspond to the established circumstances, as well as the intentions and will of the interested participants in the notarial case.

The rules that ensure the implementation of the principle of reasonableness of notarial acts and oblige the notary to verify the existence of certain facts and draw conclusions about them, in our opinion, include rules for determining: deadlines for notarial acts, the requisition of evidence documents by the notary, the signing notarial documents, referrals of documents for examination, the requisition for documents submitted for notarial acts, and the clarification of the will and intentions of interested persons.

We consider it expedient to legislate the rule that the submission of evidence documents necessary for the performance of a notarial act and is the duty of the persons concerned, the consequence of the failure of which can only be a refusal to perform a notarial act. The demand of documents in the sense of the adherence of Art. 46 of the Law in such situations is not mentioned.

The notary must exercise their powers to demand the materials of the notarial case in three cases: if the interested person, having difficulty in presenting evidence, shows the initiative or consent to such actions by the notary; when, in accordance with the rules of Art. 46-1 of the Law, the notary uses the information of the unified and state registers; and if the evidence documents provided by the interested persons contain contradictory data, which prevents the establishment of the true circumstances of the notarial case.

We propose to make additions to the current version of Art. 46 of the Law of Ukraine, providing for the possibility of issuing a fine for failure to comply with the requisition of the notary by those persons who do not participate in the notarial act. It will also be expedient to provide for the appropriate procedural registration of the procedural action of the notary to demand documents.

The grounds for application of such consequences of non-submission of evidence documents at the request of a notary is the refusal to perform a notarial act. The suspension and postponement of a notarial act are also subject to specification.

Failure to perform the duty of a notary to establish the will of the persons concerned may be

evidenced by failure to ensure proper communication (or lack of such communication) with the persons concerned, given that within the notarial process, the expression of will must be direct. The signatures of the parties on the document that acquires a notarised certificate, which must be performed according to the rules of notarial procedural form, is often considered by court practice to be the confirmation of the notary's compliance with the law.

We consider it expedient to extend the duties of a notary to establish the will and actual intentions of the parties to all notarial acts. In this regard, it is necessary to establish such an obligation as a general rule of notarial acts in Chapter 4 of the Law. A procedural guarantee of the possibility of proving the performance of this duty by a notary may be the introduction of rules for recording the performance of a notarial act by means of video and audio recording.

And, as was mentioned, a distinction should be made between documents that are subject to preservation in the materials of the notarial case and those that are returned to interested persons after being photocopied, considering the loss or preservation of their validity and legal value after the commitment of notarial action.

Sending documents for examination, which is carried out to verify their authenticity, should be recognised as a notarial action that can be done only on the initiative or consent of the person concerned. Lastly, the examination in notarial proceedings should be provided with an appropriate procedural design.

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