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STAGES OF THE NOTARIAL PROCESS: THEORETICAL AND LEGAL ANALYSIS

Summary. The article is devoted to a comprehensive theoretical study of the stages of the notarial process. Particular attention is paid to the content of the stages of the notarial process and the notary actions in each of them. The opinions of scholars on the classification of stages of the notarial process are analyzed. It is noted that the first stage is the opening of notarial proceedings, which begins with the submission of an application by the person concerned and its acceptance by a notary. In fact, the opening of notarial proceeding acts as a fixation of the appeal of interested persons to the notary for the performance of a notarial act. The grounds for refusing to initiate notarial proceedings are considered. The opinions of scholars on the division of grounds for a refusal to open notarial proceedings into two groups are highlighted. It was found that another stage of the notarial process is preparation for the notarial process. At this stage, the notary identifies the facts to establish which you can ask for specific documents or ask others. It is essential at this stage to verify compliance with the rights of minors, individuals who don't participate in the performance of notarial acts. At this stage, the notary must check the objective and subjective conditions and decide on the possibility of notarial proceedings or refusal to do so. The main tasks at the preparation stage for notarial proceedings have been identified. When performing relatively simple notarial acts, in particular, witnessing the authenticity of the signature on the document, almost all stages of notarial proceedings are carried out simultaneously, and their separate allocation is hardly possible. Having completed a set of preparatory actions, the notary proceeds to the third stage – the direct performance of notarial proceedings. This stage consists of a set of procedural notary actions and other participants. The actions of the notary at this stage are revealed. The grounds for delay the notarial act are described. In such cases, the term of the notarial act may not exceed one month. It is especially important when performing a notarial act to ensure compliance with the rules of both substantive and procedural notarial law. It has been studied that compliance with the notarial procedural form is mandatory, as ignoring this requirement can lead to the loss of essentially correct notarial deed may lead to the invalidation of an essentially correct notarial deed.

Key words: notary, notarial process, notarial act, stage.

Formulation of the problem. The trend of development of the modern state is to create optimal conditions for realizing human rights, freedoms, and legitimate interests. A notary who protects private and public legal interests play an essential role in this process. Notarial proceedings as a legally regulated activity include certain stages that form a single procedural whole. However, one of the reasons for the inefficiency of notarial activities may be non-compliance with the logical sequence in the performance of notarial acts. Notarial proceedings must develop in a specific sequence.

Therefore, strict adherence to the necessary actions at each stage of the process is an essential issue of national law. Consistent execution of stages of the notarial process allows for ensuring the legitimate interests of the subjects. This justifies the relevance of this research topic.

Analysis of research problem. The theoretical basis of our study were the works of famous scientists. Among the well-known scholars who studied the notarial process should be noted: V. V. Barankova, M. V. Bondareva, Yu. P. Zhelikhovska, T. G. Fursa and others. Given the significant contribution of scholars in the study of notarial activity, it's necessary to pay attention to the stages of the notarial process.

The purpose of the article – to find out what procedural actions will be taken at a certain stage, which will form a notarial procedure. This will help to specify the actions of the notary at different times and at each stage of the proceedings.

Presenting main material. The stage, as an integral part of the notarial process, is formed by a set of procedural actions, which are characterized by a specific range of subjects with certain rights and responsibilities inherent in this stage.

The stages of the notarial process involve the development of the main categories of stages, their classifications and criteria for activities specific to a particular stage. In the desk-book for notaries there are three stages of notarial proceedings: 1) launching of notarial proceedings; 2) establishment of the legal structure necessary for the performance of a notarial act; 3) the commission of a notarial act [1, p. 57].

We agree with the opinion of S. Ya. Fursa that notarial proceedings are formed by several phases, at each of which there are stages of notarial proceedings. Thus, the author identified three stages of the notarial process: 1) the opening of notarial proceedings; 2) preparation for notarial proceedings; 3) direct commission of a notarial act, which ends with a notarized document and its issuance [2, p. 360].

A similar classification of stages of the notarial process is given by V. V. Komarov and V. V. Barankova, highlighting the following mandatory stages: launching of notarial proceedings; preparation for the performance of a notarial act; consideration of a notarial case on the merits and adoption of a notarial deed [3, p. 85].

Let's try to consider the content of the stages of the notarial process and the actions of the notary on each of them. The first stage is the opening of notarial proceeding, which begins by virtue of the principle of dispositiveness, by filing an application by the person concerned and its acceptance by a notary. As a general rule, notaries and officials equated to them perform a notarial act upon a written or oral application of the person who applied to them. However, the legislation provides for cases of notarial acts

at the initiative of a notary or other persons, an example of which is the norm of Art. 60 of the Law on taking measures to protect hereditary property. Thus, the opening of notarial proceeding begins from the moment of the applicant's application to the notary and ends with the adoption of a decision to commit or refuse to perform a notarial act. From this point of view, the moment of emergence of notarial procedural legal relations should be considered the appeal of the person concerned with the application to the notary and its acceptance. S. Ya. Fursa quite rightly considers the filing of the application by the subject and its acceptance by the notary as facts of legal significance. The scientist believes that such a provision is a possibility to confirm the beginning of the notarial act, which should be paid, and notes that from this moment it is necessary to take into account the time spent by the notary to perform notarial proceeding. Otherwise, from this same moment the applicant gets the opportunity to challenge the actions of the notary [2, p. 360]. In fact, the opening of notarial proceeding acts as a fixation of the appeal of interested persons to the notary for the performance of a notarial act. In general, the initiation of proceeding is by the personal initiative of the person concerned. However, there are cases when other persons or bodies in the interests of a third party may apply to a notary for a notarial act, such as certifying the authenticity of copies of documents, their extracts, taking measures to protect inherited property. Therefore, the provisions of Art. 43 of the Law prohibit the performance of a notarial act in the absence of persons – its participants or their authorized representatives. At the first stage of notarial proceedings, the notary and the official who performs notarial acts must identify the person who applied for such an act and check the legal capacity of individuals and legal entities involved in transactions.

The legislation clearly defines the grounds for refusing to initiate notarial proceedings. According to Art. 49 of the Law such grounds are: committing an act that contradicts the legislation of Ukraine; failure to submit information and documents required to perform a notarial act; the action is subject to commission by another notary or an official who performs notarial acts; the notary has doubts about the awareness of the individual who applied for a notarial act, about the meaning, content, legal consequences of this action; application for a notarial act of a person who has been declared incompetent in accordance with the procedure established by law, or lack of the necessary powers of the representative of the interested person; inconsistency of the transaction concluded on behalf of the legal entity with the purposes specified in its charter, or going beyond their activity; failure to pay for the performance of a notarial act by a person who has applied for it; failure of the person who applied for a notarial act to make the payments established by law related to its commission; entry of a person who has applied for a notarial act to alienate the property belonging to him/her, in the Unified Register of Debtors; and other cases provided by law [4]. Analyzing the above-mentioned, we support the opinion of scientists on the division of grounds for refusal to open notarial proceedings into two groups. The authors included in the first group the cases when the persons concerned do not have the right to apply to a notary or an official who performs notarial acts. For example, the actions requested by the applicant are contrary to the law or the transaction that the legal entity intends to enter into does not correspond to the scope of its civil capacity. The second group includes cases when the applicant has not complied with the necessary conditions for exercising the right to apply to notarial

bodies, in particular, the application of an incapacitated person to a notary with a request to perform notarial acts, etc. [3, p. 86].

The second stage of the notarial process is the preparation for the notarial proceedings, which establishes the legal structure necessary for the performance of a notarial act. Basically, we are talking about legal facts of financial and legal nature, which altogether determine the possibility of a notarial act. The notary, based on the nature of the notarial act, determines the range of necessary facts, for the establishment of which may require certain documents or invite other persons. It is important at this stage to verify compliance with the rights of minors, third parties who do not participate in the notarial act – the second spouse, the owner of the property in transactions with the property of legal entities. It is at this stage that the notary must verify the objective and subjective conditions and make a final decision on the possibility of notarial proceedings or refusal to do so.

A group of objective statutory conditions, form the conditions for:

- belonging of the notarial act to the competence of notaries.

It is necessary to take into account the general conditions of jurisdiction of legal issues to notarial bodies. The determining feature in the delimitation of the competence of the notary and judicial bodies should be considered the possibility of acknowledgment by a notary only of undisputed rights, while the disputed legal relationship is considered in court;

- the absence of any restrictions on the right to perform notarial proceedings. Thus, the legislator established a ban on notaries and local government officials to perform notarial acts in their own name and on their own behalf, in the name and on behalf of their husband or wife, his (her) and their relatives (parents, children, grandchildren, grandfather, grandmother, brothers, sisters), as well as in the name and on behalf of employees of the notary office, employees who are in employment with a private notary, or employees of this executive committee. Officials of the local self-government body are not entitled to perform notarial acts also in the name and on behalf of this executive committee. In such cases, notarial acts are performed in any other notary office, private notary or executive committee of another local government body. In addition, the officials listed in Art. 40 of the Law prohibits the acknowledgment of wills and powers of attorney in his/her own name and on his/her own behalf, in the name and on behalf of his/her husband or wife, his (her) and their relatives (parents, children, grandchildren, grandfather, grandmother, brothers, sisters) [4]. In case of violation of the requirements established by the legislation, notarial and equivalent actions are invalid;

- the existence of the conditions, established by substantive law norms, for applying to a notary for notarial proceedings. We note that the existence of the prerequisites established by law for applying to a notary and persons equated to him/her for notarial acts should be perceived as a direct indication of the law on compliance with the notarized form of the transaction. Part 1 of Art. 209 of the Civil Code of Ukraine states that a transaction made in writing is subject to notarization only in cases established by law or by agreement of the parties. Thus, for example, acknowledgment of wills (Part 3 of Art. 1247 of the Civil Code of Ukraine), marriage (Art. 94 of the Civil Code of Ukraine), hereditary (Ar. 1304 of the Civil Code of Ukraine) agreements, lifetime support contract (Part 1 of Art. 745 of the Civil Code of Ukraine), transactions for the alienation of real estate is carried out in a notarized form, regardless of the will of the applicant. In some cases, the possibility

of notarial proceedings depends on the participation of witnesses, persons who will sign instead of a person with physical disabilities, in particular in Part 1 of Art. 1253 of the Civil Code of Ukraine it is provided, in the cases specified in par. 3 pt. 2 Art. 1248 and Art. 1262, the mandatory presence of at least two witnesses to testify a will [5];

- the absence of prohibitions to perform notarial acts. Such prohibitions may include: seizing by a judicial or investigative body in order to secure a claim in the case of acknowledgment of a contract for the alienation of immovable property; the existence of a ban on the alienation of immovable property imposed by a notary to prevent the acknowledgment of the contract of alienation of immovable property, which is the subject of a lifetime support contract. As a result, the imposition of a ban on the alienation of immovable property or its seizing is aimed at depriving individuals and legal entities of the right to dispose of property and, at the same time, is an objective ground for refusing to perform notarial proceedings concerning this property;

- compliance of notarial proceedings with the legislation of Ukraine and international acts. It is quite clear that the performance of notarial proceedings should be based on compliance with applicable law. This is primarily due to the fact that the notary cannot certify contracts or any other transactions that do not meet legal requirements. The norm of Part 3 of Art. 47 of the Law clearly states the prohibition of acceptance and provision of legal credibility to documents that do not meet the requirements of the law or contain information that degrades the honor, dignity and business reputation of an individual or business reputation of a legal entity, which have erasures or additions, crossed out words or other unconditional corrections, documents whose texts cannot be read due to damage, as well as documents written in pencil [4]. One example of mandatory compliance with this condition is the performance of notarial proceedings of witnessing the authenticity of the signature on the document;

- legal capacity of legal entities and individuals. One of the duties of a notary in performance of notarial proceedings is to verify the legal capacity of individuals and legal entities. Referring to the norm of Art. 91 of the Civil Code of Ukraine, we note that, checking the legal capacity of a legal entity, it is necessary to determine whether it is limited by a court decision. As for the legal capacity of an individual, it may be limited or the person may be declared incapacitated by a court. In this case, the exercise of his/her rights in the notarial proceedings will be carried out by a legal representative. Given these situations, the notary must decide whether to perform a notarial proceeding or refuse to do so;

- the presence of certain legal facts that determine the right of a person to perform notarial proceedings – actions, events, conditions. In fact, there are many legal facts that determine a person's right to perform notarial acts, and for each proceeding they are determined by law, and play an important role in giving individuals clearly defined rights. In certain proceedings, a person must prove the existence of such legal facts by appropriate evidence. For example, actions – the conclusion of a representation agreement, events – the death of the testator, the state – the incapacity of the person;

- compliance of the transaction concluded on behalf of the legal entity with the purposes specified in its charter or other constituent document. This requirement is aimed primarily at ensuring the state regulation of business activities of economic entities and other forms of activity. It should be noted that this norm in no way restricts their rights, as a legal entity may make changes

and additions to the statute in the manner prescribed by law, and then apply to a notary. Also, failure to file a patent or license to conduct business activities at the request of a notary is grounds for refusal to perform notarial proceedings;

- the presence of the representative's powers to perform notarial proceedings in the interests of another person. The scope of powers of the representative, the limits of their exercise and the documents asserting the powers may be established by law, and therefore exist outside the will of the constituent. In particular, Art. 242 of the Civil Code of Ukraine provides such a type as legal representation and determines its subject composition. Given the Art. 1286 of the Civil Code of Ukraine, the subject of representation may be the executor of the will, which status is determined by the norms of the Central Committee of Ukraine.

The main tasks at the stage of preparation for the notarial proceedings are to take actions related to: establishing the factual circumstances relevant to the case; determination of substantive law rules that must be applied by a notary in the performance of notarial proceedings; determining the composition of other persons who will participate in the commission of a notarial act and verification of their legal capacity; identification of interested persons, whose rights and interests may be affected by the performance of a notarial act; determining the range of persons who will assist the notary in performing notarial acts (witnesses, translators, experts, specialists, etc.); inspection, assessment of documents for their compliance with the law (sufficiency, affiliation, admissibility, indisputability); checking the presence of real estate seizing and other ways to secure the claim, which can have a significant impact on the performance of a notarial act [2, p. 372–373]. Therefore, the basis for the notarial act is the actual composition, which is confirmed by certain evidence necessary for the opening of a particular notarial proceedings. It should be emphasized that the stages of opening and preparation of notarial proceedings exist in a separate form as notarial acts of great complexity and length in time, for example in the conduct of inheritance cases. When performing relatively simple notarial acts, in particular the witnessing of the authenticity of the signature on the document, almost all stages of notarial proceedings are carried out simultaneously, and their separate allocation is hardly possible. Having completed a set of preparatory actions, the notary proceeds to the third stage – the direct performance of notarial proceedings, which consists of a series of procedural actions of the notary and other participants, the result of which is the issuance of a notarial deed. It is at this stage that the notary must verify the compliance of the content of the notarial act with the requirements of the law and the intentions of the persons concerned. The actions of the notary at this stage are reduced to: verification of the authenticity of the intentions of the participants in the notarial proceedings to certify the transaction; registration of the transaction on the corresponding notarial form; signing of a notarized transaction by its parties, representative, other person in case the applicant has physical defects; making a notary certification on the document; registration of a notarial deed in paper and electronic registers; issuance of the original notarial deed to the parties of the transaction.

Scientists distinguish several parts of the considered stage: preparation, direct execution of the notary certification or issue of the certificate and registration of notarial act.

The content of the preparatory part are the actions to establish the facts of the case. Therefore, the notary is obliged to check

the submitted documents, provide them with a final legal valuation and come to a conclusion on the legal facts, rights and interests of the interested person who applied for a notarial act. Summarizing the above-mentioned, the performance of a notarial deed is: 1) the issuance of certificates of: the right to inheritance; the right to a share in the joint property of the spouses; transfer of the application; certifying identity of a citizen with the person depicted in the photo; acceptance for storage of documents in accordance with the attached description; certificate of the fact of an individual being alive and in a certain place, etc.; 2) in the issuance of a writ of execution; 3) in the implementation of the notary certification on: transactions; contracts; debt documents on the money deposit; bills in cases of dishonor; documents on the time of their presentation; bills of honor; 4) in the implementation of the notary certification on: witnessing the authenticity of the signatures on the document; the authenticity of translation or copy of the document; 5) in making an inscription prohibiting the alienation of property; 6) in drawing up the act of description of hereditary property; 7) in the commission of a maritime protest; 8) in drawing up an act of protest of the bill in: dishonor, non-acceptance, no dating of acceptance [3, p. 90].

We should pay attention to Art. 42 of the Law, which provides for the possibility of postponing a notarial act in case of: the need to request additional information or documents from individuals and legal entities; sending documents for examination; if the notary has to make sure that the interested persons do not object to the performance of this action. In such cases, the term of the notarial act may not exceed one month. Art. 52 of the Law stipulates the obligation to record all notarial acts performed by notaries or local government officials in the registers for registration of notarial acts after making a notary certification on the document or signing a document issued by a notary [4].

Conclusions. Summarizing the above we note that the notarial process is defined as a legally regulated set of legal actions of a notary and other participants in notarial proceedings, the result of which is the commission of a notarial act, aimed at protecting rights and protected by law interests of citizens and organizations. In other words, the notarial process is a series of successively interrelated relations. It is especially important when performing a notarial act to ensure compliance with the rules of both substantive and procedural notarial law. Observance of a notarial procedural form is mandatory, as ignoring this requirement may lead to the invalidation of an essentially correct notarial deed.

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Маркович Х. Стадії нотаріального процесу: теоретико-правовий аналіз

Анотація. Стаття присвячена комплексному теоретичному дослідженню стадійності нотаріального процесу. Особливу увагу приділено змісту стадій нотаріального процесу та діям нотаріуса на кожній із них. Проаналізовано думки науковців щодо класифікації стадій нотаріального процесу. Відзначено, що першою стадією є відкриття нотаріального провадження, яка розпочинається з подачі заяви заінтересованою особою та прийняття її нотаріусом. Фактично відкриття нотаріального провадження виступає як фіксація звернення заінтересованих осіб до нотаріуса за вчиненням нотаріальної дії. Розглянуто підстави для відмови у відкритті нотаріального провадження. Висвітлено думки науковців щодо поділу підстав для відмови у відкритті нотаріального провадження на дві групи. З'ясовано, що другою стадією нотаріального процесу є підготовка до вчинення нотаріального провадження. На цій стадії нотаріус визначає факти, для встановлення яких може зажадати певні документи або запросити інших осіб. Важливим на цій стадії є перевірка дотримання прав неповнолітніх, третіх осіб, які не беруть участі у вчиненні нотаріальної дії. На цьому етапі нотаріус повинен перевірити об'єктивні та суб'єктивні умови і прийняти остаточне рішення про можливість вчинення нотаріального провадження чи відмову у його вчиненні. Визначено основні завдання на стадії підготовки до вчинення нотаріального провадження. Відзначено, що при вчиненні складних нотаріальних дій всі стадії нотаріального провадження здійснюються одночасно, і їх відокремлене виділення навряд чи можливо. Встановлено, що третьою стадією нотаріального процесу є безпосереднє вчинення нотаріального провадження. Ця стадія складається з сукупності процесуальних дій нотаріуса та інших учасників. Розкрито дії нотаріуса на цій стадії. Описано підстави для відкладення нотаріальної дії. У таких випадках, строк вчинення нотаріальної дії не може перевищувати одного місяця. Особливо важливим при вчиненні нотаріальної дії є забезпечення дотримання норм як матеріального, так і процесуального нотаріального права. Досліджено, що додержання нотаріальної процесуальної форми має обов'язковий характер. Ігнорування цієї вимоги може призвести до визнання недійсним по суті вірного нотаріального акту.

Ключові слова: нотаріус, нотаріальний процес, нотаріальна дія, стадії.