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**Валентина Іванівна Борисова**

*Кафедра цивільного права № 1  
Національний юридичний університет імені Ярослава Мудрого  
Харків, Україна*

**Лариса Василівна Красицька**

*Кафедра цивільного права та процесу  
Харківський національний університет внутрішніх справ  
Харків, Україна*

## **АЛІМЕНТНІ ЗОБОВ'ЯЗАННЯ ЧЛЕНІВ СІМ'Ї В СІМЕЙНОМУ ПРАВІ УКРАЇНИ: ПРОБЛЕМНІ ПИТАННЯ ТЕОРІЇ ТА ПРАКТИКИ**

**Анотація.** *Актуальність дослідження аліментних зобов'язань членів сім'ї в сімейному праві України обумовлена як новітніми підходами законодавця до регулювання аліментних відносин, так і проблемами правозастосовної практики в цій сфері. Метою дослідження є визначення особливостей аліментних зобов'язань членів сім'ї в сімейному праві України, виявлення проблем правового регулювання та правозастосування цих зобов'язань і розробка рекомендацій щодо їх усунення. Методологічно дослідження аліментних зобов'язань членів сім'ї умовно поділено на окремі структурні частини, в яких розкрито загальну характеристику зазначених зобов'язань в сімейному праві України та особливості окремих їх видів. Методологічна база дослідження аліментних зобов'язань членів сім'ї в сімейному праві України сформована на філософському, загальнонауковому та спеціально-науковому рівнях. В роботі доведено, що аліментні зобов'язання членів сім'ї за своєю сутністю є сімейно-правовими грошовими зобов'язаннями, які виникають на підставах, визначених законом або договором, мають тривалий та особистий характер. Запропоновано одного з подружжя вважати таким, що потребує матеріальної допомоги, якщо його доходи за місяць (заробітна плата, пенсія, доходи від використання його майна, інші доходи) складають суму, що є меншою за розмір мінімальної заробітної плати, встановленої законом. Аналогічні положення запропоновано застосувати і для визначення батьків такими, що потребують матеріальної допомоги, в аліментних зобов'язаннях з утримання повнолітніми дітьми непрацездатних батьків. Аргументовано, що зміна законодавцем мінімального розміру аліментів, які підлягають стягненню з платника аліментів на одну дитину, не є підставою для застосування статті 192 СК України, але є підставою для зміни мінімального розміру аліментів, зазначених у виконавчому листі у процедурі виконання та стягнення аліментів, та враховується під час визначення суми аліментів або заборгованості за аліментами. Запропоновано й інші зміни до СК України щодо удосконалення порядку стягнення аліментів на утримання членів сім'ї. Проведений аналіз теоретичних положень аліментних зобов'язань членів сім'ї та практичних проблем правозастосування в цій сфері і розробка пропозицій з удосконалення сімейного законодавства має значення для подальших наукових досліджень сімейно-правових зобов'язань, сприятиме формуванню ефективного механізму здійснення та захисту прав учасників сімейних правовідносин та становленню єдності судової практики.*

**Ключові слова:** Сімейний кодекс України, учасники сімейних правовідносин, платник аліментів, соціальне страхування, місячне утримання.

**Valentina I. Borisova**

*Department of Civil Law  
Yaroslav Mudryi National Law University  
Kharkiv, Ukraine*

**Larysa V. Krasyska**

*Department of Civil Law and Procedure  
Kharkiv National University of Internal Affairs of Ukraine  
Kharkiv, Ukraine*

## **ALIMONY OBLIGATIONS OF FAMILY MEMBERS IN THE FAMILY LAW OF UKRAINE: PROBLEMATIC ISSUES OF THEORY AND PRACTICE**

**Abstract.** *The relevance of the study of alimony obligations of family members in the family law of Ukraine is conditioned by both the latest approaches of the legislator to the regulation of alimony relations, and the problems of law enforcement practice in this area. The purpose of the study is to determine the features of alimony obligations of family members in the family law of Ukraine, to identify problems of legal regulation and enforcement of these obligations and to develop recommendations for their elimination. Methodologically, the study of alimony obligations of family members is divided into separate structural parts, which cover the general features of these obligations in the family law of Ukraine and the features of their individual types. The methodological basis for the study of alimony obligations of family members in the family law of Ukraine is developed at the philosophical, general scientific and special scientific levels. The study proves that the alimony obligations of family members are in essence family law monetary obligations that arise on the grounds specified by law or contract, are long-term and personal. It is proposed that one of the spouses be considered in need of financial aid if their monthly income (salary, pension, income from the use of their property, other income) is less than the minimum wage established by law. It is proposed to apply similar provisions to identify parents in need of financial aid in alimony obligations for the maintenance of disabled parents by adult children. It is argued that the change of the minimum amount of alimony to be collected from the alimony payer per child is not a basis for applying Article 192 of the Civil Code of Ukraine, but is a basis for changing the minimum amount of alimony specified in the writ of execution and alimony recovery, and is taken into account when determining the amount of alimony or alimony arrears. Other changes to the Family Code of Ukraine have been proposed to improve the procedure for collecting alimony for family members. The analysis of theoretical provisions of alimony obligations of family members and practical problems of law enforcement in this area and the development of proposals to improve family law is important for further research of family law obligations, will contribute to the development of an effective mechanism for exercising and remedy of the rights of parties in family legal relations and the establishment of the unity of judicial practice.*

**Keywords:** Family Code of Ukraine, participants of family legal relations, alimony payer, social insurance, monthly allowance.

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## INTRODUCTION

More than fifteen years have passed since the entry into force of the Family Code of Ukraine on January 10, 2002. In this time, the practice of applying the latest family law provisions has established, in particular, in the field of alimony obligations of family members. However, certain provisions of Ukrainian family law still raise questions about law enforcement. In particular, debatable are the provisions on the establishment of one of the spouses in need of financial aid, on the recovery of alimony after divorce for the maintenance of the former spouse who is able to work, on the recovery of alimony from parents for the maintenance of adult children who continue their education by correspondence. Notably, the sphere of alimony obligations constantly attracts the attention of the legislator, as evidenced by repeated changes to the Family Code of Ukraine<sup>1</sup> in order to strengthen the protection of the child's right to adequate maintenance. Therewith, in the current conditions of development of Ukrainian society and the legal system of Ukraine, it is necessary to conduct a "revision" of the current family legislation of Ukraine and determine the main directions of its renewal, including in the field of alimony obligations of family members. One of such areas is the harmonisation of domestic legislation with EU legislation.

An important step towards the approximation of family law of Ukraine with the modern European legal system is the ratification of international regulations and Ukraine's accession to international regulations governing alimony, which also become part of the national family law of Ukraine in accordance with Part 1 Article 13 of the Family Code of Ukraine. Thus, Ukraine acceded to the Convention on the Recovery of Alimony Abroad of June 20, 1956<sup>2</sup>, the Convention on the Recognition and Enforcement of Decisions Concerning Maintenance Obligations of October 2, 1973<sup>3</sup>, and the Convention on the International Recovery of Child Support and Other Family Detention of November 23, 2007<sup>4</sup>. Therewith, Ukraine still has many unresolved issues in legal regulation of alimony relations with a foreign element, despite the existence of unified legal provisions in this area. Thus, Ukraine has not acceded to the Convention on the Law Applicable to Maintenance Obligations, adopted in Hague on 2 October 1973, Article 8 of which provides that the law applicable to divorce in a Contracting State in which divorce is granted or recognised, regulates alimony obligations between divorced spouses and review of decisions concerning these obligations<sup>5</sup>.

There are also some approaches to the legal regulation of alimony in the scientific literature, but most of the studies of alimony obligations of family members were

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<sup>1</sup> Family Code of Ukraine. (2020, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/2947-14#Text>

<sup>2</sup> Law of Ukraine No 15-V "On Accession to the Convention on the Recovery of Alimony Abroad". (2006, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/15-16#Text>

<sup>3</sup> Law of Ukraine No 135-V "On Ukraine's Accession to the Convention on the Recognition and Enforcement of Decisions Concerning Maintenance Obligations". (2006, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/135-16#Text>

<sup>4</sup> Law of Ukraine No 26-VII "On Ratification of the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance". (2013, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/26-18#Text>

<sup>5</sup> Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations. Retrieved from <https://www.hcch.net/en/instruments/conventions/full-text/?cid=86>.

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conducted in relation to the maintenance of the child by mother or father until it reaches the age of majority. Thus, alimony obligations of family members have been studied in the Ukrainian legal literature in the scientific articles of V. K. Antoshkina [1], L. V. Afanasieva [2], I. V. Zhylinkova [3], T. P. Krasvitna [4], Ya. V. Novokhatska [5], Z. V. Romovska [6], L. V. Sapeiko [7], V. I. Truba [8] and other legal scholars. In foreign literature, the following scholars studied alimony obligations of family members: J. Nevado Montero [9], N. Letova [10], I. Artemyeva [11], E. Ivanova [12], J. E. Crowley [13], P. Chiappori [14], N. D. Katz [15], A. G. Valverde [16], O. A. Yavor [17], L. S. Rzhantsyna [18], T. A. Gurko [19]. However, the development of family law in Ukraine, problematic issues of law enforcement practice in alimony obligations of family members necessitate further study of theoretical provisions on the legal nature and essence of these obligations, identification of problems of their legal regulation and development of proposals for improving the family law regulation of alimony relations of family members.

The purpose of this study is to determine the features of alimony obligations of family members in the family law of Ukraine, to identify problems of legal regulation and enforcement of these obligations and to develop recommendations for their elimination.

## 1. MATERIALS AND METHODS

Determination of the specific features of alimony obligations of family members in the family law of Ukraine is impossible without the use of basic tools of the methodology of the doctrine of private law. The methodology of legal science means the system of methodological principles, techniques, means, tools, and methods of scientific cognition, which is used to obtain data in the study of state and legal reality in the context of the problems of legal practice. Describing the family law methodology, O. Yu. Ilyina notes that it is based on three basic preconditions: first, the "agreement" of most family ties; secondly, the special state interest in ensuring the normal functioning of the family as the most important social unit, a "cell" of the social organism, and most importantly – in the most effective protection of the rights and interests of children; thirdly, the impossibility of legal technologies to penetrate deeply into the fabric of family relations – the inner essence of which is more regulated through morality, custom, tradition, and other forms of social influence. Therefore, the family law methodology is quite difficult to combine private and public principles, dispositive and imperative provisions [20]. Undoubtedly, it is difficult to accept O. Yu. Ilyina's approach to the preconditions of the family law methodology, although it can be agreed that alimony obligations of family members may arise based on an agreement between participants in family legal relations, in particular, the spouses have the right to enter into a maintenance agreement with respect to one of them, in which to determine the conditions, amount, and terms of payment of alimony (Part 1 Article 78 of the Family Code of Ukraine<sup>1</sup>, etc.

Regarding the difficulties in combining private law and public principles in the family law methodology, the following should be noted. The maintenance obligations of the mother and father in relation to the child are aimed at the most effective protection of

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<sup>1</sup> Family Code of Ukraine. (2020, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/2947-14#Text>

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the rights and interests of children. Therewith, these responsibilities have long been regulated from the standpoint of public law regulation, in particular, the conclusion of alimony agreements, termination of the right to child support in connection with the acquisition of ownership of real estate, etc. However, in modern conditions, the private law framework for the regulation of alimony obligations is becoming widespread. Thus, the Family Code of Ukraine contains provisions that indicate the dispositive legal regulation of these obligations: alimony is paid monthly, and by mutual consent they can be paid in advance (Part 3 Article 77); the parties may agree to provide maintenance to one of the spouses, regardless of disability and the need for financial aid under the conditions specified in the marriage contract (Part 1 Article 99). Notably, in the legal literature attention is paid to the specifics of family ties between the parties to the alimony relations. In terms of subjects, object, and purpose, alimony obligations are inherent only in family law, but in their structure and method of protection they are remarkably similar to civil law obligations [21]. Thus, according to V. I. Truba, the analysis of the provisions of Chapter 15 of the Family Code of Ukraine allows to classify alimony as obligatory [8].

The methodological framework for the study of alimony obligations of family members in family law of Ukraine is developed at the philosophical, general scientific, and special scientific levels. The dialectical method, anthropological, axiological, and institutional approaches were predominantly used. The dialectical method allowed to consider the alimony obligations of family members in their development and to identify the characteristics of their individual types depending on their subject composition. However, the specific features of alimony obligations of family members cannot be considered separately from philosophical anthropology. The German philosopher of law Gustav Radbruch notes that only family law, also in the era of individualism, comes from a different image of a person, derived not only from reason and self-interest. Family law makes provision for the husband's right to trust in his wife, the right of parents to trust in children, with the hope that they will fulfil their duty back. In the person of husband and parents, it considers the presence of love and responsibility [22]. Admittedly, providing maintenance to family members is a sign of love and responsibility between them. D. A. Hudyma fairly points out that only the unity of the conclusions of the philosophical doctrine of law and person with the "current" theoretical developments of legal science can create a solid methodological framework for the development of legal science and practice, deprive the science of dogmatism and commentary on legislation, and law enforcement – of some shortcomings of its operation [23]. Axiological and institutional approaches provide an opportunity to consider in combination and unity of such basic categories of family law as family, marriage, parenthood, kinship, and legal values, which constitute the basis for building family relationships to provide maintenance to family members.

General scientific methods of analysis and synthesis, induction, and deduction contributed to the formulation of the concept of alimony obligations of family members, provided an opportunity to identify gaps in their legal regulation, to formulate proposals to improve family law in Ukraine. The basis of the special scientific level of study of alimony obligations of family members was historical legal and comparative legal methods. D. A. Kerimov rightly argues that outside the historical context that connects

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the phenomena and processes of modernity with those phenomena and processes that preceded them, as well as with those that will arise on their basis and in a more or less distant perspective, it is impossible to know this very modernity. And this is quite natural, because in society there are always remnants of the past, the foundations of the present and the beginnings of the future [24]. The comparative legal method of studying the alimony obligations of family members is of particular importance in the current conditions of development of the legal system of Ukraine and the recodification (update) of civil and family legislation of Ukraine. The legal doctrine of Ukraine correctly notes that the scientific recognition of the comparative approach, which has recently been actively developed and applied in almost all social and humanitarian sciences, as well as its methodological potential, suggest that it should soon take a place in the structure of the methodology of science on a par with the structural, functional, systemic, synergistic, and other general scientific methodological approaches [25]. The comparative legal method of studying the alimony obligations of family members allows to conclude that the family law of Ukraine can preserve the national traditions and features of legal regulation of these obligations, although, admittedly, a progressive phenomenon nowadays is the unification of international law provision in the field of recovery of alimony for family members.

The empirical material of the study used the materials of judicial practice on the recovery of alimony for family members, which provided an opportunity to identify problems of law enforcement in this area and suggest ways to solve them.

## **2. RESULTS AND DISCUSSION**

### *2.1 The concept and typical characteristics of alimony obligations of family members in family law of Ukraine*

The Family Code of Ukraine does not contain a legal definition of the term "maintenance obligations". Instead, it uses such concepts as "the rights and responsibilities of the spouses for maintenance", "the obligation of the mother or father to maintain the child and its performance", etc. Meanwhile, alimony obligations as a legal category are well-established in the science of family law. It is the relations of family members about the provision of maintenance that is called alimony. In the Family Code of Ukraine<sup>1</sup> the term "alimony" is used both as a synonym for maintenance and as allowance. Thus, the right to maintenance (alimony) has the spouse who is incapacitated, needs financial aid, provided that the other spouse can provide such material aid (Part 2 Article 75); maintenance of one of the spouses is provided to the other spouse in kind or in cash with their consent. According to the court decision, alimony is awarded to one of the spouses, usually in cash (Parts 1, 2 Article 77); the ways in which parents perform their obligation to maintain the child are determined by agreement between them. By agreement between the child's parents, one of them who lives separately from the child may take part in its maintenance in cash and (or) in kind. By court decision, child support (alimony) is awarded in proportion to the income of its mother or father or in a fixed amount of choice of the parent or other legal representatives of the child with whom the child lives (Parts

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<sup>1</sup> Family Code of Ukraine. (2020, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/2947-14#Text>

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1-3 Article 181); the share of earnings (income) of the mother or father, which will be collected as child support, is determined by the court (Part 1 Article 183).

In the science of family law, there are different views on the concepts of maintenance and alimony. Thus, O. O. Deriy defines alimony, on the one hand, as allowance, which is provided voluntarily by one family member to another and which can be in food, clothing, care, etc., in kind and in money, and on the other hand, alimony is money or property provided by a person liable for alimony for the maintenance of another person [26]. V. I. Truba believes that "maintenance" is a broader concept, as it includes a mutual obligation to care for, provide family members with means of subsistence, which is performed both voluntarily and compulsorily, or forced in case of a right to support one of the participants in the family relationship, who is unable to support themselves due to violation or lack of personal abilities. Alimony obligations ("alimony") are related to the concept of "allowance" as a part of the whole, as they reflect the forced or involuntary performance of the maintenance obligation [8].

If alimony is collected in cash based on a court decision or an agreement between alimony payers, then there is a transformation of maintenance obligations into alimony obligations. Alimony obligations are legal relations where one party, the debtor – the payer of alimony – is obliged to take in favour of the other party (creditor – the recipient of alimony) a certain action, which is to pay alimony in cash, and the creditor has the right to demand from the debtor the performance of its duty. Such understanding of the alimony obligation suggests its essence as a monetary obligation, albeit conditioned by the specific features of family legal relations [27].

T.P. Krasvitna notes that in the case when the maintenance of one of the spouses is provided to the other spouse in cash, the obligation of the spouses to maintain can be defined as monetary, because it mediates the movement of funds as a legal tender [4]. Therewith, the author believes that the maintenance obligation of the spouses is a special type of civil obligations, to which the provisions of the law of obligations of the Civil Code of Ukraine<sup>1</sup> may be applied in the alternative, insofar as it does not contradict the essence of the maintenance obligation [4].

Indeed, based on the analysis of the provisions of Article 8 of the Family Code of Ukraine<sup>2</sup>, the provisions of the Civil Code of Ukraine<sup>3</sup> can be applied to certain personal non-property and property relations of participants of family legal relations. However, considering that the maintenance obligations of family members are conditioned by the personal family relations of their parties, it can be argued that they are not civil in nature, although they are monetary in nature. Thus, V. A. Belov understands monetary obligations as civil relations, the content of which is the right of the creditor and the corresponding legal obligation of the debtor to make a settlement or payment, i.e. action(s) to transfer a certain (significant) amount of money (currency) [21]. The definition of a monetary obligation is contained in legislation of various industries. Thus, Article 1 of the Bankruptcy Procedure Code of Ukraine of October 18, 2018 No. 2597-VIII (hereinafter referred to as the Code) defines a monetary obligation as an obligation

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<sup>1</sup> Civil Code of Ukraine. (2020, August). URL: <https://zakon.rada.gov.ua/laws/show/435-15#Text>

<sup>2</sup> Family Code of Ukraine. (2020, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/2947-14#Text>

<sup>3</sup> Civil Code of Ukraine, op. cit.

of the debtor to pay the creditor a certain amount of money in accordance with a civil transaction (agreement) and other grounds stipulated by the legislation of Ukraine. Monetary liabilities also include liabilities for the payment of taxes, fees (mandatory payments), insurance premiums for compulsory state pension and other social insurance; liabilities arising from the inability to perform obligations under contracts of storage, work and labour, lease (rent), etc. and which must be expressed in monetary units<sup>1</sup>. Thus, the Code provides a definition of a monetary obligation in a broad meaning. In cases where the performance of the obligation involves the debtor's obligation to pay the creditor a sum of money, it is a monetary obligation. Alimony obligation to pay money for the maintenance of family members is a monetary obligation.

An analysis of the current Family Code of Ukraine<sup>2</sup> indicates that the family law of Ukraine is already in some way "interspersed" with rules on liability for breach of a monetary obligation, although it is not a maintenance obligation as a monetary obligation. Thus, according to para. 1 Part 4 Article 196 of the Family Code of Ukraine in case of overdue payment of additional expenses for a child due to the payer's fault, such payer is obliged to pay the amount of arrears of additional expenses with consideration of the established inflation index for the entire period of delay, as well as three percent per annum of the overdue amount. It is considered expedient for the legislator to extend the provisions of Article 625 of the Civil Code of Ukraine<sup>3</sup> on liability for breach of monetary obligation, despite the fact that parts 1-3 of Article 196 of the Family Code of Ukraine established a penalty for late payment of alimony [27]. In this meaning, a maintenance obligation is a monetary obligation. It is proposed to extend the provisions of Article 625 of the Civil Code of Ukraine on liability for breach of monetary obligation in terms of the possibility of recovery of the amount of debt, taking into account the established inflation index for the entire period of delay, as well as three percent per annum of the overdue amount.

One of the hallmarks of a family member's alimony obligation is its long-term nature. The legal literature states that this is performed by providing a family member who is in need of maintenance with periodic (monthly) maintenance, but for a long period. The duration of the maintenance of a family member depends on the conditions that served as the basis for the emergence of alimony legal relations. The alimony obligation will continue until the conditions under which the family member needs maintenance disappear. It should be added that the duration of the maintenance obligation of family members, in particular, the maintenance obligation between the child and its mother or father may be conditioned by the age of the child, as parents are obliged to perform their obligation to provide maintenance until child is of legal age, and in the presence of certain conditions specified by law or contract, the maintenance obligation may arise for parents in relation to the maintenance of adult children.

The alimony obligation of family members cannot be considered a legal relationship with a plurality of persons on the debtor's side, for example, the alimony obligation of the mother or father and child, because there is an independent alimony

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<sup>1</sup> Bankruptcy Procedure Code of Ukraine. (2018, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/2597-19#Text>

<sup>2</sup> Family Code of Ukraine. (2020, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/2947-14#Text>

<sup>3</sup> Civil Code of Ukraine. (2020, August). URL: <https://zakon.rada.gov.ua/laws/show/435-15#Text>

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relationship between the authorised person and the alimony debtor, in particular between father and child and between mother and child, which indicates the personal nature of the alimony legal relations.

Thus, alimony obligations of family members to provide maintenance in cash are family legal monetary obligations that arise on the grounds specified by law or contract, they have a long-term and personal nature.

## *2.2 Problematic issues of recovery of alimony for spousal support*

It is generally accepted in the legal literature that the basis for the maintenance obligation of the spouses is the legal structure, which includes the following legal facts: 1) the fact that the wife and husband are in a registered marriage; 2) incapacity of one of the spouses; 3) the need of one of the spouses; 4) the solvency of the other spouse. The right to maintenance of the spouses in case of child living with one of them depends on the age and health of the child [4]. Admittedly, the contract of matrimony on the provision of maintenance may determine other conditions for the provision of maintenance to one of the spouses by the other spouse.

An analysis of law enforcement practices regarding the recovery of alimony for the maintenance of one of the spouses indicates that changes in the socio-economic development of the state and increasing social guarantees of Ukrainian citizens that occurred in Ukraine after the entry into force of the Family Code of Ukraine<sup>1</sup>, have led to the fact that today only in rare cases it is possible to recover alimony for the maintenance of one of the spouses by a court decision due to the fact that there are practically no categories of disabled persons who can be recognised as needing financial assistance from another spouse. Thus, according to Part 3 Article 75 of the Family Code of Ukraine, a spouse who has reached the retirement age established by law or is a person with a disability of I, II or III category is considered incapable of work. In accordance with Part 4 Article 75 of the Family Code of Ukraine, one of the spouses is in need of material aid if the salary, pension, income from the use of their property, other income do not provide them with a living wage established by law.

Analysing the conditions of alimony for the maintenance of one of the incapacitated spouses in need of financial aid, it should be recalled that in 2004 the subsistence level for persons who lost their ability to work was 284.69 UAH<sup>2</sup>, and the resolution of the Cabinet of Ministers of Ukraine No. 544 of April 15, 2003 established that the minimum old-age pension from 01.07.2003 is 50 UAH<sup>3</sup>. On January 1, 2004, the Law of No. 1058-IV "On Compulsory State Pension Insurance" of July 9, 2003 came into force, Article 28 of which stipulated that the minimum old-age pension was set at 20 percent of the average wage of workers employed in the sectors of the Ukrainian economy, if men had 25 years, and women had 20 years of qualifying period. According to the provisions of Article 28 of the Law of Ukraine "On Compulsory State Pension Insurance" (as amended on 12.01.2005), if men have 25, and women have 20 years of

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<sup>1</sup>Family Code of Ukraine. (2020, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/2947-14#Text>

<sup>2</sup> Law of Ukraine No 1704-IV "On Approval of the Subsistence Minimum for 2004". (2004, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/1704-IV#Text>

<sup>3</sup> Resolution of the Cabinet of Ministers of Ukraine No 544 "On increasing the size of labor pensions". (2003, April). Retrieved from [http://search.ligazakon.ua/1\\_doc2.nsf/link1/KP030544.html](http://search.ligazakon.ua/1_doc2.nsf/link1/KP030544.html).

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qualifying period, the minimum size of the old-age pension is established in the amount of the subsistence minimum for persons who have lost the ability to work and is as follows: from 12.01.2005 – 332 UAH; from 01.01.2006 – 350 UAH; from 01.04.2006 – 359 UAH; from 01.10.2006 – 366 UAH; from 01.01.2007 – 380 UAH<sup>1</sup>.

Thus, since January 2005, persons who were considered disabled due to reaching the retirement age established by law have already been provided with a pension at the subsistence level. Only for persons with disabilities and persons who did not acquire the right to a labour pension for valid reasons, the minimum pension was set at the level of a social pension in an amount less than the subsistence level. Thus, according to paragraphs a), b) Article 94 of the Law of Ukraine No. 1788-XII "On Pension Provision" of November 5, 1991, social pensions are assigned in the following amounts: the right to a labour pension without a valid reason; b) 50 percent of the minimum old-age pension: to persons who have reached the age of: men – 60 years old, women – 55 years old and have not acquired the right to a labour pension for valid reasons; disabled persons of III category<sup>2</sup>.

Furthermore, according to Article 6 of the Law of Ukraine No. 1727-IV "On state social aid to persons who are not entitled to a pension and persons with disabilities" of May 18, 2004, the amount of state social aid to persons who are not entitled to a pension and persons with disabilities for conditions stipulated in Part 1 Article 4 of this Law, is established based on the subsistence level for persons who have lost their ability to work: persons with disabilities of I category, women who have been awarded the title of "Mother-heroine", per one child of the deceased breadwinner – 100 percent, per two children – 120 percent, per three or more children – 150 percent; persons with disabilities of II category – 80 percent; persons with disabilities of III category – 60 percent; clergymen, ecclesiastic dignitaries, and persons who, for at least ten years before the Law of Ukraine "On Freedom of Conscience and Religious Organisations" came into force, held elective or appointed positions in religious organisations officially recognised in Ukraine and legalised in accordance with the legislation of Ukraine, the presence of archival documents of the relevant state bodies and religious organisations or testimony of witnesses confirming the fact of such work, – 50 percent; persons who have reached the age established by Article 1 of this Law – 30 percent<sup>3</sup>.

The above provisions indicate that the recognition of one of the spouses as in need of financial aid, depending on the provision of the subsistence level for the recovery of alimony from the other spouse, no longer meets the needs of today. It is considered that in the current conditions of economic development and legal system of Ukraine it would be appropriate to use other state social standards to determine the state of one spouse in need of financial aid, or the state of the other spouse who can provide such material aid. Thus, the basic state social guarantees include the minimum wage, providing a person with income in this amount could be used to determine one of the spouses in need of

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<sup>1</sup> Law of Ukraine No 1058-IV "On Compulsory State Pension Insurance". (2003, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/1058-15#Text>.

<sup>2</sup> Law of Ukraine No 1788-XII "On Pension Provision". (1991, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/1788-12#Text>

<sup>3</sup> Law of Ukraine No 1727-IV "On State Social Assistance to Persons Not Entitled to a Pension and Persons with Disabilities". (2004, May).

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material aid. In this regard, Part 4 Article 75 of the Family Code of Ukraine<sup>1</sup> should be amended as follows: “4. One of the spouses is in need of financial aid if their monthly income (salary, pension, income from the use of property, other income) is less than the minimum wage established by law”.

Obligations to maintain the former spouse are stipulated by the legislation of Ukraine and the legislation of other states. Thus, according to § 1584 of the German Civil Code, after a divorce, one of the spouses who is obliged to pay alimony is liable to the relatives of the eligible person. If the obligated person is insolvent, their relatives are liable instead. § 1585 of the German Civil Code stipulates that current alimony is paid in the form of cash rent. Rent must be paid before the beginning of the calendar month. The obligor must pay the full amount of the monthly rent even if the right to alimony is terminated due to remarriage or death of the authorised person. Instead of an annuity, the eligible person may demand payment of the capitalised amount of payments, if there is a serious reason for this and if the obligated person will not be unfairly burdened as a result. Therewith, European countries have recently registered a decrease in the number of disputes over the payment of alimony by a husband for the maintenance of his ex-wife after divorce. As noted in the scientific literature, the reduction in the number of such disputes was the result of a deliberate reorientation of alimony legislation, which, by limiting the payment of alimony, sought to promote divorce and ensure greater economic equality of the former spouses [28].

With the entry into force of the Family Code of Ukraine, the provisions of Part 4 Article 76 of the Family Code of Ukraine became an innovation in alimony obligations: if in connection with the upbringing of a child, housekeeping, care for family members, illness or other significant circumstances, one of the spouses was incapable of getting an education, work, occupy a corresponding job, they have the right to maintenance in connection with the divorce and when they are able to work, provided that they need financial aid and that the ex-husband (wife) can provide financial aid. However, in law enforcement the provisions of this article raised questions: How to prove in court that one of the spouses did not have the opportunity to occupy the corresponding job, get an education, etc. precisely because of raising a child, housekeeping or other significant circumstances, and not because of lack of sufficient knowledge, life and professional experience, professional skills, insufficient qualifications? Therefore, when assessing specific life circumstances in cases of recovery of alimony for the maintenance of one of the former spouses, courts usually do not see a causal link between the inability of one spouse to find employment with their responsibilities for housekeeping, caring for family members, etc. Thus, the Desnianskyi District Court of Chernihiv in its decision of May 27, 2015 in the case No. 750/3717/15-П noted: “Considering that the plaintiff has a higher education and is an able-bodied person, the plaintiff owns a three-room apartment and a land plot, which does not indicate the plaintiff as a person in need of financial aid, in the absence of evidence confirming the fact that the plaintiff cannot be employed in connection with the household and caring for family members or with other circumstances of significant importance, the court concludes that the plaintiff is not a person entitled to maintenance in accordance with the requirements of Part 4 Article 76

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<sup>1</sup> Family Code of Ukraine. (2020, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/2947-14#Text>

of the Family Code of Ukraine, in connection with which the claim is unfounded and cannot be satisfied" [29]. It appears that Part 4 Article 76 of the Family Code of Ukraine should be excluded from the Family Code of Ukraine, which will contribute to the clarity of legal provisions and unification of judicial practice.

Consequently, the definition of such conditions for the alimony of one of the spouses, such as their need for material aid, and the solvency of the other spouse or their ability to provide material aid, currently requires changes. This study proposes to consider one of the spouses in need of material aid if their monthly income (salary, pension, income from the use of property, other income) is less than the minimum wage established by law. Accordingly, the second of the spouses is the one who can provide financial aid if their monthly income (salary, pension, income from the use of his property, other income) exceeds the amount of the minimum wage established by law.

### *2.3 Problematic issues of collecting alimony for child support*

Alimony obligations of a mother or father to support a child until they reach the age of majority are one of the most common obligations to support family members. Looking at the history of this issue, in the pre-Soviet period only individual legal regulations stipulated the obligation of parents to support children. Thus, clause 118, part 1 of chap. IV of the Civil Code of Eastern Galicia in 1797 prescribed that the father maintains the children until they can feed themselves [30]. More detailed legal regulation of such obligations was acquired in Soviet family law. The Family Code of Ukraine made provision for many innovations in the legal regulation of alimony obligations for mothers, fathers and children, for example, it significantly expanded the possibilities of contractual regulation of maintenance relations, established responsibility for late payment of alimony, payment of additional costs for a child, etc. Alimony obligations of the mother or father to support the child are based on the principles of equality of responsibilities between mother and father in relation to the child and equal responsibility of parents to the child, in some foreign countries, in particular in Italy – within the framework of the general legal guardianship of the mother and father over the child [31].

Given that the problem of alimony obligations for the maintenance of the child's parents until they reach adulthood constantly attracts attention [6; 7], this study will focus only on those problematic issues of recovering alimony for child support, which have recently become widely discussed among lawyers.

1. Thus, the legislator has repeatedly changed the minimum amount of child support, in connection with which the question arises: Is there a need to appeal to court with a separate claim to change the amount of alimony in case when the court decision indicated the minimum amount of alimony that was established at the time of the court decision?

The Grand Chamber of the Supreme Court in its ruling of March 4, 2020 in case No. 682/3112/18 stated that the legislator's change of the minimum amount of alimony to be recovered from the alimony payer per child is not grounds for changing the amount of alimony in accordance with Article 192 of the Family Code of Ukraine<sup>1</sup>, but is the basis for changing the minimum amount of alimony specified in the writ of execution in the

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<sup>1</sup> Family Code of Ukraine. (2020, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/2947-14#Text>

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procedure of execution and recovery of alimony, and is taken into account when determining the amount of alimony or debt. Law of Ukraine No. 2475-VIII of July 3, 2018 amended Part 1 Article 71 of the Law of Ukraine "On Enforcement Proceedings" with the second paragraph, which stipulates that the executor collects alimony from the debtor in the amount specified in the enforcement document, but not less than the minimum guaranteed amount stipulated by the Family Code of Ukraine. That is, the legislation prescribes a mechanism that makes provision for the payment of alimony in the amount not less than the minimum guaranteed amount stipulated by the Family Code of Ukraine, even in the presence of previous court decisions on recovery of alimony in the amount lower than the minimum guaranteed amount of alimony established by law. Thus, the courts of first and appellate instances came to a reasonable conclusion that the state executor, calculating the alimony arrears, correctly proceeded from the minimum alimony limit at the level of 50% of the subsistence minimum for a child of the appropriate age [32].

2. Recovery of alimony from the mother or father for child support must be distinguished from the collection of additional costs for the child from parents, which in essence are not alimony. In particular, the Resolution of the Civil Court of Cassation of the Supreme Court of 10 May 2018 in case 2-1161/2011 states that when deciding on the amount of funds to be recovered for additional costs, the courts must take into account the extent to which each parent is obliged to take part in these costs, considering the financial and family situation of the parties and other interests and circumstances that are significant. In case the financial situation of the parents does not allow to ensure full payment of additional costs, they can be reimbursed only in part. Considering these circumstances, the court determines the amount of additional costs for the child conditioned by special circumstances for one of the parents in a fixed amount. The existence of such additional costs must be proved by the claimant for recovery. These funds are additional, in contrast to the funds received by one parent for child support. In these cases, the costs are actually incurred or estimated, therefore they must be determined in a fixed amount. Additional costs are not an additional collection of child support. Alimony is necessary to ensure normal material conditions for the child's life. In some cases, in exceptional circumstances, apart from the usual costs for the child, additional ones are required. The amount of additional costs should be determined depending on the estimated or actual costs incurred by the child. The law refers to the jurisdiction of the court to determine the circumstances that may be considered significant. In any case, such important circumstances include the state of health, financial situation of the defendant, the presence of other minor children, disabled wife, husband, parents, adult children, etc. Additional costs per child may be financed in advance or covered once incurred, periodically or permanently. The amount of additional costs for the child must be justified by relevant documents (for example, the cost of special medical care – a certificate of medical institution on the cost of medical services; treatment costs, spa treatment – extracts from the child's medical history, doctor's prescriptions, certificates, checks, travel documents, etc.). When collecting funds for additional costs that must be incurred in the future, the court must provide a calculation or justification of the need for future costs [33].

Thus, the change of the minimum amount of child support by the legislator does not require an appeal to the court with a separate claim for a change in the amount of child support. Additional costs for the child caused by special circumstances (development of the child's abilities, illness, disability, etc.) are not alimony, but are aimed at providing the child with the appropriate standard of living necessary for its physical, mental, spiritual, moral, and social development.

#### *2.4. Problematic issues of recovery of alimony for the maintenance of an adult child*

Alimony obligations for the maintenance of an adult child are divided into two types: 1) for the maintenance of adult disabled children; 2) regarding the maintenance of adult children who continue their education. Alimony obligations of parents for the maintenance of adult incapacitated children arise in the presence of a set of the following legal facts: 1) adult children are incapable of work; 2) adult children are in need, i.e. those in need of financial aid; 3) parents can provide financial aid. Alimony obligations of parents for the maintenance of adult children who continue their education arise from the obligatory combination of the following legal facts: 1) the daughter, son coming of age of over 18, but less than 23 years old; 2) their continuing education; 3) the need in material aid in connection with education; 4) parents have the opportunity to provide such aid.

In law enforcement practice, many questions arise regarding the recovery of child support for an adult child who is continuing its education and therefore needs financial aid. In particular, the question arises about the possibility of recovery of alimony from parents for the maintenance of adult children who continue their studies by correspondence. Notably, the form of education of an adult child to collect child support from the mother or father does not matter. Thus, the Civil Court of Cassation of the Supreme Court in its decision of April 17, 2019 in the case No. 644/3610/16-ц critically assessed the conclusions of the courts of first and appellate instances and did not agree that studying in correspondence department, an adult plaintiff has the opportunity work and earn a living, which relieves parents of the obligation to maintain it [34]. Furthermore, parents are not released from the obligation to maintain an adult daughter or son, who continue their education, during the holidays. At present, the judicial practice has developed an approach where a person who has been deprived of parental rights over a child is not released from the obligation to maintain an adult child who continues its education. Although some scholars, in particular A. A. Lesko, believe that the obligation of parents to maintain an adult daughter or son, who continue their studies, is defined by Article 199 of the Family Code of Ukraine, which makes provision for the maintenance of an adult daughter or son until the age of twenty-three, does not arise for parents deprived of parental rights [35].

Admittedly, deprivation of parental rights is a sanction in family law applicable to the mother or father for non-performance or improper performance of their parental responsibilities in relation to the child on the grounds specified in Article 164 of the Family Code of Ukraine, and is carried out only in court. However, deprivation of parental rights does not relieve the parents of the obligation to maintain the child. It is considered that such an obligation cannot be terminated even after the child reaches the age of majority, if there are grounds prescribed by law for the maintenance of the parents

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of the adult daughter and son. In this regard, it is proposed to introduce in the Family Code of Ukraine a provision on the obligation of parents deprived of parental rights to maintain both adult disabled children in need of financial aid, if parents can provide such financial aid, and adult children who continue their education and therefore need financial aid until they reach the age of 23, provided that the parents can provide financial aid.

### *2.5 Problematic issues of recovery of alimony from adult children for parental support*

In accordance with Part 1 Article 202 of the Family Code of Ukraine<sup>1</sup> an adult daughter and son are obliged to support parents who are unable to work and need financial aid. The obligation of children to support their parents in need of financial aid is also known to other legal systems in the world. Thus, K. S. Pearson notes that the Virginia Parental Support Act is a typical law, the existence of which can be traced back to the history of the adoption of social security laws in colonial times. The law, codified in the Annotated Code of Laws of the State of Virginia, section 20-88, begins with a statement of general obligation, stating that “it should be...an obligation of all able-bodied persons over 18 years of age, once that person has sufficiently provided for their family, to help and support their mother/father if she/he finds himself in a difficult situation”. This law gives courts the power to determine and oblige to make payments to parents, including the distribution of costs among several children [36].

Alimony obligations of adult children for the maintenance of their parents under the laws of Ukraine arise in the presence of legal composition, which includes the following legal facts: 1) determination of the origin of an adult child from specific mothers, fathers, 2) incapacity of the mother, father; 3) the need of the mother or father for financial aid.

The most problematic issue of modern law enforcement practice is the definition of mother or father in need of financial aid. The approach reflected in the decision of the Civil Court of Cassation of the Supreme Court of December 5, 2018 in case No. 570/3274/15-ц has been established for a long time: the need for financial aid is determined in each case depending on the financial situation of parents. The court considers the parents' receipt of pensions, state benefits, subsidies, the presence of parents' property that can bring income, etc. The mere fact of the incapacity of the parents does not presuppose that the children have the obligation to provide them with maintenance – the state of incapacity for work must be accompanied by the need to receive third-party financial aid. Evidence of this need is the receipt by the mother or father of income below the subsistence level. According to the current legislation, the state provides the necessary maintenance for disabled people – old-age pension, disability pension, state aid, etc. Therefore, when issuing a court decision, the amount of such state maintenance should be considered and made dependent on the subsistence level [37].

However, at present the judicial practice departs from this approach, as evidenced by the decision of the Supreme Court of the Joint Chamber of the Civil Court of Cassation of September 5, 2019 in case No. 212/1055/18-ц, which states that in the case,

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<sup>1</sup> Family Code of Ukraine. (2020, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/2947-14#Text>

the court of first instance, having correctly established the circumstances of the case and applied the rules of substantive law, came to the reasonable conclusion that the plaintiff is a pensioner, incapable of work, has a serious illness, needs treatment, and therefore needs financial aid, which the defendant, her son, does not provide, although he is able to work, is officially employed and has the opportunity to pay child support. The appellate court's reference to the fact that the plaintiff, although incapable of work, nevertheless receives a pension in the amount significantly exceeding the subsistence level established by law for persons who have lost their ability to work and therefore does not require third-party financial aid is unfounded, since Articles 202, 203 of the Family Code of Ukraine, which regulate the disputed legal relations, do not make provision for consideration only of the subsistence level established by law, as an absolute condition for recovery or refusal to collect alimony [38].

It is considered that such an interpretation of family law on the maintenance obligations of adult children to support their parents will lead to a lack of unity of judicial practice in this category of family disputes. It would be expedient for the legislator to determine more specifically which of the parents can be considered in need of financial aid. In this category of family law disputes, similar provisions could be applied to the recognition of a person in need of financial aid as to one of the spouses, as discussed above in this study.

### *2.6 Problems of alimony obligations of other family members and relatives*

The Family Code of Ukraine in the provisions of Chapter 22 also regulates the alimony obligations of other family members and relatives, making provision for a fairly wide scope of alimony payers, which allowed some lawyers, in particular L. V. Afanasieva, to classify them as alimony obliged subjects of the second group. Thus, spouses (ex-spouses), parents and children are obliged to support each other in cases established by law, regardless of the obligations of other persons to provide maintenance. The law imposes maintenance obligations on other family members and relatives only in the absence of first-degree alimony payers [2].

Notably, the changes to the family legislation of Ukraine in terms of strengthening the protection of the child's right to maintenance did not affect the second group of alimony obligations of persons. In particular, the legislator did not amend Article 272 of the Family Code of Ukraine<sup>1</sup>, which prescribes that the amount of alimony collected from other family members and relatives for children and disabled adults in need of financial aid is determined as a share of earnings (income) or in a fixed amount. In determining the amount of alimony, the court takes into account the material and family status of the payer and recipient of alimony. If the claim is not filed against all liable persons, but only against some of them, the amount of alimony is determined with consideration of the obligation of all liable persons to provide maintenance. In this case, the total amount of alimony to be collected may not be less than 30 percent of the subsistence level for a child of the appropriate age. The court may determine the period during which alimony will be collected.

Thus, the minimum amount of alimony collected from other family members and

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<sup>1</sup> Family Code of Ukraine. (2020, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/2947-14#Text>

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relatives per child is 30 percent of the subsistence level for a child of the appropriate age. Therewith, Part 2 Article 182 of the Family Code of Ukraine already refers to the minimum guaranteed amount of alimony for one child, which cannot be less than 50 percent of the subsistence level for a child of the appropriate age. These legal provisions indicate unequal opportunities for the child to exercise its right to maintenance. In this regard, it is proposed to amend Part 2 Article 272 of the Family Code of Ukraine and to prescribe that the total amount of alimony to be collected from other family members and relatives may not be less than 50 percent of the subsistence level for a child of the appropriate age.

## CONCLUSIONS

Thus, the alimony obligation of family members is a legal relationship in which one party (the debtor – the payer of alimony) is obliged to perform in favour of the other party (creditor – the recipient of alimony) a certain action – to pay alimony in cash, and the creditor has the right to demand from the debtor to perform their duty. In this meaning, the alimony obligation is by its nature a monetary obligation, and by its essence – a family law obligation. It is proposed to extend the provisions of Article 625 of the Civil Code of Ukraine on liability for breach of monetary obligation in terms of the possibility of recovery of the amount of debt, taking into account the established inflation index for the entire period of delay, as well as three percent per annum of the overdue amount. It is proved that the recognition of one of the spouses as in need of financial aid, depending on its provision at the subsistence level for the recovery of alimony from the other spouse, no longer meets the needs of today. It is proposed that one of the spouses be considered in need of financial aid if their monthly income (salary, pension, income from the use of property, other income) is less than the minimum wage established by law. It is proposed to apply similar provisions to identify parents in need of financial aid in alimony obligations for adult children to support their disabled parents in need of financial aid.

It is established that the legislator's change of the minimum amount of alimony to be collected from the alimony payer per child is not a basis for changing the amount of alimony in accordance with Article 192 of the Family Code of Ukraine, but is the basis for changing the minimum amount of alimony specified in the writ of execution in the procedure for executing and collecting alimony, and is taken into account when determining the amount of alimony or debt. It is argued that the form of education of an adult child who continues its studies and therefore needs financial aid does not matter for collecting alimony from a mother or father, and also that parents are not exempt from the obligation to support an adult daughter/son continuing education, including during the holidays.

It was proposed to amend the Family Code of Ukraine and stipulate the obligation of parents deprived of parental rights to support both adult disabled children in need of material aid, if parents can provide such material aid, and adult children who continue their education and, in this regard, need material aid, until they reach the age of 23, provided that parents can provide such material aid.

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**Valentina I. Borisova**

Department of Civil Law  
Yaroslav Mudryi National Law University,  
61024, Pushkinskaya str., 77, Kharkiv, Ukraine

**Larysa V. Krasnytska**

Department of Civil Law and Procedure  
Kharkiv National University of Internal Affairs of Ukraine  
61080, 27 L. Landau Ave., Kharkiv, Ukraine

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