Received: 21.10.2022
Accepted: 28.11.2022
Published: 30.12.2022

Annuals of The Administration and Law
Roczniki Administracji i Prawa
2022, XXII, i. 4: pp. 209-226
ISSN: 1644-9126
DOI: 10.5604/01.3001.0016.3377
https://rocznikiadministracjiiprawa.publisherspanel.com

Mariusz Śladkowski*
ORCID no: 0000-0001-6487-3933

PROCEEDINGS FOR THE DIVISION OF COMMUNITY PROPERTY OF SPOUSES. FOLLOWING THE AMENDMENTS TO THE CODE OF CIVIL PROCEDURE INTRODUCED BY THE LAW OF JULY 4, 2019

POSTĘPOWANIE O PODZIAŁ MAJĄTKU WSPÓLNEGO MAŁŻONKÓW. PO ZMIANACH W KODEKSIE POSTĘPOWANIA CYWILNEGO WPROWADZONYCH USTAWĄ Z DNIA 4 LIPCA 2019 R.

Summary: With the growing number of divorces in Poland, one of the most common types of civil non-trial proceedings is proceedings for the division of community property of spouses. Court-ordered division of community property of spouses usually takes place when the joint holders of rights are unable to agree on issues related to the withdrawal from the joint ownership. If, however, the joint holders of rights agree on the composition of the community property and the manner in which the division is to be carried out, they will, as a rule, enter into an agreement of appropriate content. This method of division is much faster, and also provides more opportunities to do it with a broader consideration of all aspects of the situation of the entities in question. In principle, non-trial proceedings seem to be a simpler category than their procedural counterparts (if only due to the lack of contentious nature of the subject matter of the case itself, for example, the need to divide the community property of the spouses after the cessation of marital property ownership), however, the multiplicity

* President of 8th Civil Division at the District Court in Zabrze, assistant professor in the Constitutional Law and Contemporary Constitutionalism Research Group at the Faculty of Law and Administration of the University of Silesia in Katowice. Publication funding sources: author's own funds; e-mail: msladkowski@interia.pl

of problems arising in the course of these proceedings makes them of considerable interest to practitioners. One of the most important reforms of civil procedure in recent years, made by the Act of July 04, 2019 amending the Act - Code of Civil Procedure and certain other acts, influenced their actual course. Improving the implementation of the citizen's right to a court of law has been identified as one of the most important goals of this amendment.

Keywords: procedure, civil, spouse, property, division

Streszczenie: Rosnąca liczba rozwodów w Polsce powoduje, że jednym z najczęściej spotykanych typów cywilnych postępowań nieprocesowych jest postępowanie o podział majątku wspólnego małżonków. Sądowy podział majątku wspólnego następuje zwykle wtedy, gdy współuprawnieni nie są w stanie uzgodnić kwestii związanych z wyjściem z łączącej ich wspólności. Jeżeli bowiem podmioty współuprawnione są zgodne co do składu majątku wspólnego oraz sposobu dokonania podziału, to z reguły zawierają stosownej treści umowę. Ten sposób podziału jest znacznie szybszy, a także stwarza większe możliwości dokonania go z uwzględnieniem w szerszym zakresie wszelkich aspektów sytuacji danych podmiotów. I choć, co do zasady, postępowania nieprocesowe wydają się być kategorią prostszą od ich procesowych odpowiedników (chociażby ze względu na brak spornego charakteru samego przedmiotu sprawy, przykładowo konieczności podziału majątku wspólnego małżonków po ustaniu małżeńskiej wspólności majątkowej), mnogość problemów pojawiających się w toku tych postępowań powoduje, że cieszą się one sporym zainteresowaniem praktyków. Nie bez wpływu na ich faktyczny przebieg pozostała jedna z najważniejszych reform postępowania cywilnego ostatnich lat dokonana ustawą z dnia 4 lipca 2019 roku o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw. Jako jeden z najważniejszych celów tej nowelizacji wskazano poprawę realizacji obywatelskiego prawa do sądu.

Słowa kluczowe: procedura, cywilny, małżonek, majątek, podział

INTRODUCTION

With the growing number of divorces in Poland, one of the most common types of civil non-trial proceedings is proceedings for the division of community property of spouses. Court-ordered division of community property of spouses usually takes place when the joint holders of rights are unable to agree on issues related to the withdrawal from the joint ownership. If, however, the joint holders of rights agree on the composition of the community property and the manner in which the division is to be carried out, they will, as a rule, enter into an agreement of appropriate content. This method of division is much faster, and provides more opportunities to do it with a broader consideration of all aspects of the situation of the entities concerned[1].

[1] According to E. Skowrońska-Bocian, *Rozliczenia majątkowe małżonków w stosunkach wzajemnych i wobec osób trzecich*, Warszawa 2010, p. 220; hereinafter cited as E. Skowrońska-Bocian, *Rozliczenia*… The possibility of making a division of community property by way of a settlement attempt under Article 185 § 1 of the Code of Civil Procedure was mentioned by K. Skiepko [in:] K. Skiepko, ed. J. Ignaczewski, *Komentarz do spraw o podział majątku wspólnego małżonków*, Warszawa 2021, pp. 41-45.

In principle, non-trial proceedings seem to be a simpler category than their procedural counterparts (if only due to the lack of contentious nature of the subject matter of the case itself, for example, the need to divide the community property of the spouses after the cessation of marital property ownership), however, the multiplicity of problems arising in the course of these proceedings makes them of considerable interest to practitioners.

One of the most important reforms of civil proceedings in recent years, made by the Act of 04 July 2019 amending the Act – Code of Civil Procedure and some other acts[2] influenced on their actual course. Improving the implementation of the citizen's right to a court of law[3] has been identified as one of the most important aims of this amendment. According to the authors of the reform, the previous solutions in the way civil proceedings were conducted worked well under the conditions of a relatively low burden on civil courts. Therefore, it was recognized that nowadays, when the number of civil cases is successively increasing, such measures of the legislator are required that will realistically simplify and accelerate the proceedings in these cases[4].

This paper is an attempt to look at the issues of the proceedings in question, taking into account the changes introduced by the aforementioned amendment. The issues of the application for the initiation of proceedings for the division of the community property of spouses, the response to the application, and finally the course of the proceedings themselves will be discussed in turn, with particular emphasis on the evidentiary proceedings.

APPLICATION FOR DIVISION OF COMMUNITY PROPERTY OF THE SPOUSES

Proceedings for the division of community property after the cessation of marital community regime are initiated by the application of one of the spouses (former spouses). This is because they are primarily the ones who are entitled (interested) to initiate the division proceedings.

According to Article 510 § 1 sentence 1 of the Code of Civil Procedure[5], an interested party is anyone whose rights are affected by the outcome of the proceedings. The outcome of the proceedings for the division of community property may also concern

[2] Journal of Laws 2019, item 1469.

[3] M. Śladkowski wrote more extensively on this subject in: *Zmiany w zakresie przeprowadzania postępowań cywilnych dokonane ustawą z 4.07.2019 r. jako przejaw odpowiedzialności państwa za realizację konstytucyjnej zasady prawa do sądu*, "Przegląd Prawa Publicznego" 4/2021, pp. 33-61.

[4] For a broader discussion of this issue, see the Government draft on amendments to the Civil Procedure Code and certain other actis, print No. 3137, www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?id=08DD888BE3C80433C1258384004202CC, hereinafter cited as the Government draft...

[5] Act of November 17, 1964 Code of Civil Procedure (i.e., Journal of Laws 2021, item 1805, as amended), hereinafter referred to as the Code of Civil Procedure.

the heirs of one of the spouses (if the marriage ceased as a result of the death of one of the spouses or if he was declared dead), as well as the acquirers of the inheritance or share in the inheritance, the legal successors of one of the spouses and their heirs (if, after the cessation of the community, the spouse sold his share to a third party pursuant to Article 198 of the Civil Code[6] in conjunction with Article 42 of the Family and Guardianship Code[7]), a creditor who has seized a claim for the division of community property in enforcement proceedings pursuant to Article 912 § 1 of the Civil Code, the State Treasury with respect to the items of community property for which forfeiture has been ordered, the prosecutor, the Ombudsman, and finally the heirs of one of the spouses who died after the cessation of the community and before the division of the community property[8]. It has also been recognized in the jurisprudence that a creditor of one of the spouses is a legitimate party to request the division of the community property. Indeed, cases on the division of community property are not of a special, strictly family nature, which means that third parties may be admitted to them[9].

According to the wording of Article 511 § 1 of the Code of Civil Procedure, the application for non-trial proceedings should comply with the rules for a statement of claim, with the change that the interested parties in the case should be listed instead of the respondent.

The doctrine aptly remarks that in non-trial proceedings, in a case that cannot be launched ex officio, an obligatory element of the application is that the applicant must demonstrate his legitimacy to file the application (initiate the proceedings). Unlike in a trial, where the lack of a title to bring the action before the court is decided by the court after a hearing, in non-trial proceedings, even in cases where the law requires it, the court will dismiss the application in closed session without calling those interested in the case, if it is obvious from its contents that the applicant lacks the title to bring the action before the court (Article 514 § 2 of the Code of Civil Procedure)[10]. At the stage the application coding by the president of the division, the legal interest of the persons named in the application as interested parties is not questioned, and the courts do not issue orders to allow them to participate. They are served with a copy of the application along with a notice of the hearing date and from that moment they become participants[11].

Thus, the obligatory elements of the application include a precisely defined de-

[6] Act of April 23, 1964 Civil Code (i.e. Journal of Laws 2022, item 1360, as amended) hereinafter referred to as the Civil Code.

[7] Act of February 25, 1964 Family and Guardianship Code (i.e., Journal of Laws 2020, item 1359, as amended) hereinafter referred to as the Family and Guardianship Code.

[8] According to E. Skowrońska-Bocian, *Rozliczenia*…, p. 221.

[9] According to the Supreme Court (hereinafter Supreme Court) in its ruling of April 12, 1995, III CZP 34/95, OSNC 1995, No. 7-8, item 109.

[10] According to M. Rejdak [in:] *Kodeks postępowania cywilnego*, tom III: *Komentarz. Articles 425-729*, ed. by A. Marciniak, Warszawa 2017, p. 662.

[11] According to P. Telenga [in:] *Kodeks postępowania cywilnego. Kodeks postępowania cywilnego*, Vol. I: *Komentarz. Art. 1-729*, ed. by A. Jakubecki, Warszawa 2017, p. 884.

mand and the description of facts, and it is these elements that *de facto* distinguish an application for non-trial proceedings from ordinary procedural letters. The application should still contain additional elements, such as an indication of the value of the subject of the proceedings in property cases, and, if necessary, a determination of the court's jurisdiction, while it may, of course, also contain optional elements. An accurately specified request is one that allows it to be identified and distinguished from other requests of the same type. Its precise definition can, in some cases, influence the content of the decision and, following the "dissatisfaction" of the interested party with the decision, the permissible scope of the appeal. In the so-called division cases, the obligation to specify in the application for the initiation of proceedings the value of the subject matter of the case, and in the appeal the value of the subject matter of the appeal, has been modified by the content of Articles 684, 567 § 3 and Article 619 § 1 of the Code of Civil Procedure. According to these provisions, it is up to the court to determine the value of the divided property, so the court should always determine this value, acting ex officio, and is never bound in this regard by the position of the co-owners (joint owners of the rights)[12].

It is also possible to include an application for security in the application for non-trial proceedings. However, in light of Article 513 of the Code of Civil Procedure, the application to hear the case in the absence of the applicant, or the application for a default judgment, when the case can proceed despite the failure of the participants to appear, is pointless. On the other hand, the content of Article 521 of the Code of Civil Procedure excludes the filing of an application for immediate enforceability of the judgment, since in non-trial proceedings the issue of enforceability of orders before becoming final is regulated in a special way[13].

In the application initiating proceedings for the division of community property, it is necessary to cite and document the basis for the cessation of marital community property and identify the property to be divided. In cases where real estate is to be divided, evidence is needed that the property is part of the common property. Such evidence in the first instance will be extracts from land records, copies of judgments of courts or other authorities and copies of notarial contracts[14].

[12] According to A. Turczyn [in:] *Kodeks postępowania cywilnego. Postępowanie nieprocesowe. Postępowanie w razie zaginięcia lub zniszczenia akt. Postępowanie zabezpieczające. Komentarz*, ed. by O.M. Piaskowska, Warszawa 2022, p. 47.

[13] According to P. Pruś [in:] *Kodeks postępowania cywilnego. Komentarz*, tom II: *Art. 478-1217*, ed. by M. Manowska, Warszawa 2021, p. 372.

[14] According to E. Skowrońska-Bocian, *Rozliczenia*…, pp. 222-223.

RESPONSE TO THE APPLICATION IN LIGHT OF THE ACT OF JULY 4, 2019

In the state of the law in effect until November 06, 2019, the organization of civil non-trial proceedings, based on Article 13 § 2 of the Code of Civil Procedure, was imposed on the court by the content of Article 206 § 1 of the Code of Civil Procedure, which required the judge to always direct the case to a hearing, and furthermore to schedule it, knowing only the position and demands of the applicant. By virtue of the former Article 207 § 1 of the Code of Civil Procedure, in conjunction with the wording of Article 13 § 2 of the Code of Civil Procedure, obtaining the position of a participant in the proceedings before the hearing was optional and depended on the will of the court. The model undoubtedly worked well with a light to moderate court load. However, with a significant increase in the number of applications to the courts, the result of proceeding to trial "on the spur of the moment" has generally been protracted proceedings caused by the need to hear the case on multiple dates. In the opinion of the originators of the reform, the above-mentioned phenomena should be prevented by a new organization of civil court proceedings, based on three assumptions, that is, the assumption that the court proceedings are subject to planning, further assuming that the basis of the plan is the knowledge of the positions of all parties, and finally holding a hearing only when there is a real need[15].

Thus, in accordance with the provisions of Article 205^1 § 1 and 2 of the Code of Civil Procedure, applied through Article 13 § 2 of the Code of Civil Procedure, the presiding judge orders that the application be served on the participant in the proceedings and calls on him to file a response to the application within a specified period of not less than two weeks. The applicant shall be notified of the order to serve the application. The presiding judge shall order the return of the response to the application submitted out of time. According to Article 205^2 § 1 of the Code of Civil Procedure, simultaneously with the service of the aforementioned letters, the parties are instructed about the possibility of resolving the dispute by settlement before the court or a mediator, the obligation to participate in the pre-trial hearing and present all claims and evidence at the hearing, the consequences of failure to comply with the aforementioned obligations, in particular, the possibility of charging the costs of the proceedings, as well as the possibility of discontinuing the proceedings and omitting late claims and evidence, the possibility of appointing a legal representative and the fact that the representation of an advocate, attorney-at-law or patent attorney is not mandatory, the obligation to file a preparatory letter on the order of the presiding judge, the requirements for its content and the consequences of failure to do so, and finally, the return of a preparatory letter filed without the order

[15] According to the Government draft..., p. 2.

of the presiding judge. Pursuant to the wording of Article 511^1 § 1 and 2 of the Code of Civil Procedure, the filing of a response to the application in non-trial proceedings is mandatory in this regard, only if the presiding judge so orders. A preparatory hearing may be scheduled regardless of the filing of a response to the application.

Regarding the latter, in the opinion of the legislator, the nature of non-trial proceedings means that the institution of a mandatory response to the application, the opposite of a trial, will generally be unnecessary. When ordering its filing, the presiding judge should be guided by a real assessment of the need to know the positions of other participants based on the totality of the circumstances of the case[16]. However, it seems that rather difficult and multifaceted cases, which, as a rule, are proceedings for the division of community property of spouses, qualify them, as it were, "automatically" to this category of non-trial proceedings, in which becoming acquainted with the position of the parties in the proceedings before setting the first hearing date will be very beneficial.

The period of time granted to a participant in the proceedings to present his or her position on the case in writing must depend on, as a result of the application, the volume and complexity of the specific case, with the statutory minimum of two weeks guaranteed. Such a deadline is one of the court deadlines, which means that, ex officio or at the request of a party, it can be extended. Failure to file a response to the application within the prescribed time limit should result in the assertion of the facts stated in the application being considered as admitted[17].

As stipulated in Article 205^3 § 1-5 of the Code of Civil Procedure, in justified cases, particularly in abstruse or accounting cases, the presiding judge may order the exchange of preparatory letters by the parties, marking the order in which the letters are to be filed, the time limits within which the letters are to be filed, and the circumstances to be clarified. The presiding judge may oblige a party to state in the preparatory letter all claims and evidence relevant to the outcome of the case, under penalty of losing the right to invoke them during further proceedings. In such a case, the claims and evidence submitted in violation of this obligation shall be disregarded, unless the party makes it plausible that their citation in the preparatory letter was not possible or that the need for their citation arose later. The subsequent scheduling of a pre-trial hearing does not open the deadline for new claims and evidence. A party represented by an advocate, attorney-at-law, patent attorney or the General Prosecutor's Office of the Republic of Poland may oblige the presiding judge to indicate in the preparatory letter also the legal basis for its demands and applications, limiting the scope of this indication as necessary. The presiding judge shall order the return of a preparatory letter submitted either out of time or without an order.

[16] According to the Government draft..., p. 6.
[17] According to the Government draft..., pp. 3-4.

The assessment of the need for the exchange of preparatory letters should be carried out by the presiding judge as the authority preparing the case for trial and should be limited only by the general requirement of reasonableness, preventing abuse of this institution. Indeed, practice shows that the exchange of preparatory letters carries the risk of the parties' arguments going beyond the proper subject matter of the trial and the resulting delay, so time and material limitations are necessary. When ordering the exchange of preparatory letters, the chairman should designate the order in which the letters are to be submitted and the deadlines for their submission, especially the circumstances that the parties should explain more fully in these letters. The sanction for a party's violation of these limitations will be the return of the preparatory letter. In the opinion of the reform's drafters, there is no need to extend this sanction to the failure to comply with the requirements for the content of the letter, since in such a case the party's incompetence works to his or her own detriment, as the party loses the opportunity to argue the issue before the court. Finally, the regulation of the content of the preparatory letter should be made more flexible by indicating that the submission of all claims and evidence in it by a party should be made only upon the order of the presiding judge, explicitly providing for under penalty of losing the possibility of invoking them in further proceedings[18].

COURSE AND OBJECTIVES OF PROCEEDINGS FOR THE DIVISION OF COMMUNITY PROPERTY OF SPOUSES

The community property of spouses includes items of property acquired by both spouses or by one of them during the period of statutory community property regime, and this regardless of the method of acquisition. Thus, it does not matter whether it is a primary or derivative acquisition, which means that regardless of whether it occurred by legal transaction, by operation of law itself, by administrative decision or court ruling, or as a result of any other event to which the law associates the acquisition of a right, it always constitutes community property[19].

The Family and Guardianship Code does not, in principle, contain its own norms on the issue of the division of property that was included in the community property regime. Article 46 of the Family and Guardianship Code only refers to the provisions on the community property regime of inherited property and the division of the inheritance. The issue of community property regime of inherited property and the division of this property is regulated in the material legal sphere by Articles 1035-1046 of the Civil Code, and in the procedural sphere by Articles 680-689 of the Civil Code. The reference in Article 46 of the Family and Guardianship Code refers to both groups of provisions. The appropriate application of Articles 1035 et seq. of the Civil Code is complicated primarily

[18] According to the Government draft..., p. 8.

[19] According to H. Ciepła, M. Pytlewska [in:] *Podział majątku wspólnego z rozliczeniem praw spółkowych i kredytów frankowych. Regulacje dotyczące małżonków, konkubentów i partnerów związków jednopłciowych. Praktyka sądowa, notarialna i wieczystoksięgowa*, Warszawa 2022, p. 18.

because Article 1035 of the Civil Code contains another reference, namely, it orders that the provisions on joint ownership in fractional parts be applied mutatis mutandis to the co-ownership of inheritance property and the inheritance division. Thus, we are dealing with a reference to the appropriate application of the provisions contained in Section IV of Title I of Book Two of the Civil Code. The technique of double reference creates many difficulties in applying the norms to which the legislator refers to. The technique of double reference has also been used in the Civil Procedure Code, as Article 567 § 3 of the Code of Civil Procedure contains a reference to the appropriate application of the provisions on the inheritance division, i.e. the already indicated Articles 680-689 of the Code of Civil Procedure. However, these provisions do not contain a comprehensive regulation of the inheritance division. Article 688 of the Code of Civil Procedure contains another reference to the appropriate application of the provisions on the abolition of co-ownership, in particular, Article 618 § 2 and 3 of the Code of Civil Procedure. The difficulties of interpretation occurring due to such a complicated system of references are aggravated by factual problems. This is because, as already hinted at the beginning, the division of property previously included in the community property regime carried out in court proceedings, is most often carried out in a situation where there are very strong conflicts between joint holders of rights. Proceedings for the division of community property (as well as other proceedings for the abolition of community property regime – so-called "divisions") are therefore extremely arduous[20].

According to the wording of Article 684 of the Code of Civil Procedure, the compositionand value of the property to be divided shall be determined by the court.

Thus, in the first place, the court determines what items of property are subject to division. Hence the requirement that the items of property that are the subject of the division (see above) must already be indicated in the application filed. If in the body of the application the entire property is not indicated, i.e., some items included in the community property regime are omitted, in the course of the proceedings the court should strive to correct this deficiency. In doing so, the court should draw the spouses' attention to the need to indicate all the property to be divided. At the same time, it is not bound by the applications of the spouses if it is clear from their statements that there are other elements of community property. On the other hand, the content of Article 684 of the Code of Civil Procedure does not create a power (let alone an obligation - note of MŚ) for the court to conduct ex officio investigations to determine whether and what elements /still belong to the common property[21].

As emphasized in the jurisprudence, the composition of the property in question should be determined by the court on the basis of evidence valid at the time of the division. Hence, if the value of all or some of the elements of the property changes after the expert's opinion (more on this later), and before the close of the hearing, the court is obliged to

[20] According to E. Skowrońska-Bocian, *Rozliczenia*…, pp. 205-206.
[21] Ibidem, p. 223.

take evidence of a supplementary opinion[22]. It was also pointed out that the division cases constitute a single whole in the sense that the decisions made in them are, in principle, interdependent and conditioned (the so-called integrity of division rulings). Such an inextricable link exists in particular between the decisions on the method of division and on repayments or additional payments, and a defect in one of them results in the necessity of revoking the division order in its entirety. Only exceptionally, when the contested part of the division order does not affect the decision on the division itself, that is, is not inseparable from the others, it is possible to hear the case in this regard. In doing so, the court of appeal may reverse the decision to the detriment of the applicant if the subject of the appeal is integrally related to another part or the whole decision. Therefore, it was assumed that the prohibition of *reformationis in peius* does not apply in the case of indivisibility of individual decisions contained in the partially challenged division decision[23].

Both in doctrine and jurisprudence it has been widely accepted that only the items of the common property are the subject of division, while the liabilities remain outside the division[24]. Making a "division" of the debt therefore has no effect on the creditor. Therefore, it does not relieve one of the spouses from the obligation to satisfy the creditor's claim. Such an effect could occur only with the assumption of debt in accordance with the provisions of the Civil Code. In practice, in division proceedings, especially in settlements, it happens that one of the participants assumes the obligation to make payment of a certain debt. And while there is no legal basis for negating such a practice, the court should instruct the participants that the imposition of a debt on only one of the spouses is ineffective against the creditor, unless he or she has agreed to it by a separate legal transaction[25].

An interesting issue is the problem of how to divide the so-called expectative of acquisition of a right. The term expectative is used in this case to describe the legally justified hope of acquiring a subjective right. Thus, this will primarily involve situations in which the acquisition of a subjective right occurs not as the result of a single legal event, but as the result of several consecutive legal events[26]. As a starting point for resolving the issue of the division of the spouses' expropriation, it is necessary to assume that the items of property included in the spouses' community property is an entitlement to acquire a right to the items of property in the future, if it arose during the community property regime. As a result, in a situation where the event leading to the definitive acquisition of a right has already occurred after the cessation of the community property regime, the acquisition was made in favor of both spouses or former spouses and is consequently

[22] According to the Supreme Court in its order of March 16, 1994, II CRN 31/94, Docket 1994, no. 9, p. 9.
[23] According the Supreme Court in its resolution of March 11, 1977, III CZP 7/77, OSNC 1977, No. 11, item 205.
[24] According, among others, to J. S. Piatowski, *Stosunki majątkowe między małżonkami*, Warszawa 1955, p. 96, or the Supreme Court in its decision of September 26, 1968, III CRN 209/68, OSNC 1969, no. 6, item 112.
[25] According to E. Skowrońska-Bocian, *Rozliczenia*…, pp. 224-225.
[26] K. Gandor more extensively on this subject in: *Prawa podmiotowe tymczasowe (ekspektatywy)*, Wrocław – Warszawa – Kraków 1968.

subject to division[27]. A similar position was presented in jurisprudence[28] and in that case the cooperative right to housing was acquired in this way[29].

In proceedings for the division of community property, the court shall determine the value of the various items to be divided. In doing so, the value of the property is determined according to the time of division. Thus, the value of individual elements of the property shall be determined according to the prices at the time of the closing of the trial by the court of first instance or the closing of the trial by the court of second instance, unless there were no grounds for supplementing the evidence. Therefore, as indicated above, in the event that there is a change in the value of all or some of the elements of the divided property after the experts' estimate, a re-evaluation should be carried out. Otherwise, it would not be possible to decide the case taking into account the state of affairs existing at the time of adjudication[30].

When determining the value of the items included in the divided property, any liabilities should be taken into account. This is because such liabilities reduce the real value of such items. The value of the items included in the property to be divided can be determined by the participants of the proceedings themselves. It should be assumed that the court is bound by such a consensual determination of value, and only in the event of a dispute between participants will it be necessary for the court to determine this value. Since, as a rule, determining the value of particular property items will require special knowledge, the court will appoint expert witnesses to determine the value (see below)[31].

The division of the property previously subject to community property regime can, like the abolition of joint ownership, be carried out primarily, through the physical division of individual items included in the community property (the so-called division in kind). If, as a result of such a division, things of different value accrue to individual persons, then appropriate additional payments are determined. The second way is to award individual items, or even the entire estate, to one of the parties. In such situations, as a rule, repayments are ordered in favor of the joint holder of rights. Finally, the third way of division is to sell the items included in the community property and divide the amount obtained in proportion to the size of the shares held by each person (known as civil division). Each of these methods of division is applicable to the division of property previously included in the community property regime[32].

With regard to physical division, it should be stated that the reference in Article 46 of the Family and Guardianship Code to the appropriate application of the provisions on division of inheritance, coupled with the reference in Article 688 of the

[27] According to A. Dyoniak, *Ustawowy ustrój majątkowy małżeński*, Ossolineum 1985, p. 59.
[28] According to the Supreme Court in its resolution of January 12, 1978, III CZP 86/77, OSNCP 1978, no. 10, item 171.
[29] M. Śladkowski more extensively on this subject in: *Prawo do lokalu mieszkalnego jako przedmiot stosunków majątkowych pomiędzy małżonkami*, Warszawa 2008.
[30] According to the Supreme Court in its resolution of December 15, 1969, III CZP 12/69, OSNCP 1970, no. 3, item 39.
[31] According to E. Skowrońska-Bocian, *Rozliczenia*…, p. 230.
[32] Ibidem, p. 206.

Civil Code to the appropriate application of the provisions on the abolition of joint ownership, means that in making a division of joint property, the court is bound by the priority of physical division arising from Article 211 of the Civil Code. In applying this principle, however, it should be borne in mind that the subject of the elimination of joint ownership is a specific thing, while the subject of the division of the community property is a number of rights, both those that are rights "in the thing" (e.g., ownership) and those with no connection to the thing (e.g., the aforementioned expectative of the acquisition right). Article 211 of the Civil Code further implies the inadmissibility of a physical division if such a division would be contrary to the provisions of the law, the social and economic purpose of the thing or would entail a significant change in the thing or a significant reduction in its value[33].

Withdrawal from the common property regime by awarding all property to one of the spouses or former spouses is *de facto* applicable in three situations. Firstly, when the property to be divided includes few elements (and often only one). Secondly, when the division involves property that constitute an organized economic entity. Finally, the allocation of the entire property to one of the joint holders of rights may take place when physical division is not permissible in a given situation. Such a conclusion is based on the wording, applied mutatis mutandis, of Article 212 § 2 of the Civil Code[34].

The sale of property subject to division in proceedings for the division of community property is relatively rare. This is because, unlike in the removal of co-ownership, it is rather rare that none of the co-owners will obtain some item included in the common property. Of course, it cannot be ruled out that the community property includes, for example, only a property that is not physically divisible, and none of the joint holders of rights agrees to allocate the property to him in its entirety and make him or her liable for repayment. The sum obtained from the sale of the various elements of the community property shall be divided among the joint holders of rights in proportion to their respective shares[35].

CHANGES IN EVIDENCE PROCEEDINGS MADE BY THE ACT OF JULY 04, 2019, WHICH MAY AFFECT THE COURSE OF THE CASE ON THE DIVISION OF COMMUNITY PROPERTY BETWEEN SPOUSES

Most of the provisions of the Code of Civil Procedure governing evidence proceedings were in effect in the same wording as they were given in the 1960s until 2019. It should therefore come as no surprise that some of them clearly did not meet the requirements of the effective work of the civil division of our system of justice. The following will discuss those changes made by the law of July 04, 2019 that are

[33] Ibidem, pp. 231-233.
[34] Ibidem, p. 234.
[35] Ibidem, p. 235.

most likely to affect the actual course of proceedings for the division of community property between spouses. Thus, novelties in the general evidentiary proceedings will be discussed, as well as changes in the taking of witness evidence and expert opinions. It is the latter two types of evidence that predominate in the evidentiary applications of those involved in the category of cases in question.

Thus, according to Article 210 § 2 of the Code of Civil Procedure, at the hearing each party is obliged to make a statement on the opposing party's claims of fact. In doing so, the party is obliged to specify the facts that her or she denies.

The authors of the amendment drew attention to the fact that in the current practice the rule is to deny all claims of the opposing party, except for those explicitly admitted. The consequence of the above was to expand the scope of facts to be proven to almost the entirety of the opposing party's claims, which clearly led to an unwarranted expansion of the scope of evidence, and thus constituted procedural obstruction[36].

According to the wording of Article 235^1 of the Code of Civil Procedure, in the application for evidence, a party is obliged to designate the evidence in a way that makes it possible to take it and to specify the facts to be proved by this evidence.

When introducing the above regulation, attention was paid to the fact that a party's strict indication of the fact it intends to prove with the evidence application is an essential element of a fair trial. Raising procedural standards therefore required moving away from a bad practice in which applications for evidence were made "for circumstances" instead of to prove specific facts. This usually caused it to be unclear what a party actually wanted to prove with a given piece of evidence. Indeed, in extreme cases, evidence was submitted "on the merits of the claim". It also made it impossible to assess the relevance of the evidence in question to the outcome of the case. Hence the legislator's idea to introduce an explicit requirement that the application for evidence is to indicate the facts that the party wants to prove with the evidence in question. The phrase "identify and specify" emphasizes that the indication is to be individualized as to each fact and as to each piece of evidence. The party is obliged, on the one hand, to exhaustively list all the facts to be proven by the requested evidence, and, on the other hand, with each piece of evidence, to indicate which fact is to be proven by it[37].

As further stipulated in Article 235^2 § 1 and 2 of the Code of Civil Procedure, the court may, in particular, disregard evidence, the taking of which is precluded by a provision of the Code of Civil Procedure, evidence intended to prove an undisputed fact, irrelevant to the resolution of the case or proven in accordance with the applicant›s claim, evidence unsuitable to prove a given fact, evidence impossible to take, evidence aimed only at prolonging the proceedings, as well as when a party's application does not meet the requirements of Article 235^1 of the Code of Civil Procedure, and the

[36] According to the Government draft..., p. 54.
[37] According to the Government draft..., p. 55.

party, despite being summoned, has not remedied the deficiency. By omitting the evidence, the court issues a decision indicating the legal basis for this decision.

Justifying the introduction of the above-mentioned standard, attention was drawn to the fact that in previous jurisprudential practice, a negative ruling on the admission of evidence was most often formulated as a "disregard of evidence" (or dismissal of evidence - note of MŚ). This phrase was also used to denote the court's negative decision on a party's application for evidence, resulting in its inadmissibility. Since it is the effect, amounting to the failure to take evidence, that is important for the party, there is no need to differentiate such a decision into the dismissal of the evidence application, its return, rejection, etc. This is because the rule of "omission of evidence" includes all of these decisions. The criteria in question, which boil down to a catalogue of circumstances that justify the refusal to take evidence, have been developed in practice, by the way, as logical consequences of the praxeological categories of the prohibition of evidence, the relevance of a given fact to the outcome, the usefulness of evidence to establish a given fact, the possibility of taking evidence and the prohibition of protracting the proceedings. Since these circumstances are the same in every court proceeding, they can be systematized. In doing so, it should be made clear that the omission of evidence is made by an order. At the same time, it seems beneficial for the internal openness of the trial that in the order omitting evidence the court should indicate its legal basis, especially since the grounds for omission are catalogued[38].

Pursuant to the wording of Article 236 § 1-3 of the Code of Civil Procedure, in the order to admit evidence, the court shall designate the means of evidence and the facts to be proved by it, and, if necessary and possible, also the date and place where the evidence is to be taken. If the order for the admission of evidence was requested by a party, it is sufficient to refer to the content of its application in the order. When ordering the taking of evidence to a designated judge or a summoned court, the court shall designate this judge or this court. If no date or place for the taking of evidence is designated, it will be designated by the designated judge or the summoned court.

As the originators of the amendment rightly pointed out at the same time, applications for evidence were, are, and probably will be made mainly in procedural letters, and since this is the case, there is no need for the court, when admitting evidence, to rewrite the content of a party's letter for the ruling. Thus, the reference to a party's application in the evidence order should have been expressly permitted. In doing so, this provision will be able to be applied not only if the application is granted in full. Indeed, nothing prevents the admission of evidence, for example, to confirm the facts indicated in the application except for this or that fact. It is only important that the content of the decision is unambiguous[39].

[38] According to the Government draft..., p. 57.
[39] According to the Government draft..., p. 56.

Finally, according to Article 243[2] of the Code of Civil Procedure, documents in or attached to the case file are evidence without issuing a separate order. The court issues an order if it bypasses the evidence of such a document.

Justifying the introduction of the regulation in question, it was stated that the document itself determines the scope of the information it includes, that is, the fact it is supposed to demonstrate. Thus, the taking of evidence from a document simply involves reading it. As can be seen from the above, the specificity of this evidence makes it unnecessary to issue an order for its admission. Therefore, it should have been provided that a document contained in the case file becomes evidence without the need to admit it by separate order. Only its exclusion from evidence requires an appropriate order[40].

According to Article 263 of the Code of Civil Procedure, a witness who is unable to appear when summoned due to illness, disability or other irremovable obstacle shall be questioned at his or her place of residence.

As the authors of the amendment stressed, the appearance of a witness at a court summons may be prevented not only by illness or disability, but also by another obstacle that cannot be overcome, such as deprivation of liberty. Therefore, it was necessary to broaden the prerequisites that allow a witness who cannot appear in court to be questioned at his or her place of residence. By the way, the term "handicap", which is going out of use, had to be replaced by the term "disability", which is already used in legal acts[41].

According to the wording of Article 271[1] of the Code of Civil Procedure, a witness shall testify in writing if the court so orders. In this case, the witness takes the pledge by signing the text of the pledge. The witness is obliged to file the text of the testimony in court within the time limit set by the court. The provisions of Article 165 § 2 of the Code of Civil Procedure, Article 274 § 1 of the Code of Civil Procedure, and Article 276 of the Code of Civil Procedure shall apply mutatis mutandis.

In justifying the addition of the above provision, it was stated that the submission of written testimony can significantly speed up the resolution of the case and save the parties costs and the court work. Therefore, this possibility, hitherto provided only in the European small claims procedure, had to be extended to all civil judicial proceedings[42].

As further stipulated in Article 272[1] of the Code of Civil Procedure, if the court has doubts about a witness's ability to perceive or communicate observations, it may order that the witness be questioned with the participation of a medical expert witness or psychological expert witness, and the witness may not object to it.

In justifying the introduction of the above standard, it was noted that Article 259 point 1 of the Code of Civil Procedure stipulates that a person incapable of perceiving or communicating his or her observations cannot be a witness. It is the court's responsibility to assess whether the person requested to be interviewed as a witness is

[40] According to the Government draft..., p. 58.
[41] According to the Government draft..., p. 59.
[42] According to the Government draft..., p. 59.

affected by such infirmity. Therefore, it is necessary to give the civil court an additional instrument to determine such frailty, in the form of the participation of a medical expert witness (psychologist or neurologist) or psychologist in the interview of the person in question. At the same time, questioning a witness with the participation of such an expert means examining the witness's mental state, and therefore interfering with his or her privacy. However, the witness will only be forced to endure the expert's participation in the hearing, without further examination. In contrast, such an extent of interference with a witness's privacy is so small that the public interest in establishing the truth clearly outweighs the protection of the witness's privacy. Nevertheless, the court's authority to order such a hearing cannot be derived solely from the general rules of evidence, but must be given explicit statutory authority[43].

Finally, according to Article 278[1] of the Civil Procedure Code, the court may admit evidence of an opinion prepared at the application of a public authority in other proceedings provided for by act.

The authors of the amendment drew attention to the fact that expert opinions prepared on a completely private commission, on the order of an entity conducting proceedings provided for by the act, on the order of a non-judicial body conducting proceedings other than a court, or on the order of a court in another civil or criminal case, are widely used in legal transactions. Nonetheless, the previous regulations governing the evidence of expert witness testimony did not explicitly resolve whether evidence of expert witness testimony prepared not at the request of the court presiding over the case was admissible in civil court proceedings, and if so, what the nature of such evidence was. Meanwhile, the practical benefits of using this type of evidence in civil proceedings are obvious. Thus, it was only necessary to properly determine in which cases the benefit of using an out-of-court opinion would outweigh any objections. In doing so, the selection was based on three important factors. Firstly, when a court or other public authority orders an opinion, with which, as a rule, comes the right of the parties to verify such an opinion, positively affects the objectivity of such evidence. Secondly, making the commissioning of an opinion subject to the discretion of a party to a legal relationship will always, regardless of the actual cognitive value of that opinion, raise suspicions about the expert witness' lack of impartiality. Thirdly and finally, opinions prepared on behalf of the parties are subject to copyright and in practice are usually subject to restrictions on the scope of their use, not allowing their use in court proceedings[44].

[43] According to the Government draft..., p. 60.
[44] According to the Government draft..., p. 62.

SUMMARY

Cases involving the division of community property of spouses fall into the category of the most difficult civil non-trial proceedings. The difficulty of these cases is caused, on the one hand, by the multiplicity of findings that the court must make, and on the other hand, most often, by the high degree of antagonism between the parties. As for the former, it will be a complicated and lengthy task for the court to determine the composition and value of the property, as well as how it should be divided. Achieving this goal is a particularly arduous task amid rampant inflation. Indeed, the valuation of individual elements made, for example, in the middle of the proceedings, does not necessarily remain valid at the time of the closing of the trial.

For the reasons indicated above, the fundamental task of the legislator remains to create such procedural regulations to create conditions for maximum dynamization of the course of the category of cases in question. For this reason, great hopes are vested in the amendment resulting from the law of July 04, 2019. The new model for the organization of civil proceedings outlined above, as well as the modernization of evidentiary solutions discussed in detail, should make it possible to proceed more quickly in these cases, without detriment to the quality of the decisions rendered in them.

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