Annales Canonici 11 (2015) • s. 95-105
DOI: http://dx.doi.org/10.15633/acan.1057

Rev. Piotr Kroczek

The Pontifical University of John Paul II in Krakow

Introduction to the separate property regime in Polish law

1. Preliminary issues

The aim of the paper is to provide an analysis and give a clear description of the separate property regime (popularly called: antenuptial or prenuptial agreement) in Polish law.

1.1. Polish legal system

Polish legal system belongs to the family of civil law. The foundations of legal norms are laws. "The sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and regulations" (art. 87 item 1 of the Constitution of the Republic of Poland[1]). Neither the legal custom, nor the judgements of the courts belong to the constitutional sources of legal norms or create universally and generally binding norms, although the latter serve as very valuable clues or instructions for the interpretation of the provisions of law for users of law, e.g., the judgments of the Supreme Court of the Republic of Poland are very often cited in the judgments of the lower courts.

1 The Constitution of the Republic of Poland of 2nd April, 1997, as published in "Dziennik Ustaw" (full name: "Dziennik Ustaw Rzeczypospolitej Polskiej" ("The Journal of Laws of the Republic of Poland") [hereinafter: J.L.] No. 78, item 483, as amended; the translation of the Constitution is taken from the official web side of Polish Sejm (this is the lower chamber of the parliament of Poland), http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (19.06.2013).

1.2. General rule of equity of spouses

For the clarification of the separate property regime, it must be said that man and woman have equal rights in Polish law – especially in the family matters. This general rule is present in the art. 33 item 1 of the Constitution of the Republic of Poland. One of provisions of the Family and Guardianship Code[2] states directly – "Spouses have equal rights and obligations in marriage" (art. 23 f.g.c.). Also many other provisions of the Code underline equity and manifest the same rule (see, e.g., art.: 24, 25, 27, 41 § 1, 50^1, 93 § 1 f.g.c.).

1.3. Private International Law

An important source of norms for the legal situation of the spouses in the context of the property regime is the Act of 4 February 2011 – Private International Law.[3] The law encompasses legal rules determining which law is applicable to international or cross-border private relations, family law included. In such situations, a foreign element is present and the situation involves a conflict of laws. Articles from 48 to 54 of the Private International Law refer to marriage related matters, and matrimonial property, especially art. 51–53.

Article 51 item 1 of the cited law provides that "Personal and patrimonial relations between spouses are subject to the law of their currently existing common nationality".[4] In the absence of the law of a currently existing common nationality of the spouses, the applicable law shall be the law of the country where two spouses have "a common domicile" (also known as "permanent residence"), that is, the place where they stay with the intention of residing permanently.[5]

If the spouses do not have a common domicile in the same country, the applicable law shall be the law of the country, where the two spouses normally stay, that

2 Ustawa z dnia 25 lutego 1964 r. Kodeks rodzinny i opiekuńczy (consolidated text in J.L. of 2012 item 788 as amended) [hereinafter: f.g.c.]; English translations of the laws are taken from *Lex. System Informacji Prawnej* (*Lex. System of Legal Information*) [hereinafter: Lex], unless otherwise indicated.

3 Ustawa z dnia 4 lutego 2011 r. – Prawo prywatne międzynarodowe (Dz.U. Nr 80, poz. 432 z późn. zm.). The law replaced Act of 12 November 1965 – Private International Law (J.L. of 1965, No. 46, item 290 as amended) [hereinafter: p.i.l.].

4 Translated by the author.

5 See the definition of "domicile" in art. 25 of the Civil Code, that is ustawa z dnia 23 kwietnia 1964 r. (consolidated text in J.L. of 2014 item. 121 as amended) [hereinafter: c.c.].

is, the country of their usual stay. If the spouses do not stay in the same country, the applicable law shall be the law of the country to which both of them are bound the most (art. 51 item 2 p.i.l.).

Article 52 item 1 of the Private International Law refers directly and exclusively to the property relations arising from the marriage. It gives the spouses two possibilities. They can subordinate their property relations to: 1) the law of nationality of either spouse, or to 2) the law of the country in which one of them has domicile or in which one of them stays. The choice of the option can be made before as well as after contracting marriage (art. 52 item 1 p.i.l.).

It is important to notice that according to art. 52 item 2 of the Private International Law, the agreement on marital property shall be subject to the law chosen by the parties according to the norms from art. 52 item 1. In the absence of the law choice, the agreement on marital property shall be governed by law relevant to personal and property relations between the spouses at the time the contract is executed. While choosing the law that shall govern the property relations arising from marriage or the law that shall govern the agreement on marital property, it is sufficient to comply with the form prescribed for the agreements on marital property by the chosen law or law of the country where the choice was made (art. 52 item 3 p.i.l.).

2. Matrimonial property regimes in general

The main source of norms in the matter of marriage, family, and the matrimonial property regimes is contained in the Act of 25th February 1964 – the Family and Guardianship Code. The law in question provides different matrimonial property regimes.

The first of them is the statutory property regime, which is the default one. It means that in case when those who are to be married, or the spouses, make no legal action in the matter of the marital property, the regime in question is automatically provided by the law.

The next group of the regimes are contractual property regimes. The common feature of the regimes is that they are voluntarily contracted between the spouses. The group consists of three different contractual property regimes:

1. the community of property,
2. the separate property regime,
3. the separate property with compensation for possessions gained.

The last of the regimes provided by law is the compulsory property regime, which is, in the essence and in most of the legal effects, the same as the separate property regime. The main difference between the compulsory property regime and the contractual property regimes is that the former is not established by the sides, but by the court on demand of either spouse or by operation of law.

3. Separate property regime

The term "separate property regime" (in Polish: "rozdzielność majątkowa") belongs to the legal language. The legal language is the language used in legal texts (laws, statutes, regulations). The juridical language, on the other hand, is the language referring to the law written in the legal language.[6] In the juridical language, the term "separate property regime" is called: "antenuptial agreement" (in Polish: "intercyza").

The essence of the regime in question is contractual distribution of property. The regime is established by the agreement on marital property between the two sides, who exclusively have legal possibility to establish the agreement, that is, between those who are to be married (in a sense that the contract is likely to precede the marriage, and it comes into effect in the moment of contracting marriage), and, of course, between the spouses. The agreement is to be concluded in a notarial deed. The partaking of the notary is necessary for validity of the legal action (art. 47 § 1 f.g.c.).

The law does not provide any special reason for establishing the separate property regime. The legal doctrine indicates that usually the regime in question is used in situation when one of the spouses misspends money or property of the joint property of the marriage.[7] Another possible motive to establish such a regime can be, for instance, the need of delivering to each of the spouses, especially when the spouses conduct business activity, full (but not absolute) autonomy in management of their own personal property.[8]

---

6 P. Kroczek, *The Art of Legislation*, 2nd rev. ed., Kraków 2012, p. 136–137.

7 A. Dyoniak, *Ustrój wspólności zysków a ustrój wspólności dorobku*, „Studia Prawnicze" (1990) no. 1, p. 24.

8 T. Sokołowski, *Komentarz do art. 51 Kodeksu rodzinnego i opiekuńczego*, [in:] M. Andrzejewski i in., *Kodeks rodzinny i opiekuńczy. Komentarz*, Lex 2013.

The agreement in question is not invariable. It may be 1) amended, or 2) terminated (art. 47 § 2 f.g.c.). The legal shape of amendment depends, without prejudice to the provisions of law, on the parties. If the agreement is just terminated during the marriage, the statutory joint property regime is formed between the spouses, unless the parties agreed otherwise and, in practice, choose any other contractual property regimes provided by the law. Spouses may bring claims against other parties on the basis of the agreement on marital property, but only if its conclusion and nature were known to the parties (art. 47^1 f.g.c.).

The agreement about the separate property regime does not have retroactive effect.[9] It means that the agreement formulates situation of the property (either each of the elements of the property or the property as the whole) of each of the spouses *ex nunc*, that is, for the future, but never *ex tunc*.

Still, the agreement that establishes the separate property regime between the spouses does not prejudice the right of each of the sides to obtain the compulsory property regime established by the court with retroactive effect. It can be done but only when the date of bringing an action is earlier than the date of the agreement. The court decision refers only to the period between the two dates (see art. 52 f.g.c.).[10]

The separate property regime is regulated principally in the two articles of the Family and Guardianship Code – art. 51, and art. 51^1. Their interpretation shall form a necessary background for a proper presentation of pertinent legal issues.

3.1. Separate property (art. 51 f.g.c.)

Article 51 of the Family and Guardianship Code states that "in the case of the contractual distribution of property, each spouse retains the property acquired both before concluding the agreement, and property acquired later." The essential characteristic of the separate property regime is that each of the spouses has only the personal property (in Polish: "majątek osobisty"). It means that after the agreement has gained legal validity, there is no joint property (in Polish: "majątek

---

9 See The Appellate Court in Pozań, Judicial decision of 28.03.1995, court ref. no. I ACr 844/94, published in *Legalis. System Informacji Prawnej* (*Legalis. System of Legal Information*) [hereinafter: Legalis] no. 46329; cf. E. Gniewek, *Umowa wyłączenia wspólności majątkowej małżeńskiej w praktyce notarialnej*, "Rejent" (2000) no. 2, p. 179.

10 The Supreme Court – Civil Chamber, Judicial decision of 24.04.2011, court ref. no. IV CSK 460/10, published in Legalis no. 338446.

wspólny"[11]) between the spouses, that is, property acquired by both spouses or by either of them while in the marriage (art. 31 § 1 f.g.c.).

In case when the agreement in question is made during the marriage, and the spouses have had statutory property regime and have shared the joint property, the agreement can contain the provisions about the division of the joint property. The provisions about the fractional co-ownership are to be applied.

The separate property regime causes that the joint property is replaced by the two personal properties. Each of the personal properties covering:

1. fractional shares (always 50% to 50%) in the elements of the property that constituted the matrimonial joint property,
2. property acquired individually by each of the spouses,
3. fractional shares (usually 50 % to 50 %, but it can be in any proportion – the spouses decide) in the properties acquired by the spouses as the co-owners (provision of the Civil Code are to be applied).[12]

There is in the Polish law the principle *numerus clausus* which in the context of matrimonial property means that it is not possible to exclude from the agreement certain elements of the property.[13] Although some provisions of law order that some elements of the property must always be a part of joint property, for instance, property essential for fulfilling the housing needs of the family. It is because the spouses are deemed tenants of premises (art. 680[1] § 2 c.c.), regardless of the property regime between them (art. 680[1] § 1 c.c.). It must be remembered that "By applying accordingly the provisions on establishing a separate property regime in a court judgment, the court may, for good cause, at the demand of one of the spouses cancel the joint tenancy of premises" (art. 680[1] c.c. § 2).[14]

---

11 According to art. 31 § 2 f.g.c. the joint property includes in particular: 1) remuneration received for work and income from other gainful activities of each of the spouses, 2) income from joint property as well as the personal property of each of the spouses, 3) amounts collected in an account or an employee pension fund for either of the spouses.

12 T. Smyczyński, *Prawo rodzinne*, Warszawa 2005, p. 97.

13 See E. Gniewek, *Umowa wyłączenia wspólności majątkowej małżeńskiej w praktyce notarialnej*, "Rejent" (2000), no. 2, p. 180.

14 M. Olczyk, *Komentarz do zmiany art. 51 (1) Kodeksu rodzinnego i opiekuńczego wprowadzonej przez Dz.U. z 2004 r. Nr 162, poz. 1691*, [in:] M. Olczyk, *Komentarz do ustawy z dnia 17 czerwca 2004 r. o zmianie ustawy – Kodeks rodzinny i opiekuńczy oraz niektórych innych ustaw (Dz.U.04.162.1691), w zakresie zmian do ustawy z dnia 25 lutego 1964 r. – Kodeks rodzinny i opiekuńczy (Dz.U.64.9.59)*, *Lex* 2005.

The division of property, according to the doctrine and some judgments of the Supreme Court, does not transform the legal state of the fixed property in the land register.[15] The Judgement of the Supreme Court – Civil Chamber of April, 1 1998 (I CKU 121/97) contains an important thesis in this matter. The thesis in question states that between spouses, after the statutory property regime was terminated there is a special kind of joint property to which one must apply – with some limits – the provisions about the fractional co-ownership. The ownership in question is not quite the fractional co-ownership because some elements do not match this kind of property. The Supreme Court stated that agreement between the spouses about the introduction of the separate property regime cannot be considered as sufficient the reason for changing in the land register the state of the fixed property from to the joint co-ownership of the spouses to the fractional co-ownership. The agreement, generally, tells nothing about the legal state of the fixed property.

It is important to underline that regardless the property regime between the spouses the norm from art. 27^{16} i 28^{17} or 28^{1} [18] the Family and Guardianship Code can be applied.

3.2. Self-management (art. 51^{1} f.g.c.)

As it was said, in the regime in question, there is no joint property of the spouses, but there are two separate, in the legal sense, properties of the two spouses. Art. 51^{1} regulates the self-management of the property and states that "Each

---

15 See, e.g., The Supreme Court – Civil Chamber, Judicial decision of 1.04.1998, court ref. No. I CKU 121/97, Legalis no. 46789.

16 Art. 27 f.g.c – "Both spouses are obliged, each according to their strength, earning capacity and assets, to contribute towards meeting the needs of the family founded by their marriage. Meeting this obligation may also partly or completely consist in their personal efforts towards the bringing up their children and working in a common household."

17 Art. 28 § 1 f.g.c – "If one of the cohabiting spouses does not perform the obligation to contribute towards satisfying the needs of the family, the court may order that all or part of the remuneration from work or other receivables of that spouse be paid to the other spouse." Art 28 § 2 "An order as mentioned in the previous paragraph remains valid even if the spouses stop living together. However, at the request of either spouse, the court may modify or cancel the order."

18 Art. 281 f.g.c – "If one of the spouses has the right to a residence, then the other spouse is authorized to use the residence in order to meet the needs of the family. This provision also applies to household articles."

spouse manages his/her own property". The management is legal and actual.[19] It means that no agreement of the spouse is needed for taking the legal action on the property of the other spouse. It would be contrary to the provisions of law if the agreement between the spouses were to limit in any way one of the spouses in self-management of the property.[20]

Despite the division of the properties, the spouses still have the obligation expressed in art 23 of the Family and Guardianship Code "to work together for the good of the family their marriage has created." Also the spouses have the obligation to share information on the status of personal property, especially of the considerable value, e.g., the real estate, but it seems that only in the case when the management could have great influence on the fulfillment of the obligation from the Family and Guardianship Code.[21]

It must be added that separate property regime does not exclude the legal possibility of acquiring together by the spouses the ownership rights; the rights being acquired by them not in their capacity as spouses but simply as co-owners. The co-ownership is fractional. In this case, the shares of each of the spouses in the co-owned thing are the part of the personal property of the spouse. "Each co-owner may dispose of his share without the other co-owners' consent" (art. 198 c.c.). Of course, the management of the co-owned thing is regulated by the provisions of art. 208 ff of the Civil Code.

Even in the case of the division of the properties of the spouses, art. 29 of the Family and Guardianship Code is to be applied. It states about mutual representation of the spouses – "If one of cohabiting spouses experiences a temporary obstacle, the other spouse may act for him/her in ordinary administrative matters, and in particular may collect amounts due without a power of attorney, unless opposed by the spouse experiencing the obstacle. The spouse's opposition is effective towards third parties, if they were aware of it". One of the spouses is entitled

---

19 T. Sokołowski, *Komentarz do art. .51 (1) Kodeksu rodzinnego i opiekuńczego*, [in:] M. Andrzejewski i in., *Kodeks rodzinny i opiekuńczy. Komentarz*, Lex 2013.

20 G. Jędrejek, *Komentarz do art. 51(1) Kodeksu rodzinnego i opiekuńczego*, [in:] G. Jędrejek, *Kodeks rodzinny i opiekuńczy. Małżeństwo. Komentarz do art. 1–61 (6)*, Lex 2013.

21 "The duty of information" is postulated by, e.g., G. Jędrejek, *Komentarz do art. 51 (1) Kodeksu rodzinnego i opiekuńczego*, [in:] G. Jędrejek, *Kodeks rodzinny i opiekuńczy. Małżeństwo. Komentarz do art. 1–61 (6)*, Lex 2013; quite contrary opinion is represented by, e.g., T. Sokołowski, *Komentarz do art. 51 (1) Kodeksu rodzinnego i opiekuńczego*, [in:] M. Andrzejewski i in., *Kodeks rodzinny i opiekuńczy. Komentarz*, Lex 2013.

in the separate property regime to represent the other one. The following conditions for valid action must be fulfilled simultaneously: spouses must be cohabiting, the obstacle must be temporary, and the matter of administrative action must be ordinary.[22]

Conclusion

As the conclusion it can be noted that the separate property regime is not regulated in Polish law in detail. For better elucidation of the regime in question one must consult the judgments of the courts and opinions of the representatives of the legal doctrine.

The paper presents only the most typical situations. Further elaboration of the subject would have to be based on the details of a specific case or formed in answer to particular questions.

Summary

Introduction to the separate property regime in Polish law

Introduction to the separate property regime in Polish law – The aim of the paper is to provide clear description of the separate property regime in Polish law. First preliminary issues were given about the characteristic of the Polish legal system and the important for the whole system of law in Poland. Next, the matrimonial property regimes are shortly described. The pivot of the paper is the 3rd part in which the separate property regime is described. The conclusion is that law does not regulate the regime in question in every detail, so for better understanding of the regime one must consult the judgments of the courts and opinions of the representatives of the legal doctrine.

Keywords: polish law, marriage, matrimonial property regime, separate property regime, Family and Guardianship Code

22 T. Sokołowski, *Komentarz do art. 51 (1) Kodeksu rodzinnego i opiekuńczego*, [in:] M. Andrzejewski i in., *Kodeks rodzinny i opiekuńczy. Komentarz*, Lex 2013.

Rozdzielność majątkowa w polskim systemie prawnym: wprowadzenie

Celem tego artykułu jest jasny opis rozdzielności majątkowej w polskim prawie. Na początku zostały pokazane kluczowe cechy systemu prawnego obowiązującego w Polsce. Następnie krótko opisano ustroje majątkowe. Najważniejszą częścią artykułu jest jego zasadnicza część trzecia, przedstawiająca rozdzielność majątkową. Wniosek, jaki można wysnuć z tego przedstawienia, jest taki, że polskie prawo nie reguluje precyzyjnie ustroju majątkowego, o którym mowa, dlatego w celu jego lepszego poznania należy uciekać się do orzecznictwa i opinii doktryny.

Słowa kluczowe: polskie prawo, małżeńskie ustroje majątkowe, rozdzielność majątkowa, kodeks rodzinny i opiekuńczy

Bibliography

1. Andrzejewski M. i in., *Kodeks rodzinny i opiekuńczy. Komentarz*, Lex 2013.
2. Dyoniak A., *Ustrój wspólności zysków a ustrój wspólności dorobku*, "Studia Prawnicze" (1990) no. 1, p. 15–25.
3. Gniewek E., *Umowa wyłączenia wspólności majątkowej małżeńskiej w praktyce notarialnej*, "Rejent" (2000) 2, p. 176.
4. Jędrejek G., *Kodeks rodzinny i opiekuńczy. Małżeństwo. Komentarz do art. 1–61 (6)*, Lex 2013.
5. Konstytucja Rzeczypospolitej Polskiej z dn. 2 kwietnia 1997 r. (Dz.U. Nr 78, poz. 483 z późn. zm. i sprostowaniem) (the Constitution of the Republic of Poland of 2nd April, 1997), the translation of the Constitution is taken from the official web side of Polish Sejm (this is the lower chamber of the parliament of Poland), http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (19.06.2013).
6. Kroczek P., *The art of legislation: the principles of lawgiving in the Church*, 2nd rev. ed., Kraków 2012.
7. Olczyk M., *Komentarz do ustawy z dnia 17 czerwca 2004 r. o zmianie ustawy – Kodeks rodzinny i opiekuńczy oraz niektórych innych ustaw (Dz.U. 04.162.1691), w zakresie zmian do ustawy z dnia 25 lutego 1964 r. – Kodeks rodzinny i opiekuńczy (Dz.U. 64.9.59)*, Lex 2005.
8. Smyczyński T., *Prawo rodzinne*, Warszawa 2005.
9. The Appellate Court in Pozań, Judicial decision of 28.03.1995, court ref. no. I ACr 844/94, published in *Legalis*, no. 46329.

10. The Supreme Court – Civil Chamber, Judicial decision of 1.04.1998, court ref. no. I CKU 121/97, Legalis no. 46789.
11. The Supreme Court – Civil Chamber, Judicial decision of 24.04.2011, court ref. no. IV CSK 460/10, published in Legalis no. 338446.
12. Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (The Civil Code) (Dz.U. z 2014 r., poz. 121 z późn. zm.); English translation is taken from *Lex. System Informacji Prawnej* (*Lex. System of Legal Information*).
13. Ustawa z dnia 25 lutego 1964 r. Kodeks rodzinny i opiekuńczy (The Family and Guardianship Code) (Dz.U. z 2015 r., poz. 583); English translation is taken from *Lex. System Informacji Prawnej* (*Lex. System of Legal Information*).
14. Ustawa z dnia 4 lutego 2011 r. Prawo prywatne międzynarodowe (Dz.U. Nr 80, poz. 432 z późn. zm.).