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DIVISION OF THE JOINT PROPERTY OF SPOUSES – PARTNERS IN A REGISTERED PARTNERSHIP AND SHAREHOLDERS IN A LIMITED LIABILITY COMPANY

Abstract

The purpose of the paper is to analyze the issue of the division of the joint property of spouses in the scope of individual components of this joint property – partnership rights due to participation in a registered partnership and shares in a limited liability company. While many studies have been written on the subject of partnership rights belonging to the property of spouses, the issue of the division of the spouses' property including these rights is only beginning to appear in deliberations of few authors.

An independent interpretation of the law as well as an analysis and critical look at the literature were adopted as the basic research method. The subject of the research involves a registered partnership (as a model partnership) and a limited liability company (because in many places regulations concerning a limited liability company and a joint-stock company are similar). Although the issues of the division of the joint property of spouses are regulated by the provisions of the Family and Guardianship Code (Articles 45 and 46 FGC) and the Civil Code, one can find norms concerning the operation of companies and partnerships (Article 1 § 1 CCC) which modify general principles regarding the manner of division of joint property and are applied as a special rule. The civil division of a partnership share in a registered partnership (Article 62 CCC) and the division in kind of a single share in a capital company (Article 333 § 1 CCC) are not possible. It is the my belief – although I am aware that this is a controversial thesis – that it is possible to divide a partnership share in a general partnership. Restrictions on the method of the division are provided for in Articles 10, 183^1, 332^1 CCC, which, in my opinion, apply to the division of the joint property of spouses.

Keywords: division of the property of spouses, joint property, registered partnership, limited liability company

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General comments

a. The issue of married persons' conducting business activity[1] and their participation in civil law partnerships[2] and commercial companies[3] has enjoyed great

[1] E.g. Jędrejek, G., Pogonowski, P., *Działalność gospodarcza małżonków*, Warszawa 2002; Łączkowska, M., *Stosunki majątkowe między przedsiębiorcą i jego małżonkiem w świetle ustroju wspólności ustawowej*, Warszawa 2006.

[2] E.g. Policzkiewicz, Z., *Dopuszczalność spółki cywilnej między małżonkami*, in: Sołtysiński, S. (ed.), *Problemy kodyfikacji prawa cywilnego (studia i rozprawy). Księga pamiątkowa ku czci Profesora Zbigniewa Radwańskiego*. Poznań 1990, pp. 523–532; Jędrejek, G., *Spółka cywilna między małżonkami*. Warszawa 2003; Wręczycka, K., *Spółka cywilna między małżonkami*, "Acta Universitatis Wratislaviensis – Przegląd Prawa i Administracji" 2004, No. LXIV, pp. 275–292; Łączkowska, M., *Spółka cywilna jako forma prowadzenia działalności gospodarczej a ustawowa wspólność majątkowa małżeńska*, "Przegląd Prawa Handlowego" 2007, No. 7, pp. 9–12; Klepacka, M. A., *Spółka cywilna między małżonkami w świetle ustawowego ustroju majątkowego – zagadnienia wybrane*, "Monitor Prawniczy" 2007, No. 21, pp. 1183–1189.

[3] Dyoniak, A., *Przynależność do majątków małżonków udziału w spółce z ograniczoną odpowiedzialnością i akcji*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1991, No. 3, pp. 25–35; Jędrzejewska, A., *Spółka osobowa a małżeńska majątkowa wspólność ustawowa*, "Kwartalnik Prawa Prywatnego" 1996, No. 3, pp. 511–560; Kondracka, A., *Ustrój małżeński a prawa i obowiązku akcjonariusza*, "Radca Prawny" 1999, No. 4, pp. 55–58; Wręczycka, K., *Udział w spółce z ograniczoną odpowiedzialnością a wspólność majątkowa małżeńska*, "Przegląd Prawa Handlowego" 2001, No. 8, pp. 35–44; Kondracka, A., Mróz, T., *Glosa do wyroku SN z dnia 20.05.1999 r., sygn. akt I CKN 1146/97*, "Monitor Prawniczy" 2001, No. 10, pp. 556–558; Kurnicki, T., *Pozycja współmałżonków udziałowców i akcjonariuszy spółek kapitałowych*, "Prawo Spółek" 2004, No. 12, pp. 24–31; Szajkowski, A., *Wyłączenie wstąpienia do spółki z o.o. współmałżonka wspólnika (uwagi na tle nowelizacji k.s.h. z 2003 r.)*, "Prace z Wynalazczości i Ochrony Własności Intelektualnej" 2004, No. 88, pp. 289–300; Zdanikowski, P., *Prawo udziałowe w spółce kapitałowej jako przedmiot majątku wspólnego małżonków*, "Palestra" 2006, No. 9–10, pp. 103–107; Stępień, A., *Akcje należące do majątku wspólnego małżonków*, "Przegląd Prawa Handlowego" 2006, No. 12, pp. 40–44; Nazar, M., *Komercjalizacja majątkowych stosunków małżeńskich w spółkach kapitałowych*, in: Kidyba, A., Skubisz, R. (eds.), *Współczesne problemy prawa handlowego, Księga jubileuszowa dedykowana prof. dr hab. M. Poźniak-Niedzielskiej*, Kraków 2007, pp. 201–222; Stępień, A., *Glosa do wyroku Sądu Najwyższego z 5 października 2005 r., sygn. akt IV CK 99/05 (Nabycie udziału w spółce z o.o. przez małżonka ze środków z majątku wspólnego)*, "Prawo Spółek" 2007, No. 1, pp. 52–56; Stępień-Sporek, A., *Przynależność udziałów w spółce z o.o. do majątków małżonków*, "Państwo i Prawo" 2007, No. 10, pp. 58–69; Stępień-Sporek, A., *Przynależność do majątków małżonków praw spółkowych w spółkach osobowych*, "Prawo Spółek" 2008, No. 2, pp. 22–30; Kułak, K., *Udział kapitałowy jako przedmiot majątku wspólnego małżonków – uwagi de lege ferenda*, "Rejent" 2008, No. 7–8, pp. 60–72; Chłopecki, A., *Akcje zdematerializowane w małżeńskiej wspólności majątkowej*, "Przegląd Prawa Handlowego" 2008, No. 10, pp. 46–53; Nazar, M., in: Smyczyński T. (ed.), *System Prawa Prywatnego*, *Tom 11, Prawo rodzinne i opiekuńcze.* Warszawa 2009, pp. 279–289; Sieradzka, M., *Glosa do wyroku SN z dnia 21.01.2009 r., II CSK 446/08*, "Gdańskie Studia Prawnicze – Przegląd Orzecznictwa" 2009, No. 4 101–107; Karczewska-Pacholczyk, M., Kobyłka, N., *Glosa do postanowienia SN z dnia 03.12.2009 r, II CSK 273/09*, "Glosa" 2010, No. 4; Kulgawczuk, D., *Akcje i udziały w majątku wspólnym małżonków*, special issue of "Monitor Prawniczy" – "Prawo spółek w orzecznictwie Sądu Najwyższego" (2009–2010)" – okiem praktyków 2010", No. 19, pp. 12–13; Kubas, A., *Udział w spółce handlowej jako składnik majątku wspólnego*, "Przegląd Prawa Handlowego" 2011, No. 4 pp. 18 et seq; Kwaśnicki, R. L., Piskorz, A., Nalazek, A., *Udziały/akcje imienne znajdujące się w majątku wspólnym małżonków, cz. I – w sprawie statusu wspólnika/akcjonariusza zbiorowego*, "Monitor Prawa Handlowego" 2011, No. 1, pp. 60–66; Szermach, A., *Udział w spółce z o.o. a wspólność ustawowa małżeńska*, "Monitor Prawniczy" 2013, No. 20, pp. 1088–1097; Dworek, D., *Udziały/akcje w majątku wspólnym małżonków*, (special issue MoP 1/2014), "Monitor Prawniczy" 2014, No. 1, pp. 11–13; Liber, B., *Status wspólnika spółki z o.o. a uzyskanie udziału ze środków pochodzących z majątku wspólnego małżonków*, "Edukacja Prawna" 2014, No. 6, pp. 36–39; Słabuszewski, R., *Przynależność praw spółkowych w spółce jawnej do majątków małżonków*, Warszawa 2015; Szumański, A., *Status prawny małżonka wspólnika w spółce kapitałowej w sytuacji, gdy objęcie albo nabycie praw udziałowych w spółce jest finansowane z majątku wspólnego małżonków*, "Monitor Prawniczy" (dodatek) 2015, No. 7, pp. 32–40; Zdanikowski, P., *O niektórych konsekwencjach przynależności udziałów w spółce z o.o. do majątków małżonków*, "Monitor Prawniczy" 2015, No. 7; Kuniewicz, Z., Malinowska-Woźniak, K., *Status prany małżonków w spółkach cywilnych i handlowych*, Warszawa 2016; Stefanicki, R., *Przynależność i wykonywanie – nabytych z majątku wspólnego – praw udziałowych w spółce z ograniczoną odpowiedzialnością (spójność prawa handlowego i rodzinnego w zakresie statusu małżonka wspólnika)*, "Państwo i Prawo" 2017, No. 10, pp. 65–78; Sieczka, Ł., Szewczyk, J., *Jeśli wkład do spółki z o.o. pochodzi z majątku wspólnego, objęte w zamian udziały również wchodzą w jego skład*, "Monitor Prawniczy" 2017, No. 19, pp. 24–25; Jaszczyk, K., *Skutki wniesienia do spółki z o.o. wkładu należącego do majątku wspólnego wspólnika i jego małżonka – glosa – III CZP 32/16*, "Monitor Prawniczy" 2017, No. 24, pp. 1343–1345.

scholarly interest, if not out of inspiration from practice, certainly with the benefit for it. In terms of participation in partnerships and companies, most of the works concern the ownership of the rights to the property of the spouses or possibly the management of these rights. There are few statements about the division of the joint property of spouses in the scope in which it includes partnership rights.[4] The following text analyzes the issues of division of joint property of spouses with regard to their partnership rights. The analysis concerns the registered partnership as a model partnership (for other partnerships provisions on the registered partnership apply respectively, unless the provisions of the Commercial Companies Code[5] (hereinafter: CCC) provide otherwise – Articles 89, 103 and 126 § 1 CCC) and the limited liability company. A considerable share of reflections regarding the limited liability company may also be applied to the joint-stock company, although it is necessary to point out some differences (addressed in the final part of the work).

b. Regulations on the division of the property of spouses are included in family law regulations referring to the inheritance law, where in turn reference is made to the right in rem (Article 46 of the Family and Guardianship Code[6] (hereinafter: FGC), Article 1035 of the Civil Code[7] (hereinafter: CC)). The nature of assets subject to division in the form of partnership rights or shares is regulated in the Commercial Companies Code. This makes it necessary to consider the principle of unity of the civil law when searching for solutions to specific problems. After all, civil law structures reconstructed on the basis of provisions contained in the Civil Code (e.g. on the cancellation of co-ownership) apply also to the matters included in non-code provisions (regardless of whether there is any regulation on

[4] Adamus, R., *Uczestnictwo małżonka w spółce jawnej a podział majątku wspólnego*, "Jurysta" 2015, No. 1, pp. 22–27 (Whereas, this article concerns only the affiliation and distribution of the company's profit when one of the spouses before the marriage was a shareholder in a civil partnership later transformed into a general partnership, i.e. when the company's share was not part of the joint property); Okolski, D., Strzelecka, S., *Problematyka legitymacji akcjonariusza współmałżonka w świetle podziału majątku wspólnego a zdatność arbitrażowa*, "Przegląd Prawa Handlowego" 2016, No. 1, pp. 25–33; Śledzikowski, M., *Wpływ podziału majątku wspólnego małżonków na status akcjonariusza spółki akcyjnej*, "Przegląd Prawa Handlowego" 2017, No. 8, pp. 42–46.

[5] Act of 15 September 2000 – Commercial Companies Code, consolidated text: Dz.U. (Journal of Laws) of 2019, item 505.

[6] Act of 25 February 1964 – Family and Guardianship Code, consolidated text: Dz.U. (Journal of Laws) of 2019, item 2086.

[7] Act of 23 April 1964 – Civil Code, consolidated text: Dz.U. (Journal of Laws) of 2019, item 1145.

the relationship of a given legal act with the Civil Code or not). With regard to the subject of this article, there are provisions referring to the application of the code regulations (Article 2 CCC and Article 46 FGC). Therefore, the manner of solving specific problems will be affected by the pursuit to maintain the coherence of legal norms that form the subsystem of civil law norms and its unity in terms of the basic civil law concepts and constructions. In the case of doubts concerning the interpretation of provisions on private law institutions included outside the Civil Code, a presumption should be made in favour of the pro-code interpretation. The principles of civil law and the principles of individual divisions of this law (e.g. family and guardianship law and company law) should be weighed in case of collisions.

Discrepancies between the positions of scholars and case-law concerning the issue of partnership rights or shares forming part of the property of spouses, the legal status of the spouse who is a partner in a partnership or a shareholder in a company as well as the heterogeneous terminology used in the legal language, make it necessary to introduce some assumptions at the outset and to clarify terminological issues. At the same time, I point only to the position I have adopted, one of many previously expressed (sometimes even the one that is not dominant), as a starting point for further, detailed reflections, being aware that each of the assumptions could be (and most often already has been) a subject of a separate study. The framework of the article, however, does not allow for a detailed reflection on each side issue.

The legislator[8] itself as well as the case-law of the Supreme Court[9] have spoken on the admissibility of including shares in a limited liability company or in a joint-stock company in the joint property of spouses. I assume that shares in a limited liability company and shares in a joint-stock company may belong to the joint property, whereby both spouses or one of them may be shareholders. Having the status of a shareholder and company rights or shares forming the

[8] Art. 183^1 and 332^1 the Commercial Companies Code.

[9] Judgment of the Supreme Court of May 20, 1999, I CKN 1146/97, OSNC 1999/12, item 209; decision of 23 November 2000, I CKN 950/98, unpublished; judgment of the Supreme Court of January 21, 2009, II CSK 446/08, OSNC Additional Co. 2010 No. A, item 7, p. 34; the decision of the Supreme Court of December 3, 2009, II CSK 273/09, unpublished; decision of the Supreme Court of January 31, 2013, II CSK 349/12, unpublished; Supreme Court judgment of 7 July 2016, III CZP 32/16, OSNC 2017/5, item 57; the decision of the Supreme Court of 16 March 2018, IV CSK 105/17, Biuletyn SN 2018/10, item 9. In one of the rulings the Supreme Court wrongly made the belonging of a share to the joint property dependent on the will of the spouses (judgment of the Supreme Court of 5 October 2005, IV CK 99/05, OSNC 2006/7-8, item 127).

assets are two different things, which means that where only one of the spouses is a shareholder, shares may belong to the joint property (of course, both spouses may happen to be shareholders). This results not only from the search for analogies with the belonging of dues to the joint property, but also from the approval of the position that if an act is performed (e.g. subscription or acquisition of shares) by one of the spouses – even with the use of joint property – only one of the spouses is the party to this act, i.e. the spouse who joined a company or acquired a share.[10] Above all, such a position takes into account two basic principles of civil law and company law (or corporate law in general), i.e. the principle of autonomy of the will and the principle of voluntary membership, which preserves the unity of civil law in this respect. In addition – as was already pointed out in the case-law[11] – a situation in which the composition of the company is unclear only because some shareholders are married and engage financial resources in the company which form in whole or in part the joint property cannot be accepted for purely pragmatic reasons. Special complications could arise in the case of a single-shareholder company.

Definitely more doubts arise from the fact that partnership rights in the registered partnership belong to the property of the spouses, in particular the possibility of including these rights in the joint property.[12] In this article I make the assumption that partnership rights in a registered partnership may belong to the joint property as they have not been excluded from the joint property pursuant to Article 33 FGC (points 3 and 5 in particular) or another special provision, while the law does not provide for other property than the joint property and personal property of the spouses in matrimonial property regimes. This position also begins to appear in

[10] There is also resolution of the Supreme Court of 24 September 1970, III CZP 55/70, OSPiKA 1973/6, item 120, resolution of the Full Civil Chamber of the Supreme Court of September 28, 1979, III CZP 15/79, OSNCP 1980/4, item 63.

[11] Reasoning of the judgment of the Supreme Court of May 20, 1999, I CKN 1146/97, OSNC 1999/12, item 209.

[12] As to representations of various concepts of studies, see in particular: Jędrzejewska, A., *Spółka osobowa a małżeńska majątkowa wspólność ustawowa*, "Kwartalnik Prawa Prywatnego" 1996, No. 3, pp. 544–551; Kidyba, A., *Atypowe spółki handlowe*, Kraków 2001, p. 197; Jędrejek, G., *Spółka cywilna między małżonkami*, Warszawa 2003, pp. 145–148; Sołtysiński, S., in: Sołtysiński S., et al., *Kodeks spółek handlowych, Komentarz*, Tom I, Warszawa 2006, p. 382; Bryłowski, P., *Przepisy kodeksu spółek handlowych regulujące odpowiedzialność wspólników spółek osobowych za zobowiązania spółek w świetle norm regulujących małżeńską wspólność ustawową*, in: Frąckowiak, J. (ed.), *Kodeks spółek handlowych po pięciu latach*, Wrocław 2006, pp. 309–311; Nazar, M., in: Smyczyński, T. (ed.), *System Prawa Prywatnego, Tom 11, Prawo rodzinne i opiekuńcze*, Warszawa 2009, pp. 322–325.

the case-law practice.[13] On the ground of a registered partnership I also distinguish between having the status of a partner and partnership rights belonging to given assets, which means that where only one of the spouses is a partner partnership rights may belong to the joint property (both spouses also may happen to be partners). The content of the articles of partnership[14] or the content of the consent of the remaining partners (in the event of acquiring all rights and obligations pursuant to Article 10 CCC)[15] determine the obtaining of the status of a partner and not the origin of funds for the contribution or acquisition of all rights and obligations. The general rights and obligations of a partner in a registered partnership in a legal language are commonly referred to as a "partnership share" (*Gesellschaftsanteil*). However, when accepting this terminological convention, it should be stressed that the partnership share in a registered partnership as a component of the joint property of the spouses (according to the FGC terminology – "property" belonging to the joint property) is a personal right, thus a situation of the rightholder covering only rights (without related duties only he or she is involved in) of a relative, property, non-hereditary and in principle non-transferable nature.

As a result, I assume that a partnership share in a registered partnership, a share in a limited liability company or a share in a joint-stock company may belong to the joint property. In such a situation the following persons may be partners or shareholders:

- one of the spouses (if one of them entered into a commercial company agreement, or acquired a share in a limited liability company or a joint-stock company or a partnership share in accordance with Article 10 CCC), or
- both spouses (if both of them entered into a commercial company agreement or were acquirers of a partnership share in an already exist-

[13] For example, District Court for Łódź-Śródmieście in the decision of May 21, 2014, II Ns 1514/07 approved by the Regional Court in Łódź in the judgment of March 3, 2015, III Ca 1484/16; Regional Court in Łomża in the judgment of November 15, 2017, I Ca 332/17 and judgment of the Voivodeship Administrative Court in Szczecin of 25 October 2007, I SA/Sz 59/07.

[14] According to Article 25(2) of the Commercial Companies Code the articles of partnership must include, among others, the description of the contributions made by each partner and their value, therefore it is inadmissible that the articles of partnership do not specify whether both spouses are partners or one of them. Notification of a registered partnership to the register must contain the first and last names of partners or the business name.

[15] Even if the consent itself, granted on the basis of Article 10 § 2 CCC, did not specify whether one spouse or both spouses are to be the acquirers, the act on the basis of which the acquisition takes place (e.g. a sale contract or a gift agreement) must specify the party of this act.

ing registered partnership, a share of an already existing limited liability company or a share in an already existing joint-stock company).

As for the possible ways of division (both contractually and arbitrarily – Articles 211 and 212 CC) of things covered by co-ownership, three solutions are possible,

– physical division,

– granting the thing to one of the spouses where the other spouse is paid off,

– civil division (i.e. sale of goods and division of the amount obtained from the sale).

Next, I will try to answer the question whether and how one can divide such a thing as a partnership share in a registered partnership, a share in a limited liability company or a share in a joint-stock company in accordance with the norms of family law, inheritance law and real rights and company law.

Division of a partnership share in a general partnership

a. The view that allows the division of a partnership share into two or more partnership shares is considered to be disputable.[16] Such a concept would be opposed by the prohibition of splitting partnership rights.[17] However, this prohibition should not be understood as a prohibition of replacing one partner or the so-called joint partner in a partnership with several partners. Each partner who appears in the partnership after the division of the partnership share will have their own rights and obligations of a partner in a partnership, including all rights and obligations covered by the prohibition of splitting. It is possible to make a "mathematical" reference here, which states that the prohibition of splitting the rights and duties of a partner concerns "dividing" individual rights and obligations that are indivisible and not their "multiplication". Therefore, it is not possible to divide the general rights and obligations in such a way that, for example, one spouse will get the right to profit, to run the partnership's affairs and to terminate the articles of partnership, and the second one will get the right to interest on the capital share, to represent the partnership and to demand

[16] Grykiel, J., *Zbycie udziałów w ogóle praw i obowiązków wspólnika spółki osobowej*, *Cz. 1*, "Prawo Spółek" 2009, No. 9, p. 14; Kuropatwiński, J., *Glosa do postanowienia SO w Bydgoszczy z dnia 13.05.2009 r.*, *VIII Ga 23/09*, "Glosa" 2011, No. 2, pp. 43, 49.

[17] Regional Court in Bydgoszcz in the decision of May 13, 2009, VIII Ga 23/09, unpublished.

that the partnership be dissolved. There is no absolute prohibition that instead of one partner there should be e.g. two, each of whom having his or her own rights and obligations covered by the prohibition of splitting. It should be added that in the context of a share in a limited liability company, the prohibition of splitting company rights is also in force[18] and there is no doubt that a share in this company may be divided into two separate shares, which, moreover – where a shareholder may hold only one share, as in the registered partnership – results from the provisions themselves (Article 181 § 1 and Article 183 § 3 CCC).

As for the manner of the division, it is reasonable to use analogy to the rules for the division of shares worked out in the light of Article 181 § 1 CCC and Article 183 § 3 CCC. The first of the provisions stipulates that in a situation where a shareholder may have only one share, the articles of association may allow the transfer of a part of the share. If the transfer is made to a person who is already a shareholder, their share increases by a part of the acquired share. If the transfer is made to a person who has not been a shareholder, a new share is created. In fact, the share is divided into independent, separate shares[19] (Article 181 § 2 CCC begins, after all, with the words "The division may not result in …").

The situation of existing partners may of course change (e.g. they may be voted down, if instead of one spouse-partner whose share belonged to the joint property or the so-called joint partner there will be two separate partners with separate shares and votes). However, this is not an obstacle to the division of shares because this is not the only case where the voting power of partners may change, which is discussed below.

The division "in kind" may mean no change in the composition of partners, if both spouses were partners in the partnership. The spouses will then "become independent" within the partnership (instead of a joint share entailing the status of a joint partner in the partnership, they will acquire separate, independent shares). Such a division does not require the consent of the remaining partners, as the composition of partners does not change.[20]

[18] As to how to understand it, see in particular Herbet, A., Obrót udziałami w spółce z o.o. Warszawa 2004, pp. 163–180; Zdanikowski, P., *Prawo udziałowe w spółce z o.o.*, Warszawa 2011, pp. 158–161.

[19] Szajkowski, A., Tarska, M., in: Sołtysiński S. et al. (ed.), *Kodeks spółek handlowych*, *Komentarz*, Volume II, Warszawa 2014, pp. 295–296; Opalski, A., in: Opalski, A. (ed.), *Kodeks spółek handlowych*, *Komentarz*, Volume IIA, Warszawa 2018, p. 433.

[20] Contrary to this: the decision of the Regional Court in Kraków of August 10, 2017, XII Ga 125/17, unpublished.

The division of the share "in kind" and the granting of one of the resulting shares to a spouse who has not been a partner so far is more problematic (this is a matter of including the partnership share in the joint property, combined with obtaining the status of a partner by only one spouse). The question arises whether it requires the consent of all the remaining partners (based on Article 10 § 2 CCC). It should be assumed that yes, because then such a division will not infringe the interest of the remaining partners. If the transfer of a partnership share requires the consent of the partners (in principle all of them unless otherwise jointly agreed in the articles of partnership), the division "in kind", which results in the status of a partner being obtained by the spouse who is not a partner, should also require such a consent (because unwanted partners should not be imposed on the company, the more so as we are dealing with – unlike with capital companies – the right in principle inalienable, and an organization in which the characteristics of partners and their mutual trust are important). In the absence of the consent, it will not be possible to grant the share to the spouse who was not a partner.

Regarding the accounting division of rights related to a shared share (e.g. in terms of participation in profits and losses, partners' capital share.), it should be assumed that spouses acquiring separate partnership shares, in place of the joint share, take over the rights and obligations they enjoyed as a rule in equal parts (Article 43 § 1 FGC), possibly in parts where unequal shares in the joint property have been established (Article 43 § 2 FGC). For example, when the spouses had a capital share in the amount of PLN 800,000 and the share in profits and losses and liquidation assets fixed in the articles of partnership at 30% the division in kind results in each spouse becoming a partner with a capital share in the amount of PLN 400,000 and a share in profits and losses and assets after liquidation in the amount of 15% (Article 48 § 1 CCC, Article 50 § 1 CCC, Article 51 § 1 CCC, Article 82 § 2 CCC, Article 83 CCC, Article 2 CC in conjunction with Article 197 CC). Admitting the possibility of dividing the acquired share between spouses requires, in particular, a division of the capital share.[21]

There is also a category of rights and obligations (voting rights, representation rights, joint and several liability for debts), which will be vested in each

[21] Such a solution is considered by W. Pyzioł against the background of the admissibility of dividing the capital share between heirs becoming members of the partnership pursuant to Article 60 CCC (Pyzioł, W., in: Pyzioł, W., Szumański, A., Weiss, I., *Prawo spółek*, Warszawa 2016, p. 77).

partner in the scope that was enjoyed by a spouse-partner or spouses-partners jointly before the division of the partnership share. Therefore, it will not be possible that in place of one vote after the split each spouse will be entitled to half a vote. It should be added that the change in the number of votes – which undoubtedly changes the situation of the remaining partners – can also occur in the opposite direction. In principle, therefore, there is no prohibition on performing acts that change the situation of the remaining partners as to the power of their vote. For example, if a person A acquires pursuant to Article 10 CCC partnership shares from persons B, C and D who were partners in the partnership, capital shares are added up, but a partner A will have one vote (not three) and will not be, for example, "three-fold" liable for the partnership's debts. If the partnership shares of partners B, C and D involved the right to interest on the capital share at 5%, then the partner will also be entitled to 5% of the total capital share (rather than 15%). If, on the basis of individual capital shares (e.g. three shares of PLN 20,000 each), interest is payable to partners in different amounts (e.g. 5, 6 and 7%), it will be the same after the shares are combined (the partner will have one share with the value of PLN 60,000 on which interest will amount to 5% on PLN 20,000, 6% on PLN 20,000 and 7% on PLN 20,000). However, it should be added that the articles of partnership may make the partner's voting power dependent on the value of the capital share. In such a situation, the division of the partnership share together with the capital share will also lead to the division of the voting power between independent – after the division – partners.[22] Partnership rights of a corporate nature according to the statutory construction are not dependent on the size of the capital share, but result from the mere fact of holding the status of a partner (being a partner).

Also in the light of the principle of unity of civil law (Article 2 CCC as a rule orders to apply the provisions of the CC directly, and in exceptional circumstances – accordingly), the above interpretation is justified, arguing for the admissibility of the division of the partnership share "in kind" since the basic right of co-owners is to demand that the co-ownership be cancelled (Article 210 § 1 CC), and the fractional co-ownership itself is, by its very essence, a temporary and undesirable state. This is all the more so because it can be done without violating the prohibition of the splitting of rights and obligations that make up

[22] Kuropatwiński, J., *Glosa do postanowienia SO w Bydgoszczy z dnia 13.05.2009 r., VIII Ga 23/09*, "Glosa" 2011, No. 2, p. 52.

the partnership share and retaining the influence of the remaining partners on the composition of the partnership.

b. Considering the possibility of granting the partnership share belonging to the joint property to one of the spouses, two situations should be identified:

– when both spouses are partners in the partnership,
– when only one of the spouses is a partner in the partnership.

Specifying the manner of cancelling co-ownership of assets one should first of all take into account the will of the spouses themselves – participants of the proceedings for the division of joint property. In the event of a division of an asset such as a partnership share in a commercial partnership, the interest of the partnership and the remaining partners is imposed on the will and the interest of the spouses.

It seems less problematic when both spouses are partners because granting a partnership share to one of them will not cause the appearance of an unwanted partner in the partnership since both spouses are already partners. As a result of the cancellation of the joint share and granting it to one of the spouses, only one of the spouses will remain as a partner in the partnership.

In a situation where the partnership share belongs to the joint property and only one of the spouses is a partner (only one of them concluded the articles of partnership or joined the partnership) it is reasonable to grant the partnership share to the spouse who is the partner in the partnership. Granting the share to the other spouse would be possible subject to the rigors of Article 10 CCC (the possibility of transferring the share provided for in the articles of partnership and the consent of all the remaining partners, unless the articles of partnership provide otherwise).

This allows a statement that whenever the cancellation of co-ownership of a partnership share leads to a change in the composition of partners (transfer of a partnership share onto a spouse who has not been a partner so far), it is necessary to meet the requirements provided for in Article 10 CCC because the regulations of the civil law and the family law overlap with the regulations of the company law, which must be taken into account both in the contractual and judicial division.

c. The law allows, though does not prefer, for the cancellation of co-ownership by sale of an asset and distribution of the sum obtained between spouses (Article 212 (2) CC). This form of cancelling co-ownership of a partnership share

is not possible in the case of a registered partnership. According to Article 212 § 2 CC, the sale should be made in accordance with the provisions of the Code of Civil Procedure.

Since, as a rule, it is not possible for a partner in a register partnership to transfer their share (Article 10 CCC is an exception to the rule), there can also be no enforcement on the partnership share as partner's all rights and obligations. During the term of the partnership, a creditor of a partner may receive an attachment order concerning only the rights enjoyed by the partner in respect of participation in the partnership which the partner may freely dispose of, or an attachment order concerning the claims of the partner arising in the event of the partner's withdrawal or dissolution of the partnership and then terminate the articles of partnership (Article 62 § 1–3 CCC).

An asset that is not subject to enforcement sale (partnership share) cannot be subject to the so-called civil division (sale under the Code of Civil Procedure and distribution of the amount obtained).

d. The partnership share's belonging to the joint property of the spouses subject to division is determined by the moment of termination of the joint property, where the participation must remain joint at the time of the division, and the value of the partnership share should be determined according to the prices at the time of adjudication,[23] using the valuation method according to the balance sheet drawn up in accordance with Article 65 CCC.[24]

The division of assets including shares in a limited liability company

Cancellation of co-ownership of a share in a limited liability company can take the form of:

- "physical" division,
- granting the share to one of the spouses along with a pay-off for the other spouse,
- the sale of the joint right and division of funds.

a. Regarding the physical division of shares, it is necessary to distinguish between a situation where, according to the articles of association, a shareholder may have only one share and a situation permitting the holding of more than one share.

[23] Resolution of the Supreme Court of 23 February 2018, III CZP 103/17, unpublished.

[24] Resolution of the Supreme Court of 13 March 2008, III CZP 9/08, OSNC 2009/4, item 54; Supreme Court decision of 17 April 2013, I CSK 468/12, unpublished.

Pursuant to Article 153 CCC, the articles of association determine whether a shareholder may have one or more shares. If the shareholder may have more than one share, all shares in the share capital shall be equal and indivisible.

According to Article 181 § 1 and 2 CCC, if, according to the articles of association, a shareholder may have only one share, the articles of association may allow for the transfer of a part of the share. As a result of the division, no shares lower than PLN 50 may be created.

In the case of a divided share, the cancellation of co-ownership may therefore consist, if it is provided for in the articles of association, in separating parts from the joint right which will become independent and in awarding them to each spouse.

Where the spouses have more joint shares, they can be divided "physically" between both spouses by allocating a certain number from a larger number of shares held (e.g. instead of 100 joint shares, 50 will be awarded to the wife and 50 to the husband), while it is not possible to divide a single share into parts (Article 153 CCC).

By making such a "physical" division of a share or shares, an issue of the need to take into account the limitations under Article 183^1 CCC results.

The meaning of Article 183^1 CCC and its influence on the division of the property of the spouses have repeatedly been the subject of the positions of the doctrine,[25] representatives of which either stated that no legal norm could be interpreted at all from this regulation,[26] or they assumed – and this view is correct – that Article 183^1 CCC, where an appropriate clause is included in the articles of association, precludes granting a share belonging to the joint property to a spouse who is not a shareholder, and some even limited the normative content of this provision to such a prohibition (binding both the spouses and the court making the division).[27]

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[25] In addition to the comments on Article 183^1 CCC see in particular the items regarding capital companies listed in footnote 3.

[26] Zdanikowski, P., *Prawo udziałowe*, p. 188.

[27] Kubas, A., *Udział w spółce handlowej jako składnik majątku wspólnego*, "Przegląd Prawa Handlowego" 2011, No. 4, p. 26; Chomiuk, M., in: Jara, Z. (ed.), *Kodeks spółek handlowych*, *Komentarz*, Warszawa 2017, p. 704; Rodzynkiewicz, M., *Kodeks spółek handlowych*, *Komentarz*, Warszawa 2018, pp. 376–377. However, it should be added that few authors express the view that the provision does not exclude the possibility of granting shares following the division of joint property to the spouse whom the limitation under the articles of association concerns pursuant to Article 183^1 CCC (Kuniewicz, Z., *Wybrane problemy dotyczące objęcia małżeńską wspólnością majątkową praw udziałowych w spółkach kapitałowych* in: Kuniewicz, Z., Malinowska-Woźniak, K. (eds.), *Status prawny małżonków w spółkach cywilnych i handlowych*, Warszawa 2016, p. 283; Nowacki, A., *Spółka z ograniczoną odpowiedzialnością*, *Komentarz*, Warszawa 2018, p. 655.

In the opinion of the Supreme Court, shares in a limited liability company belonging to the joint property cannot be granted to a spouse who is not a shareholder where a reservation pursuant to Article 183[1] CCC is included in the articles of association.[28]

Where the share forms part of the joint property:

– both spouses may be shareholders (in which case Article 184 CCC will apply),
– one of the spouses may be a shareholder.

Shares subject to division may be awarded to the spouse-shareholder or to the spouse who is not a shareholder, because shares in a limited liability company are, as a rule, transferable. At the same time, when dividing assets that belonged to statutory joint property, the court may award shares of a limited liability company belonging to the joint property to a former spouse who is not a shareholder only with his or her consent.[29]

b. Both divisible and indivisible shares may be awarded to one of the spouses with a repayment for the other. Then, however, it is necessary (in addition to Article 183[1] CCC) to consider the effect on the permissible way of dividing the possible restrictions in the transfer of shares.

According to Article 182 § 1–3 CCC a transfer of a share, its part or a fractional share and a pledging of the share may be, under the articles of association, subject to the company's consent or otherwise restricted. Unless the articles of association provide otherwise, consent shall be given by the management board in writing. Should the consent be refused, the registry court may allow for the transfer if there are significant reasons.

Transfer within the meaning of Article 182 § 1 CCC means, undoubtedly, acts in law such as a sale, gift, exchange, etc. As a rule, trading a share is unrestricted both in terms of the "transfer" (sale, exchange, gift, etc.) and in terms of forms of trading with a source in a specific event, to which the act assigns a legal effect in the form of universal or singular succession.[30] It is problematic to recognize the "transfer" of the conventional cancellation of co-ownership, and there should be no doubt that "transfer" within the meaning of this provision does

[28] Order of the Supreme Court of January 31, 2013, II CSK 349/12, unpublished.

[29] Reasoning of the decision of the Supreme Court of 16 March 2018, IV CSK 105/17, unpublished.

[30] Szajkowski, A., Tarska, M., in: Sołtysiński, S. et al. (eds.), *Kodeks spółek handlowych, Komentarz*, Volume II, Warszawa 2014, p. 297.

not include a judicial division of joint property.[31] I believe that neither court nor contractual cancellation of co-ownership by granting a share or shares to one of the spouses will fall within the scope of Article 182 CCC.[32] The share was, after all, covered by the joint property of the spouses, which is why each of the spouses already had the right to the whole. In such a case, it is difficult to talk about "a transfer" at all. Moreover, if the registry court in the case of existence of valid reasons may allow for the transfer of the share, the more the civil court that cancels the joint property of a share should be able to do so. In light of this regulation, reference should also be made to the principle of unity of civil law, as the provision of Article 182 § 1 CCC must be considered as an exception to the principle set out in Article 57 § 1 CC, and if so, it should be interpreted strictly.[33]

c. In the event of a judicial division of shares by their transfer and distribution of obtained funds, Article 185 CCC applies. The Civil Code refers to the provisions of the Code of Civil Procedure (Article 212 § 2 CC). This provision (Article 185 CCC) is intended to maintain the influence of shareholders on the company's composition (and thus similar to Articles 182, 183 and 183[1] CCC). Since the legislator decided that in the event of compulsory enforcement on the share the provisions of the articles of association referred to in Article 185 CCC need to be considered, the more one need to take into account such restrictions, when the transfer of a share under the Code of Civil Procedure results from the court's decision to divide the joint property by transferring shares and dividing the obtained funds. The contractual division, consisting in the transfer of shares and the distribution of obtained funds, must take into account the requirements or restrictions introduced in the company in accordance with Article 182 CCC.

d. There is no doubt that the value of the share is determined according to the prices at the time of the division (in the event of a judicial division, at the moment of adjudication).[34]

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[31] Cf. Kwaśnicki, R. L., *Zakres autonomii woli w kształtowaniu ograniczeń zbywalności praw udziałowych spółek kapitałowych*, "Prawo Spółek 2003", No. 2, p. 11, which excludes from the concept of "transfer" the transfer of shares due to inheritance, through privatization processes, in the performance of the agreement on separate property regime.

[32] The same in: Nowacki, A., *Spółka z ograniczoną odpowiedzialnością*, *Komentarz*, Warszawa 2018, pp. 585, 655.

[33] Cf. judgment of the Supreme Court of 5 March 1996, I CKN 29/96, OSNC 1996/5, item 75.

[34] Rodzynkiewicz, M., *Kodeks spółek*, p. 381; resolution of the Supreme Court of 13 March 2008, III CZP 9/08, OSNC 2009/4, item 54.

e. The above findings can be largely applied to the division of the spouses' assets including shares, but some specific problems should be flagged up. As to the "physical" division of the shares, it will only be admissible if the spouses have more than one share, because the shares are always indivisible (Article 333 § 1 CCC). As regards the division of shares between spouses, Article 332^1 CCC applicable to the division of joint property is the equivalent of the regulation contained in Article 183^1 CCC for the joint stock company. Attention should be paid to whether the division of shares will not change significantly the subject of the division or decrease the value of shares (which would violate the division rules contained in Article 211 CC) if there is a conflict between the spouses that could be transferred onto the company's field of activity, while spouses exercising share-related rights jointly held a controlling interest that they will no longer hold as separate shareholders.[35] The transfer of shares in order to obtain cash and its distribution must take into account the restrictions on the transferability of shares provided for in the statute in the event of a contractual division and it does not have to take into account these limitations in the event of a judicial division resulting directly from Article 337 § 5 CCC, which does not have its equivalent in the provisions for a limited liability company. The court then orders the sale in the course of execution.[36] As for the value of the share, the doctrine indicates that one should consider the prices at the time of the ruling.[37]

Conclusions

As a rule, the issues of the division of joint property of spouses are regulated by the provisions of the Family and Guardianship Code and the Civil Code. However, there are such regulations regarding the operation of companies (Article 1 § 1 CCC), which modify the general rules regarding the manner of dividing joint property. For example, a civil division of a partnership share in a registered partnership will not be possible (Article 62 CCC), neither will the division in kind of a single share (Article 333 § 1 CCC). Restrictions as to the manner of the division will be imposed on the spouses or the court under Articles 10, 183^1 and 332^1 CCC. Modifications included in the Commercial Companies

[35] Śledzikowski, M., *Wpływ podziału*, p. 45.

[36] Śledzikowski, M., *Wpływ podziału*, pp. 44–45.

[37] Okolski, D., Strzelecka, S., *Problematyka legitymacji*, p. 32; Śledzikowski, M., *Wpływ podziału*, p. 45.

Code may also concern other issues, e.g. forms of acts (this will apply, for example, to Article 180 CCC and the need to make a division under the articles of association, including the requirement of a written form with signatures certified by a notary). Regulations of the Commercial Companies Code will then apply as special provisions and must be taken into account by both the court (in the case of a judicial division) and the spouses themselves (former spouses) in the case of a contractual division.

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