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Cezary Małozieć

Uniwersytet Humanistycznospołeczny, Warszawa

PARTICIPATION IN A LIMITED LIABILITY COMPANY AS AN ELEMENT OF MARITAL PROPERTY

Key words: co-ownership of things, participation in a limited liability company, legal status of a spouse in a limited liability company, limited liability company

Abstract

The subject of this study is the characterization of the rights and possible obligations of a spouse of a partner of a limited liability company. Participation in a company with limited liability belonging to one of the spouses sometimes enters into joint property, and in the event of the cessation of this communion, it is divided. The company's share belongs to the inheritance property.

Introduction

Establishing the legal status of a spouse of a partner with limited liability is important for spouses in the statutory property community as well as for the partnership with limited liability, as well as for other partners. For in the situation when one of the spouses joins the company, the problem arises of exercising rights resulting from the fact that the rights of shares in the company belong to the property of the joint spouses or to the personal property of the spouse who is the partner of the company. On the one hand, it is difficult to accept a radical view on exclusion of joint-stock rights from the assets of the joint spouses in the company with limited liability covered by one of the spouses representing a signifi-

cant asset value, however, there is no legal basis for such a position. On the other hand, there is opposition to the statement that these rights are enjoyed in the same and in the same way by both spouses and that each of them has an independent legal position in the company. Nevertheless, the said problem does not arise in the case of establishing a separation of property between the spouses by way of a contract or court ruling, and when the contributions come from the personal property of the spouse who joined the company with limited liability. The same is the case when the sole object of the contribution to the company is to be work or services, which the partner agrees to provide to the company, regardless of the type of property regime binding for the spouses.

The scope of application of provisions on co-ownership of property to the joint rights of partners in a limited liability company

The right to ownership of a specific item belongs to only one person, however, this rule is subject to limitation under art. 195 of the Act of 23 April 1964 Civil Code (KC)¹. According to the above-mentioned provision, ownership may be vested in several people individually. Co-ownership should not be treated as a separate institution of property law, it is a different type of property². Co-ownership is a property-dependent institution, its derivative. This can be evidenced by the location of this institution in the book of the second Civil Code, entitled "Ownership and other property rights". The doctrine emphasizes the three attributes of the co-ownership relation: they are the unity of the subject, the multiplicity of subjects and the indivisibility of the common law³.

The unity of an object should be understood as a common property right that refers to one thing (one subject). The subject matter of a common law may be one immovable or movable thing, not a collection or set of things. However, it is also possible that the subject of joint ownership is a collective thing (book collection) or thing along with belongings. The division into simple and complex things and collections of things takes on significance with co-ownership, for which the constitutive feature is the unity, but not the homogeneity of the object of co-ownership. Since, as indicated above, co-ownership is one of the varieties of property rights, then its subject may be only a single thing, not a set of specific property rights (eg property), then, for it is possible to talk about the commonality of rights or property⁴.

The indivisibility of the law indicates that during co-ownership ownership of things is not subdivided, and thus no co-owner is entitled to the exclusive right to a part of the thing physically separated. However, each of the co-owners has the same right to the whole

thing, but limited co-owners limited by the same law. All co-owners are also the owners of the whole thing with the fact that none of them owns the whole, and the exercise of ownership rights is vested in all of them jointly⁵.

As stated by the Voivodship Administrative Court "The essence of co-ownership shows that the co-owner (having the de facto right to the whole thing) can not be treated worse than the owner, and differentiating the position of the owner and co-owner only due to the share of ownership (full share, part of share) would be contrary to the principle of equality before the law constituting a constitutional principle in the Polish legal system (Article 32 of the Constitution of the Republic of Poland)"⁶.

In a situation where co-owners made the division of things to use, the so-called quoad usum, this only has an effect on the manner in which individual co-owners execute share permits. It does not change the fact that they still have the right to the whole thing. Commonness exists as long as the ratio of co-ownership lasts⁷.

The multiplicity of entities means that ownership of the same thing is vested in several, and thus at least two persons who are self-contained entities and do not create a corporate entity, e.g. a legal entity. In turn, when a co-owner is an entity that is a legal person or an organizational unit that has no legal personality, and has legal capacity (so-called defective legal entity as stipulated in Article 331 § 1 of the Civil Code), co-ownership is not created because the entity is one, and partners do not become co-owners. Application of the provisions of art. 195–221 KC in this case is turned off⁸. Bearing in mind the above features of the co-ownership institution, it can be concluded that the rights included in the proprietor's right do not coincide with the rights held by the exclusive owner, because in their scope they must take into account the rights of other co-authorized entities. The subjective rights of individual co-beneficiaries are subjected to a specific kind of division in a purely abstract sense, because in fact, apart from the fact of this division, there is still only one property right⁹.

¹ T. j. Dz. U. z 2019, poz. 80.

² K. Krziskowska, *Art. 195*. [w:] *Kodeks cywilny. Komentarz. Tom II. Własność i inne prawa rzeczowe (art. 126–352)*, [red.] M. Fras, K. Krziskowska, lex 2018.

³ E. Gniewek, J. Gołaczyński, P. Machnikowski, R. Mikosz, *Prawo rzeczowe. System prawa prywatnego. Tom 3*, [red.] E. Gniewek, Warszawa 2013, s. 658; K. Osajda, *Art. 195*. [w:] *Kodeks cywilny. Komentarz*, [red.] K. Osajda, Legalis 2018, Na. 1; E. Gniewek, P. Machnikowski, *Art. 195*. [w:] *Kodeks cywilny. Komentarz*, [red.] E. Gniewek, P. Machnikowski, Legalis 2017, Nb. 1–4.

⁴ K. Krziskowska, *Art. 195*..., *op.cit.*

⁵ P. Księżak, *Art. 195*. [w:] *Kodeks cywilny. Wybór orzecznictwa. Komentarz orzeczniczy*. Lex 2015.

⁶ Wyrok WSA z siedzibą w Gdańsku z dnia 10 lutego 2010, sygn. II SA/Gd 719/09, niepubl.

⁷ E. Gniewek, *Komentarz do Art. 195*..., *op.cit.*, Nb. 3.

⁸ K. Krziskowska, *Art. 195*..., *op.cit.*

⁹ A. Szajkowski, *Wynalazki wspólne. Aspekty prawne*, Osso-lineum 1982, s. 175.

In addition to the co-ownership institution (in the material sense) referred to in art 195 of the Civil Code, the doctrine mentions the case when several persons have the same subjective property right. Such a situation has been articulated in the provisions of the Code of Commercial Companies, including in art 180 and 182 Commercial Companies Code (KSH)¹⁰ regarding the sale and encumbrance of a part of the share or its fractional part, and also in art. 184 of the Commercial Companies Code, which regulates the exercise of rights by a joint representative established by co-authorized from participation. Therefore, the common thing is sometimes a component of property belonging to several persons, which includes both property rights of property and other property rights. Thus, it became justified to delineate the concepts of “co-ownership” and “commonality” encompassing property rights other than property, or the whole property¹¹. The legislator in art. 1035 KC and subsequent regulations governing inheritance purposely uses the concept of “commonality” in inheritance property. Similarly, it does so in art. 184 KSH without using the word “co-ownership”, but only “co-authorized from participation”. However, due to the lack of specific provisions regulating the full commonality of rights, and bearing in mind the key similarities between co-ownership and commonality of rights, ie unity of the subject, indivisibility of law and multiplicity of entities, the view expressed by the Supreme Court seems correct about co-ownership of things not regulated in the provisions of the Civil Code and in special acts of common relations governing other property rights, including the subjective rights of partners in capital companies. In each case, first of all, the admissibility and scope of application of a specific provision regulating the co-ownership institution should be considered to the existing situation¹².

The above-mentioned need for proper application of the provisions about co-ownership of things applies to the joint ownership of shares in the company with limited liability. The possibility of sharing shares in a limited liability company is a consequence of the acceptance that the share is a proprietary property right

subject to trade. At the moment of acquiring or subscribing for shares by several persons, there is a relationship of membership between the purchasers of shares and the company itself. The membership ratio consists of both participation rights and the right of membership, which together constitute the subject of commonality. Consequently, none of the co-workers can with the exception of the second person, have an independent partner status in the company. Co-shared status is only shared together. The commonality itself may concern one or more shares, depending on the contractual provisions. When the ratio of membership includes a larger number of shares, it includes an indivisible right of membership and individual rights of participation constituting a separate subject of commonality¹³.

The subject matter of the Code of Commercial Companies regulates the exercise of rights by co-authorized from the participation but only in relation to the company and in this respect these provisions constitute a *lex specialis* in relation to the provisions of the Civil Code regarding the exercise of rights by co-owners. By following the provisions of the Civil Code, we distinguish two forms of shared shares, they are: joint ownership and co-ownership in fractional parts¹⁴.

Participation in a limited liability company as part of a joint property

The admissibility of recognizing the participation rights in limited liability companies in joint property or in the personal property of the spouses in accordance with the principles set out in the Family and Guardianship Code is not questioned. Nevertheless, the issue of belonging to a limited liability company to the property of joint spouses, covered only by one of them, but for funds coming from common property, was and is the subject of numerous controversies. They result, among others from the fact that two legal regimes should be considered for the resolution of this legal issue: the company law regime and the family law regime. Both regimes differ in their axiological assumptions, which translates into the scope and method of legal protection provided¹⁵.

¹⁰ T.j. Dz. U. z 2019, poz. 60.

¹¹ J. Ignatowicz, *Prawo...*, *op.cit.*, s. 128; A. Wąsiewicz, *Formy współwłasności i ich istota*. NP 1960, nr 11–12, s. 1679–1682.

¹² Wyrok SN z dnia 15 grudnia 1958 r., sygn. akt I CO 22/58 niepubl.; uchwała SN z dnia 16 czerwca 1967 r. sygn. III CZP 45/67 niepubl.

¹³ A. Kidyba, *Kodeks spółek handlowych. Komentarz, t. I*, Warszawa 2004, s. 838.

¹⁴ A. Szajkowski, M. Tarska [w:] S. Sołtysiński, A. Szajkowski, A. Szumański, M. Tarska, *Kodeks...*, *op.cit.*, s. 314.

¹⁵ L. Kwaśnicki, A. Piskorz, A. Nalazek, *Udziały/akcje*

Shareholding rights in a company with limited liability they can belong to several people, as well as to spouses on a fractional or joint basis. The Supreme Court in the resolution of May 22, 1996 stated that it was against the norms of the Commercial Code (analogous to the provisions of the Commercial Companies Code), since the Commercial Code does not provide that the joint participation in a limited liability company can only be fractional, it can not be assumed that it excludes the sharing of shares 'with content corresponding to the commonality'¹⁶. Therefore, the legal position of the spouses in a limited liability company, where the right to participate is part of their personal property, which is the subject of fractional communion, in principle does not raise any doubts. As a rule, the basis for the acquisition of the participation right in the cases in question is the contract concluded by both spouses or by one spouse, but also on behalf of the other. In this case, there is no doubt that both spouses become a party to a legal relationship whose element is the acquired right. Spouses obtain the material status of a partner resulting from the resulting common law and formal status consisting in the possibility of exercising a joint shareholding right in relation to the company¹⁷. Therefore, the legal position of the spouses in the company in the case when the participation right is a component of their personal property, being the subject of fractional communion, in principle, does not raise doubts. As a rule, the basis for the acquisition of the participation right in the cases in question is the contract concluded by both spouses or by one spouse, but also on behalf of the other. In this case, there is no doubt that both spouses become a party to a legal relationship whose element is the acquired right. Spouses obtain the material status of a partner resulting from the resulting common

law and formal status consisting in the possibility of exercising a joint shareholding right in relation to the company¹⁸.

Discrepancy of opinion occurs in connection with the exercise of the right to participate in a limited liability company, when it was acquired to the assets of the spouse by only one of the spouses and only on their own behalf¹⁹.

In this case, there is a subjective difference between the parties to the agreement leading to the acquisition of the right to share in the joint property and jointly-owned entities of joint property and rights, which became a component of this property of both spouses. The subjective difference referred to above is perceived as an obstacle to the non-party to the contract as an entity arising as a result of the conclusion of a contract of obligation, which consists of the relative right acquired to the joint property. Consequently, only the spouse, i.e. the party to the contract on the basis of which the right was acquired, is deemed to exclude the holder of the legal relationship entitled to exercise the common law towards the other party²⁰. In connection with the above, a problem arises here as to the nature of the participation in the company.

Participation may belong to a joint property or to the property of a separate spouse who acquired shares in a limited liability company on its own behalf. In a judgment of 5 October 2005, the Supreme Court stated that participation in a company with limited liability acquired by one of the spouses from funds coming from joint assets may become a component of this property, if the spouses so decide. The Supreme Court in its justification wrote that when a legal act was performed by one of the spouses as part of ordinary management of common property, or with the consent of the other spouse, the party to this activity is only the spouse who participated in it, he who made the declaration of will creating and co-shaping a given legal relationship. The court assumed that the joint purchase by the spouses of shares in a limited liability company determines the content of the agreement transferring

imienne znajdujące się w majątku wspólnym małżonków, cz. I, [w:] W sprawie statusu współnika/akcjonariusza zbiorowego, MPH, nr 1/2011, s. 60 i n.; R.L. Kwaśnicki, Wykonywanie praw z udziałów/akcji wchodzących w skład majątku wspólnego małżonków, [w:] J. Kruczalak-Jankowska, Wpływ europeizacji prawa na instytucje prawa handlowego, Warszawa 2013, s. 73 i n.; T. Mróz, Uczestnictwo w spółce kapitałowej a ustawowy ustrój majątkowy małżonków, [w:] M. Modrzejewska, Prawo handlowe XXI wieku czas stabilizacji ewolucji czy rewolucji, 2010 r., s. 638; A. Szermach, Udział w spółce z o.o. a wspólność ustawowa małżeńska, MP, nr 20/2013, s. 1088 i n.; A. Kubas, Udział w spółce handlowej jako składnik majątku wspólnego, Przegląd Prawa Handlowego, nr 4/2011, s. 22.

¹⁶ Uchwała SN z dnia 22 maja 1996 r., sygn. III CZP 49/96, OSNC 1996, nr 9, poz. 119.

¹⁷ M. Nazar, *op.cit.*, s. 29.

¹⁸ M. Nazar, System prawa prywatnego, [red. T. Smoczyński], Prawo rodzinne i opiekuńcze t. 11, Warszawa 2014, s. 264.

¹⁹ M. Nazar, *op.cit.*, s. 29.

²⁰ Wyrok SN z dnia 5 października 2005 r., sygn. IV CK 99/05, lex nr 176341; uchwała SN z dnia 24 września 1970 r., sygn. III CZP 55/70, OSPiKA 1973, nr 6 poz. 120; uchwała pełnego składu Izby Cywilnej SN z dnia 28 września 1979, sygn. IIICZP 15/79, OSNC 1980, nr 4, poz. 63.

the ownership of shares, and not the source of funds for their acquisition. The funds from the property of the joint spouses used for the purchase of shares are only relevant for potential settlements between the spouses²¹. A similar view was adopted by the Supreme Court in its resolution of 13 March 2008, which stated that “if the contribution of one of the spouses to a civil partnership transformed into a general partnership comes from the property covered by the matrimonial property, the property belongs to the claim for the contribution to which the contribution was covered. The amount of such receivables is determined in accordance with the rules applicable when calculating the value of the share in the event of a shareholder from a general partnership (art. 65 KSH). The value of the expenditure on the joint property of the spouses for the purchase of one’s share belonging to one of them with limited liability is determined according to the market price of this share. When calculating the value of shares in both companies, the state of the company should be taken into account from the moment of establishing the marital property and the price from the date of adjudication. The court in that judgment recognized the shares acquired by one of the spouses in a limited liability company for funds coming from the joint ownership as belonging to his personal property. Then purchased shares, as an expenditure from a shared property on the participant’s personal property. It follows that there is no uniform rule regarding contributions to a limited liability company for shared-equity funds. Therefore, different solutions are possible, individual for a given situation, in particular regarding the content of the partnership agreement and the will of the spouses²². In turn, a different view was adopted by the Supreme Court in its judgment of 20 May 1999 which stated that in the event of the purchase by the spouse of funds coming from joint property, by way of a legal transaction, participation in the limited liability company of capital, not just an association of shareholders, gathered around a chosen economic goal, it is therefore a capital company with a personal (corporate) element remaining in the background. In this case, the court considered that the acquired share is part of the joint property, but a partner only the spouse who participates in the legal act becomes a member of the company. The court,

referring to the teleological interpretation, considered that the adopted solution eliminated complications determining the composition of the company, which is important in the practice of business transactions. The Supreme Court also stated in its justification that “as a result of the inconsistency of the reconciliation of the status of partner resulting from the articles of association, only for the spouse purchasing the shares, with the total nature of the matrimonial property to which the shares acquired”²³. Establishment in the doctrine was the reason for the discussion. A. Kidyba, assessing the above the judgment alleged inconsistency in his thesis “recognition of the status of partner of the spouse-buyer of the participation” and the justification of “recognizing participation rights as an element of common property of both spouses” because, in his opinion, it puts into question the unpublishability of “personal status and the obligation partner”²⁴. According to M. Dumkiewicz, the status of partner in cooperation with a limited liability company. This means that only the spouse who legally purchased (acquired) the shares is entitled to exercise all rights connected with the participation in the company, because as a result only the person disclosing the will to join the company is disclosed. subscription (acquisition) of shares “subjective right to membership”²⁵. Nevertheless, A. Szajkowski questioned both the basic thesis formulated by the Supreme Court and its justification. He stated that “when a uniform shareholding law, not subject to disengagement on the so-called purely property rights and corporate rights, enter into joint property, both spouses become jointly entitled from the right to share in a limited liability company. A separate issue is the exercise of the right of both spouses in the company (Article 184 § 1 of the Code of Laws)”²⁶. The Supreme Court in subsequent judgments: of 21 January 2009 and of 3 December 2009²⁷, maintained the current view of the case law of the above-mentioned cases, considering that shares in capital commercial companies acquired by one spouse

²³ A. Kidyba, *Kodeks...*, *op.cit.*, s. 834.

²⁴ M. Dumkiewicz, *Wspólność udziałów w spółce z ograniczoną odpowiedzialnością*, Warszawa 2011, s. 147.

²⁵ A. Szajkowski, *Wyłączenie wstąpienia do spółki z o.o. współmałżonka współnika* (uwagi na tle nowelizacji k.s.h. z 2003 r.), *Prace Instytutu Własności Intelktualnej UJ*, Kraków 2004, z. 88, s. 294–295.

²⁶ Wyrok SN z dnia 21 stycznia 2009, sygn. II CSK 446/08, OSNC-ZD 2010, nr A, poz. 7; z dnia 3 grudnia 2009 r., sygn. II CSK 273/09, lex nr 551106.

²⁷ *Ibidem*.

²¹ A. Malerowicz-Jakubów, *Wspólność majątkowa małżeńska...*, *op.cit.*, s. 290–291.

²² Wyrok SN z dnia 20 maja 1999 r., sygn. I CKN 1146/97, OSNC 1999, nr 12, poz. 209.

from funds coming from joint property they enter this property, but the shareholder becomes a spouse who participates in the activity leading to the acquisition of the right to share²⁸. Reasons for the above judgments, it was considered that the separation, the so-called the external zone, including relations between the company and shareholders, and the so-called internal, including relations between spouses, differs from the thesis of “dualistic split” of participation in corporate rights and obligations, formulated by the Supreme Court in its judgment of 20 May 1999. The said interpretation proposal brings the judicial classification of the legal position of spouses co-lawful in the field of law shareholder to the concept of distinguishing the material and formal status of spouses as partners in a limited liability company²⁹. Doubts arise here in the interpretation conclusion that the law of relative nature, and in particular the right to participate in a limited liability company acquired independently and solely on its own behalf by one of the spouses, acquires common property, but the only party remains the spouse who he participated in the acquisition of the right to participate and is entitled to exercise this right in relation to the other party of the legal relationship, although this relationship falls within the joint ownership acquired in accordance with the relative law. According to the Supreme Court thought in the justification, a relative right, alone and exclusively in one's own name, acquired by one spouse on joint property only in some undetermined “internal relationship”, through the benefits it brings, also accrues to the other spouse who, being an entity of joint property, does not become creditor³⁰. In connection with the above, the commonality of fractional or joint property is an indivisible community (pro indiviso), that is, all assets are indivisible to all co-employees, and all co-assets include all assets through shares in total and in specific components. Shares are marked by fractions in the fractional aggregate, while in the joint community during the duration of the relationship from which it arises, remain indefinite³¹.

²⁸ M. Nazar, *op.cit.*, s. 31.

²⁹ Wyrok SN z dnia 21 stycznia 2009, sygn. II CSK 446/08, OSNC-ZD 2010, nr A, poz. 7; z dnia 3 grudnia 2009 r., sygn. akt II CSK 273/09, lex nr 551106.

³⁰ E. Gniewek, *Problem udziału we współwłasności (wspólności) łącznej*, [w:] *O źródłach i elementach stosunków cywilno-prawnych. Księga pamiątkowa ku czci prof. Alfreda Kleina*, [red.] E. Gniewek, Kraków 2000, s. 105–106.

³¹ A. Wąsiewicz, *Powstanie, istota i zniesienie współwłasności ułamkowej*, Poznań 1965, s. 20.

Existing regulations do not create grounds for the creation of so-called shared divisions (pro diviso), that is, co-ownership and commonality of real parts. In such a co-ownership structure, the subject of co-ownership in the legal circulation is admitted as one undivided thing, but the co-owners are only the owners of the designated parts of the common thing³². Thus, the acquisition of the shareholding rights in a capital company to the property of joint spouses, both jointly by both spouses and independently by one spouse, makes both spouses become co-members in the scope of the participation right. Both spouses obtain the material status of partners resulting from the acquisition of the share right by the marital property as part of the joint property. The participation right covered by the marriage can be exercised in a partnership with a husband, a spouse having the formal status of a partner, i.e. entered in the register of shares (Article 184 in conjunction with Article 188 KSH)³³. As the Code of Commercial Companies provides for the co-rights to be exercised by the co-beneficiaries, it should be considered permissible to activate the formal status of a partner by a co-registered spouse in the scope of the shareholder's right and having only the material status of the partner, subject to different provisions in the articles of association, e.g. adopted on the basis of the so-called. the provision added art. 1831 KSH. The formal status of a shareholder could be activated by, in particular, notifying the company of the acquisition of the participation right by the marital property and the entry in the share register (Article 187 of the Commercial Companies Code). In its decision of 31 January 2013, the Supreme Court stated that the shares in a limited liability company owned by the joint property, of which only one of the former spouses was a partner, may be divided between former spouses and, accordingly, co-defendants who do not is a partner, provided that the articles of association do not include the content provided for in art. 183 § 1 of the Commercial Companies Code, a limitation or exclusion of the spouse's partner to that company³⁴. According to A. Kidyba, art. 1831 KSH is to counteract joining a company unwanted by partners of a spouse who could

³² A. Szumański, *Status prawny małżonka współnika w spółce kapitałowej w sytuacji, gdy objęcie albo nabycie praw udziałowych w spółce jest finansowane z majątku wspólnego małżonków*, MP, nr 7/2015, dodatek specjalny, s. 37 i n.

³³ Postanowienie SN z dnia 31 stycznia 2013 r., sygn. II CSK 349/1, lex nr 1314384.

³⁴ A. Kidyba, *Kodeks spółek handlowych...*, *op.cit.*, s. 764.

become a partner if the court considered that the distribution of the property may take place through the division of shares³⁵. On the other hand, A. Szajkowski made many critical remarks about art. 1831 of the Commercial Companies Code, accusing the discussed internal rule of contradiction. He pointed out that this provision refers to a state that already exists, and not a future state, as in the case of art. 183 of the Commercial Companies Code on inheritance. Therefore, we are dealing with a situation in which the participation is already covered by the marital property, i.e. “both spouses are then entitled to co-partnership with the limited liability”, and the articles of association may “exclude joining the spouse’s partner”³⁶. According to A. Szajkowski, the commented provision causes specific expropriation of the spouse from shareholding rights, i.e. the loss of the company’s co-partnership right, which is contrary to art. 64 Act of April 2, 1997 Constitution of the Republic of Poland³⁷. He argues that the legislature was not modeled on art. 183 of the Commercial Companies Code, which makes the effectiveness of exclusion of heirs from the inheritance of participation rights from the definition in the articles of association of the rules for the repayment of heirs not present to the company. According to A. Szajkowski, we are dealing here with a situation in which the partner’s spouse is a shareholder of the company and by introducing into the articles of association the provisions of art. 183 § 1 KSH is excluded from the company without indicating any rules defining the rules for settlements between spouses³⁸.

If the formal status of a partner is vested in both spouses who are jointly entitled by virtue of their shareholding rights, they should exercise their rights in the company by a joint representative. In both cases regarding the exercise of rights of co-operation art. 184 KSH only the application of art. 36 § 2 first sentence and art. 36¹ of the Act of 25 February 1964. Family and Guardianship Code (KRO)³⁹.

The first sentence in art. 36 § 2 KSH of the states that each spouse can independently manage shared

property. This phrase indicates further provisions of the Family and Guardianship Code (art. 36 § 3, art. 361, 37, art. 36 § 3, art. 361, 37 of the Act of November 17, 1964, Code of Civil Procedure KPC⁴⁰). However, it only refers to the norms of the family code⁴¹. This position is confirmed by case law. In the resolution of 7 July 2016, the Supreme Court stated: “If the contribution made to the company with limited liability belongs to the property of the joint shareholder and his spouse, also the share in the company covered by the partner is part of this property”. In the justification of the resolution, the Supreme Court noted that the Code of Commercial Companies does not regulate the issue of belonging to a joint property of shares in a limited liability company, acquired for funds from joint property. That is why it is necessary to reach the provisions of the Family and Guardianship Code, which regulate property relations of spouses who remain in the statutory system of property commonwealth. As emphasized by the Supreme Court, art. 33 KRO contains a closed catalog of the personal property of the spouses. This means that personal belongings can only belong to those items that are expressly mentioned in this provision, while the remaining assets are part of the joint property. Because shares in a limited liability company do not fall within the catalog contained in art. 33 KRO should be considered as entering the joint property⁴².

This position is confirmed by case law. In the resolution of 7 July 2016, the Supreme Court stated: “If the contribution made to the company with limited liability belongs to the property of the joint shareholder

⁴⁰ T. j. Dz. U. z 2019, poz. 60.

⁴¹ Uchwała SN z dnia 7 lipca 2016 r., sygn. III CZP 32/16; uchwały SN z dnia 24 lipca 1997 r., sygn. III CZP 26/97, OSNC 1998, nr 1, poz. 3; z dnia 11 września 2003 r., sygn. III CZP 52/03, OSNC 2004, nr 11, poz. 169 i z dnia 13 marca 2008 r., sygn. III CZP 9/08, OSNC 2009, nr 4, poz. 54 oraz postanowienie z dnia 16 stycznia 2013 r., sygn. akt II CSK 193/12, niepubl.; uchwała SN z dnia 29 czerwca 2010 r., sygn. III CZ 42/10, OSNC-ZD 2010, nr D, poz. 124.

⁴² Sąd Najwyższy w postanowieniu z dnia 23 listopada 2000 r., sygn. I CKN 950/98 (nie publ.) przyjął, że z art. 184 k.h. nie da się wyprowadzić zakazu objęcia udziału (udziałów) w spółce z ograniczoną odpowiedzialnością przez małżonków na współwłasność bezudziałową w rozumieniu przepisów kodeksu rodzinnego i opiekuńczego. Sytuacji małżonków, jako udziałowców w spółce nie zmienia wyłączenie przez nich wspólności ustawowej, tyle tylko, że udział w spółce staje się wówczas przedmiotem współwłasności ułamkowej. Nadal, bowiem mogą oni swoje prawa w spółce, stosownie do art. 184 § 1 k.h., wykonywać za pośrednictwem wspólnego przedstawiciela, którym może być jeden z nich.

³⁵ A. Szajkowski, *Wyłączenie wstąpienia do spółki z o.o. współmałżonka współnika (uwagi na tle nowelizacji k.s.h. z 2003 r.)*, Prace Instytutu Własności Intelktualnej UJ 2004, z 88, s. 296–297.

³⁶ A. Szajkowski, *Wyłączenie wstąpienia...*, *op.cit.*, s. 293.

³⁷ Dz. U. z 2009, poz. 946.

³⁸ B. Bieniek, *Małżeńskie prawo majątkowe*, [red.] J. Ignaczewski, Warszawa 2008, s. 574–575.

³⁹ T. j. Dz. U. z 2019, poz. 303.

and his spouse, also the share in the company covered by the partner is part of this property". In the justification of the resolution, the Supreme Court noted that the Code of Commercial Companies does not regulate the issue of belonging to a joint property of shares in a limited liability company, acquired for funds from joint property. That is why it is necessary to reach the provisions of the Family and Guardianship Code, which regulate property relations of spouses who remain in the statutory system of property commonwealth. As emphasized by the Supreme Court, art. 33 KRO contains a closed catalog of the personal property of the spouses. This means that personal belongings can only belong to those items that are expressly mentioned in this provision, while the remaining assets are part of the joint property. Because shares in a limited liability company do not fall within the catalog contained in art. 33 KRO should be considered as entering the joint property⁴³.

The legal status of the partner's partner in the event that the acquisition or acquisition of the share of limited liability is financed from the property of the spouse

In the light of art. 36 § 2 KRO, each of the spouses is entitled to carry out unlimited activities of the management of common property in the scope of objects of this property, in which they can be, among others. shares and shares. A. Chłopecki indicates that "the performance of the board includes activities that concern property objects belonging to the joint property (and thus both shares and shares)"⁴⁴. Article 184 § 1 KSH applies the principle that (all) partners co-authorized from shares exercise their rights in the company by a joint representative. In the light of the above provisions⁴⁵, it might seem *prima facie* that there is a collision of norms, when the regulations of family law allow the spouse to act independently, while the provisions

of the Commercial Companies Code require co-authorized shares to exercise their corporate rights by a joint representative. Therefore, the question arises whether to apply KSH or KRO provisions to the exercise of shareholder rights, the result of a conflict between family law standards and the law of commercial companies? And the assessment of the legal situation is complicated if the share belonging to the property of the joint spouses was acquired or covered by one of them. Therefore, the question should be asked whether the acquisition or subscription of a share in a joint council automatically creates the status of co-parents of both spouses, and consequently, who and according to what principles can perform actions regarding a given participation? Although KSH and KRO contain norms that belong to one branch of law, they take advantage of relative autonomy due to their specific features regulated by legal uncertainties.

The purchase of shares with limited liability may be the result of the personal act of one or both of the spouses or it may be the effect of acquiring by one or more representatives of one or both spouses. Acquisition of shares in a limited liability company to joint property occurs when:

- 1) the purchase is made only by one of the spouses who acts within the limits of the legislation he is entitled to;
- 2) the purchase is performed by a proxy on the basis of a power of attorney granted only by one spouse;
- 3) the purchase is made only by one of the spouses who acts with the obligatory or optional consent of the other spouse;
- 4) purchases are made by both spouses acting jointly, that is jointly;
- 5) purchase is made by one of the spouses acting on behalf of the other spouse based on the power of attorney granted to him;
- 6) the acquisition is made by a plenipotentiary who was authorized by both spouses⁴⁶.

In each of the distinguished ways of acquiring shares, legal consequences are connected. However, the least are the problems of the purchase of shares by both spouses or the acquisition of shares on their behalf by a proxy. This is, therefore, a situation where: the pur-

⁴³ A. Chłopecki, *Akcje zdematerializowane w małżeńskiej wspólności majątkowej*, Transformacje Prawa Prywatnego, Kraków Nr 10/2008, s. 50.

⁴⁴ T. Kurniecki, *Pozycja współmałżonków udziałowców i akcjonariuszy spółek kapitałowych*, Prawo Spółek, Warszawa, Nr 12, 2004, s. 28.

⁴⁵ Z. Kuniewicz, *Wybrane problemy dotyczące objęcia małżeńską wspólnością majątkową praw udziałowych*, [w:] *Status prawny małżonków w spółkach cywilnych i handlowych*, [red.] Z. Kuniewicz, K. Malinowska-Woźniak, Warszawa 2016, s. 265.

⁴⁶ S. Sołtysiński, *Kodeks handlowy*, Komentarz, t. 1, [w:] S. Sołtysiński, A. Szajkowski, A. Szumiński, J. Szwaja, Warszawa 1994, s. 526.

chases are made by both spouses acting jointly (together); the acquisition is made by one of the spouses who acts on behalf of the other spouse based on the power of attorney granted to him; the acquisition is carried out by a plenipotentiary who was authorized by both spouses. The aforementioned cases, the spouses are a party to the share purchase agreement and, consequently, a party to the legal relationship whose source is the said contract. This situation takes place in the original and derivative acquisition. Shares become the subject of joint property and the spouses occupy the position of a collective partner in the company. As a result, the shares are subject to a joint community, and in the manner of exercising the rights of the spouses against shares, it is specified in art. 184 KSH. Co-authorized persons therefore perform their rights in co-operation with limited liability by a joint representative, while the benefits related to participation are jointly and severally liable. The above-mentioned provision applies to the fractional share and total aggregate.

In the matter of solving the problem of affiliation of company rights covered by the partnership, but purchased only by one spouse, S. Sołtysiński presented, considering this issue on the basis of a general partnership, he stated that only the spouse who is a party to the company is the subject of corporate and bonded or organizational rights. With this assumption, the share obtained in return for the contribution made to the company from the property of the spouses “does not enter into either the property of the joint spouses or a separate property [presently personal, editor. Z.K.] a spouse who is a partner”⁴⁷. This view was expressed while the Commercial Code was in force, and was upheld on the basis of the Code of Commercial Companies⁴⁸. This author unequivocally defends the idea that independently a spouse shareholder even when submitting that the action is part of the statutory community can independently perform all share rights, both purely property and organizational. Granting priority to the Code of Commercial Companies. He also believes that this does not affect the interest of the other spouse. Then, the necessity for the spouses to cooperate in the exercise of participation rights, that is, the joint exercise of these rights, is not possible to reconcile with the nature of a joint-stock company. The author also points to difficulties in exercising share rights while respect-

ing the provisions of the Family and Guardianship Code, in particular, provisions requiring the consent of the spouse to perform certain activities⁴⁹. Although the concept of this author has lost its critical character due to the amendment of the family and guardianship code, which took place in 2004. However, the idea of locating shareholding rights as a sure property that is neither personal nor common property is difficult to defend, as the KRO provisions explicitly they distinguish only two types of property masses, that is, common or personal.

The deeper theoretical foundation was presented by M. Nazar, who appealed to the construction of subjective law and property. Recalling the fundamental thesis on the basis of civil law that the subjective right is part of the content of the legal relationship beyond which it can not exist. Treating the shareholding right in a capital company as a subjective right. The author said that since he is part of the marital property, he thus creates the status of a joint partner of both spouses. It would be difficult to explain the legal situation of a spouse who, being co-registered, has no rights to the subject of common law⁵⁰. Next, M. Nazar argues that the applicable legal provisions do not foresee the existence of a divided divorce (*pro diviso*), which would be subject to the recognition of certain components as the subject matter of the entitlement of only one entity⁵¹. It should be emphasized that both authors note that the allegations concerning the threat to trade safety raised by their adversaries are unfounded. Meanwhile, some supporters of the presented position themselves emphasize that this concept is fully effective in the derivative acquisition of shares in the company, while a certain weakness reveals itself in the acquisition of the original⁵².

Therefore, if the shares are to be acquired by the spouses and they become part of the joint property, and then there is to be a regulation of them, then there is the problem of the effectiveness of such activities, when they are made by one spouse. The legislator, because for some activities requires the consent of the spouse. According to art. 37 § 2 of the KRO stipulates that the validity of the contract concluded by one spouse without the required consent of the other depends on

⁴⁹ M. Nazar, *System...*, *op.cit.*, s. 302–303.

⁵⁰ *Ibidem*.

⁵¹ A. Herbert, *System prawa prywatnego*, [w:] *Prawo spółek kapitałowych*, Warszawa, t. 17 A. 2010, s. 277.

⁵² K. Pietrzykowski, *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2012, s. 427.

⁴⁷ S. Sołtysiak, *Kodeks spółek handlowych...*, *op.cit.*, s. 267.

⁴⁸ S. Sołtysiak, *Kodeks spółek handlowych...*, *op.cit.*, s. 251.

the confirmation of the contract by the other spouse. We have, therefore, a sanction defined as ineffectiveness suspended, although it is aptly stated in science that this expression does not fully reflect the sense of this defect⁵³. There is no doubt here that the consent of one of the spouses to perform an action concerning the management of joint property “is a declaration of the will of a third party in the meaning of art. 63 § 1 of the penal code”⁵⁴. In the light of the assessment, the spouse who is not a participant in a legal act performed by the other spouse does not become a party to this activity⁵⁵.

The failure to specify the nature of the term “ordinary management activities when applying the provisions of the KRO created great difficulties related to the assessment of the validity of legal actions made without the consent of the spouse. In this situation S. Sołtysiński postulated caution of spouse’s contractors manifesting themselves that “the founders of a joint-stock company, and later the management board should in such cases obtain” just in case “the consent of the second spouse”⁵⁶.

Following the amendment of the KRO in 2004, the issue of a catalog of activities which, being the activities of the management of joint property – require the consent of the spouse, has been unambiguously settled. The legislator has resigned here from the concept of ordinary management activities and activities exceeding the ordinary management, exchanging exhaustively activities requiring the consent of the spouse. It is about that art. 37 § 1 of the KRO, which requires consent for the sale, load, paid purchase, subject of which are real estate, perpetual usufruct, agricultural holding, enterprise, as well as donations from joint property, with the exception of small donations customarily accepted. Therefore, there is no doubt that for the regulation of company shares belonging to joint property, the consent of the other spouse is not required. Therefore, all activities regarding company shares taken with third parties and with the company may be performed independently by one of the spouses⁵⁷. According to the catalog of activities requiring the consent of the spouse, the issue of the effectiveness of acquiring or acquiring company

shares should be analyzed, if the titles of membership in the company are acquired or acquired in changes for items that require the consent of the spouse. In the case when the spouse acquires the participation in a legal act requiring the consent of the spouse (eg exchange for ownership of the real estate or perpetual usufruct right). In this situation, there is no problem with the assessment of the effects of such an operation performed without the required consent, or an assessment of the effects of this activity on the company. Thus, we are dealing here with the suspension of the effects of a legal transaction, just as in the absence of the company’s consent to the sale of shares⁵⁸.

There will be a problem here if the property or other property listed in art. 37 § 1 of the KRO shall be contributed as a contribution to the company, and in return for it, the spouse includes shares. There is no doubt that there is a need to obtain the consent of the spouse, since the property is covered by a property partnership. In this case, the doubts will concern the possibility of confirming such an action, and in the further consequence of the deadline, in which confirmation can take place. In a situation where a partner contributes a contribution in the form of real estate to the company, then the provisions of the articles of association are the source of the partner’s obligation to make such contribution. When granting capital companies in the organization of legal entity lost sense, the judgment of the Supreme Court of 5 December 19992, in which he stated that the need to conclude a separate agreement to transfer the right to the company, if this contribution is the perpetual usufruct right⁵⁹. This means that it will find application of art. 155 of the Civil Code introducing the rule of a double, obligatory – disposing the effect of legal acts. These effects do not occur, in the absence of consent of the spouse for the conclusion of the articles of association, in which the subject (right) mentioned in art. 37 § 1 KRO. This article is out of focus and the broad way is not precise defines the cases of consent, using the formula: “legal action leading to”, and therefore consent is required for a binding action, e.g. for the conclusion of a partnership agreement.

In connection with the above, the question may be asked whether it is possible to give such consent after the conclusion of the articles of association. The part-

⁵³ K. Pietrzykowski, *op.cit.*, s. 421.

⁵⁴ Wyrok SN z dnia 22 stycznia 2009 r., sygn. II CSK 446/2008, OSNC-ZD 2010, nr A, poz. 7.

⁵⁵ S. Sołtysiński, *Kodeks spółek handlowych...*, *op.cit.*, s. 251.

⁵⁶ Z. Kuniewicz, *op.cit.*, s. 269.

⁵⁷ Wyrok SN z dnia 7 września 1993 r., sygn. II CRN 60/93, OSNC 1994, nr 7–8, poz. 159.

⁵⁸ Wyrok SN z dnia 5 grudnia 1992, sygn. III CZP 128/91, OSNC 1992, nr 6, poz. 106.

⁵⁹ Dz. Urz. UE L z 2009 r., Nr 258, s. 11 z późn. zm.

nership agreement is of a creative character, i.e. a new legal entity is created, which is a capital company in the organization, however in this case, the effectiveness of such activity is suspended until confirmation, and the company does not arise in the organization. It is not possible here, in my opinion, to suspend the effectiveness of a company's agreement after its entry into the register. In this respect, the Polish legislator follows the provisions of the Directive of the European Parliament and of the Council of 16 September 2009 on the coordination of guarantees that are required in the Member States from companies within the meaning of art. 48, second paragraph, of the Treaty, in order to obtain equality, to ensure the protection of the interests of both partners and third parties. It follows from the provisions of that directive that the entry of the company in the register is of a returnable nature and the company thus entered exists despite the deficiencies resulting from its creation (Article 12 of the Directive). Only in strictly defined cases can the registry court decide to terminate it. Under the Code of Commercial Companies, these cases are indicated in art. 21 KSH. Therefore, the consent of the spouse should be expressed at the latest when submitting the application for registration of the company, and in the case of disagreement, the registry court should request the applicant to remedy this lack. However, if the company was entered in the register despite the spouse's consent, the situation should be treated as if the company's agreement had not been concluded (Article 21 § 1 point 1 of the Commercial Companies Code), and so it is a lack that can be removed in the mode of art. 21 § 2 of the Commercial Companies Code.

Conclusions

Despite the multitude of attempts made both in the literature in the field of commercial and family law and in the Supreme Court's jurisprudence, also after the entry into force of the Commercial Companies Code and the amendment of the Family and Guardianship Code, there has been no doctrine and judicature for a satisfactory legal position of spouses in a limited liability company, and especially spouses who remain in the system of property commonwealth. Incorrect addition to the Code of Commercial Companies, Art. 183¹ KSH and 332¹ KSH not only did not contribute to the specification of the legal position of spouses in compa-

nies with limited liability but it deepened the interpretation disputes. However, separate regulations may indirectly determine the composition of property masses by prescribing to specific rights features which, according to the provisions of the Family and Guardianship Code, determine the individual property of spouses in the property system (Article 33 points 3 and 5 and Article 49 § 1 points 2 and 3 KRO). In this situation, it is desirable to establish in the Commercial Companies Code in terms of character and jurisdiction as to their multi-entity character, and to determine the mode of activating the formal status of a partner by a spouse who has only material status as a partner due to joint ownership rights, which he acquired independently and exclusively to joint property on his own behalf, the other spouse.

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