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THE ABOLITION OF THE CO-OWNERSHIP AS THE METHOD OF ELIMINATION THREATS ARISING FROM UNREGULATED LEGAL STATUS OF THE REAL ESTATE

Paulina Ledwoń

ABSTRACT

The author focuses on the analysis of the co-ownership of the real estate in the legal and economic context as well as on the methods of elimination threats arising from unregulated legal status of the real estate. The author describes the origin of the state of the joint ownership of the real estate and its influence on the value of the real estate. The author analyses the concept of the

real estate in the Polish legal system and describes the particular methods of the abolition of the co-ownership of the real estate, such as the contractual abolition of the co-ownership, concluding the settlement by the co-owners, the division of the real estate conducted in the court proceedings.

KEYWORDS

Co-ownership, real estate, property, unregulated status

INTRODUCTION

The co-ownership of the real estate, common in economic relations, often lasts through years. Not always because such condition is desirable. The investment including the property which has unclear legal status and multiple co-owners is risky, while clear legal status and independent owner of the property makes its value increase. The only one solution to these problems is often the definitive abolition of the co-ownership of the real estate. What is more, each co-owner is entitled to initiate proceedings in this regard, if only the status is not desirable for him any longer.

Methods of abolishing of the co-ownership are several, each has its advantages and disadvantages. One can conclude an agreement abolishing the co-ownership of the property in a notary office, or a settlement, as well as it is allowed to establish the separate ownership of the premises, sale of the property and then distribution of the money among the owners or legal proceedings in which the priority

has unanimous division, then we have the division in nature, and finally, sale of the real estate by public court auction. The advantage of the legal proceedings is lower cost and still widespread belief in the superiority of the decision of the court over civil contract.

This article desires to introduce the concept of co-ownership and its sources, as well as the methods of its abolition.

THE CONCEPT OF REAL ESTATE IN THE POLISH CIVIL CODE

According to the Polish Civil Code, the real estate is part of the earth's surface which creates a separate property (land), as well as buildings permanently connected with land or parts of such buildings, if under the special provisions, they are a separate subject of property

Property is thus:

- a) land, which is both parts of the earth's surface and creates a separate property,
- b) buildings permanently connected with land,
- c) part of the buildings, if under special provisions are a separate subject of property (eg. premises).

THE CO-OWNERSHIP OF PROPERTY

The literature emphasizes that the nature of the co-ownership is defined by three main features: the unity of the object, the multiplicity of subject and the integrity of the law¹. The law knows only two types of co-ownership: fractional and joint co-ownership. The ownership in fractions is when the ownership belongs to all of the co-owners and until the moment of the abolition of the co-ownership, no one has its physically divided part, as well as no one has the right to dispose it, one can dispose only an ideal part of the ownership expressed as a fraction. A feature of the fractional ownership is the potential opportunity to dispose share, sale, donate and encumber it with mortgage. The expiration of the ownership is when all the shares will go to one person². The size of the shares is determined by the provisions of the contract, will, court order or law.

Joint ownership can only arise from certain legal relationships. Joint ownership is not determined by the amount of shares and lasts as long as it is not possible to demand its abolition³. The most common example is the conjugal community (art. 31 in conjunction with art. 48 of the Family Code⁴), an example of this is also the situation of the civil partnership. The real estate brought to the civil partnership becomes a subject of the joint co-ownership. Partner cannot dispose its share in the common property or in its individual components only by himself. In case he leaves the partnership he loses the right to common property and retains the right to return the things that he brought to the partnership to use as well as he is able to demand the value of his contribution in cash. Common property is owned by the other partners without the need of any legal action connected with the retransfer of

ownership of the property⁵. An important feature of the joint co-ownership is the fact that its subject is not one thing and it has a specific economic and social reasons.

THE SOURCES OF CO-OWNERSHIP OF THE REAL ESTATE

There are many sources of the co-ownership, the most common are:

- a) the actual events, when according to the provisions of law, they bring legal effects, such as prescription of the property by several persons (art. 172 of the Civil Code);
- b) legal action, such as an acquisition of a share in an existing co-ownership;
- c) legal provision, for example, the transformation of the perpetual co-usufruct of the real estate into the co-ownership pursuant to the *Act on the transformation of the perpetual usufruct right to the ownership of real estate*⁶;
- d) the verdict of a court or administrative decision;
- e) to some extent, inheritance, because according to art. 1035 of the Civil Code, if there are several heirs of the legacy, to the co-ownership of its assets and to the division of the inheritance the provisions on co-ownership in fractions will apply accordingly⁷;
- f) indirectly by marriage, as the conjugal community regime arises *ex lege* after entering the marriage, unless the spouses concluded prenuptial agreement or agreement during the marriage that excludes conjugal community⁸. Divorce between spouses means that conjugal community regime ends, consequently, fractional co-ownership arises on the property acquired during the marriage;
- g) concluding the contract that forms a civil partnership, joint co-ownership lasts from the time of incorporation of the partnership until its

¹ S. Rudnicki, *Własność i inne prawa rzeczowe. Komentarz do Kodeksu Cywilnego*, Wydawnictwo Prawnicze, Warszawa 1996, p. 186.

² S. Rudnicki, [in:] G. Bieniek, S. Rudnicki, *Nieruchomości. Problematyka prawna.*, Wydawnictwo Prawnicze LexisNexis, Warszawa 2007, str.870.

³ A. Gola, *Współwłasność*, Wydawnictwo prawnicze, Warszawa 1987, p. 8.

⁴ Ustawa z dnia 25 lutego 1964 r. Kodeks rodzinny i opiekuńczy, Dz.U. 1964 Nr 9 poz. 59 ze zm.

⁵ S. Rudnicki, *Własność nieruchomości*, Wydawnictwo Prawnicze LexisNexis, Warszawa 2008, p. 28.

⁶ Ustawa z 29 lipca 2005 r. o przekształceniu prawa użytkowania wieczystego w prawo własności nieruchomości, Dz.U. nr 175, poz. 1459 ze zm.

⁷ E. Skowrońska – Bocian, *Komentarz do kodeksu cywilnego. Spadki*, Wydawnictwo Prawnicze LexisNexis, Warszawa 2003, p. 226.

⁸ A. Dyoniak, *Ustawowy ustrój majątkowy małżeński*, Wydawnictwo Ossolineum, Warszawa 1985, p. 193.

termination, then the joint co-ownership is transformed into a fractional co-ownership⁹.

METHODS OF ABOLITION OF THE CO-OWNERSHIP OF THE REAL ESTATE

When there are no conflict between co-owners, they may enter into an agreement abolishing co-ownership in a notary office. The above agreement shall be governed by the same provisions that regulates agreement transferring ownership of a property, consequently, it must be strictly concluded in the form of a notarial deed. The contract must clearly indicates the parties to the contract and include a precise description of the property which is the subject of division. In accordance with the principle of freedom of contract, the parties can match the content and method of the abolition of co-ownership in accordance with the will of its co-owners, but in conformity with the law and the principles of social coexistence¹⁰.

Once there was a dispute whether it is possible to abolish the co-ownership in an amicable way¹¹. At present, art. 1157 of the Code of Civil Procedure¹² (CCP) introduced the possibility to submit to arbitration disputes concerning property rights which may be the subject of a court settlement, while in art. 1165 § 1 of CCP legislator said that this may involve both litigation and non-litigation proceedings. The only requirement is that the co-owners concludes an agreement in which they agree to submit the dispute to arbitration. The agreement reached in conciliation court is legally binding the same as the verdict of the court after its approval by the court of law (art. 1212 § 1 of CCP). The common court of law shall refuse to perform these actions only if they were contrary to the fundamental principles of the legal order of the Republic of Poland (1214 § 3 p.2 of CCP) .

The settlement concluded in the court shall substitute the form of the notarial deed which

is required in case of legal actions concerning real estates¹³. Court settlement can be extended to other claims between co-owners, then it fulfills the function of the comprehensive regulations of the disputable issues between the parties, as it was the intention of the legislator.

Abolition of the co-ownership of the property as an effect of litigation proceeding takes place very often especially when there are many disputable issues between co-owners, although it is possible even if there are no conflict, but only as an expression of the desire to minimize the costs of the notary public, because the request may include an unanimous demand. The motion may be submitted by one of the co-owners, several, or by all of them acting together, or by their heirs (art. 210 and 922 of the Civil Code), and by the creditor of the co-owner, if his rights has been confirmed in enforcement proceedings¹⁴ (art. 912 § 2 of the Civil Code). Indirectly, the applicant can be a partner of the civil partnership when he demands repayment after liquidation of the partnership¹⁵ (art. 875 § 1 of the Civil Code). The application may be submitted by the prosecutor (art. 7 CCP) and by the Ombudsman.

If the proceedings did not bring to the settlement, in accordance with art. 622 § 1 of CCP the court should induce co-owners to carry out harmonious division, pointing out ways that can lead to this. An unanimous application of the co-owners may include demand to abolition of the co-ownership in any manner permitted by law, co-owners often prefer to abolish co-ownership of the property by awarding the right of the ownership to one of their group when they are interested in repayment in cash, sometimes the property is not interesting, then the most appropriate way is to sell it.

If there is no basis to issue an order corresponding to the unanimous application of co-owners, but there are conditions that allow to carry out the division in nature, the court carries out this division into parts corresponding to the shares of co-owners, taking into account all

⁹ Ł. Dziulreja, *Współwłasność nieruchomości. Sposoby zniesienia współwłasności*, Wydawnictwo e-prawnik.pl, Kraków 2008, p.16.

¹⁰ *Ibidem*, p. 108 – 109.

¹¹ T. Misiuk, *Problemy integracyjne postępowania działowego*, Palestra 1973, nr 9, p. 16.

¹² Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego, Dz.U. 1964 nr 43 poz. 296 ze zm.

¹³ Wyrok SN z 13 października 1955 r., III CR 599/55 OSN 1956, nr 3, poz. 78.

¹⁴ E. Wengerek, *Postępowanie zabezpieczające i egzekucyjne. Komentarz*, Wydawnictwo Prawnicze, Warszawa 1972, p. 456.

¹⁵ Postanowienie SN z 30 września 1977 r., III CRN 76/77, OSNCP 1978, nr 7 poz. 115.

relevant circumstances as well as the social and economic interest. Differences in values of the particular parts are compensated by cash payments, in proportion to the size of shares. Even if only one co-owner has applied for the division in nature and such division is possible, the duty of the court is to abolish the co-ownership in such way¹⁶.

As mentioned, the differences between the value of the parts of the property are compensated by cash, that are proportional to the value of the shares. The court, if necessary, shall decide to divide the payments in installments, the deadlines cannot exceed ten years as there is stated in art 212 § 3 (second sentence) of the Civil Code. If the entire property is granted to one co-owner, he is also burdened with the repayments to the other co-owners (art. 212 § 2 of the Civil Code). As a rule, co-owners are entitled to the full amount of repayment, an exception of this rule in when the subject of the division is an agricultural farm, then the repayments may be reduced. The court may resign to award payments for co-owners only if they clearly expressed that wish¹⁷.

The co-ownership of a building can be abolished by establishing a separate ownership of the premises. In the previous legislation only judicature allowed for such a solution. Currently, this problem has been precisely regulated by art. 11 of *the Law on Ownership of Premises*¹⁸, which states that the provisions regulating the establishment of separate ownership by agreement, shall apply *mutatis mutandis* to establishing the separate ownership by a court verdict abolishing the ownership of real estate. The court may authorize the participant of the proceeding to perform the necessary work of adaptation, by issuing a pre-order.

It is also allowed to establish a separate ownership of the premises when the separate ownership has been already established, but the new premises must as well meet conditions of the

provisions¹⁹. Separate ownership of the real estate, in accordance with the said act, may be an independent dwelling, which is separated by permanent walls within the building, room or a complex of rooms, which are destined to permanent stay of the people, and which together with supplementary spaces are used to meet their housing needs.

One of the methods to abolish the co-ownership of the property is to sell it and then to distribute a sum of money between participants of the division. The content of art. 625 of CCP states that in order that manages the sale of the item belonging to co-owners, the court shall decide about the mutual claims of the co-owners, or just order a sale, postponing the decision on the mutual claims of the co-owners and on the distribution of the money obtained from the sale to the moment when the sale is conducted.

It should be noted that the abolition of the co-ownership by the sale of property is an ultimate solution, practiced when the situation of the co-owners does not allow to meet the financial needs of the other participants by way of repayment, and at the same time the division in nature is impossible²⁰. It is a result of the fact that during the sale conducted in auction organized by the court its extremely hard to achieve better price than by the sale conducted on free market. The sale of real estate is conducted in enforcement proceedings. Enforcement proceeding may be initiated *ex officio* or at the request of any of the co-owners on the basis of an enforcement title, which states that the abolition of the co-ownership is to be carried out by the sale of the real estate. The judicial abolition of the co-ownership by the sale of property in public auction will cause the termination of the co-ownership upon its sale²¹.

CONCLUSION

The co-ownership of property is commonly found in legal relations and cannot be completely avoided, however, if the management of a common thing faces numerous obstacles,

¹⁶ M. Sychowicz, *Postępowanie o zniesienie współwłasności*, Wydawnictwo prawnicze, Warszawa 1976, p. 62.

¹⁷ H. Pietrzykowski, [in:] A. Piasecki [ed.] *Kodeks postępowania cywilnego. Komentarz*. t. 2, Wydawnictwo CH Beck, Warszawa 2006, p. 286.

¹⁸ Ustawa z dnia 24 czerwca 1994 r. o własności lokali, Dz.U. 1994 nr 85 poz. 388 ze zm.

¹⁹ Uchwała SN z 15 marca 1989 r., III CZP 14/89, OSN 1990, nr 2, poz. 27.

²⁰ Ł. Dziurleja, *Współwłasność nieruchomości. Sposoby zniesienia współwłasności*, Kraków 2008, p. 86.

²¹ Uchwała SN z dnia 20 lutego 1989 r., III CZP 4/89, OSNC 1990, nr 2, poz. 25.

consequently the state of the co-ownership brings more economic harm than good, then it is worth to consider on the abolishing of the co-ownership by methods pointed out in this article.

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