

This paper is a summary of a doctoral dissertation titled ‘The exercise of real estate ownership rights by the spouses remaining in community of property and the principle of family protection’, prepared under the direction of an INP PAN Professor Marek Andrzejewski.

I. A description of the subject of the research and the aim of the dissertation.

The doctoral dissertation ‘The exercise of real estate ownership rights by the spouses remaining in community of property and the principle of family protection’ is a comprehensive representation of the leading themes stated in the title. The content of the thesis refers only to the spouses remaining in the system of community of property. It is, in fact, the kind of system in which the indicated working problems actually exist. Spouses remaining in separate property systems are excluded from consideration, since each of them independently manages their assets, there is no common property and because of it, as it is clear from the literature and case law, most of the presented issues will not apply to them.

The work does not deal with the ownership of all the legal rights of the spouses. It has been limited to real estate property rights. The legislator found them to be extremely valuable for the family, gave them a special economic status and guaranteed protection. Real estate maintenance generally requires more financial investment and personal effort than maintaining a Personal Property of similar value.

Real Estate plays a special role in economy. It should be considered an essential subject matter, also because of their main physical feature, which is durability. Additionally, it is very often an important component of community property of spouses. Another special feature of the property indicating their rank is running its registry. They are entered into the land registry, which also ensures the security of trading in the process of their administration. Ownership of the property is also protected by the principle of land registers and the presumptions in the Law on Land and Mortgage (‘ustawa o księgach wieczystych i hipotece’).

Numerous publications on the subject of management of the entire assets of spouses can be found in the literature. I think that it is justifiable to narrow the subject of the thesis to real estate, in order to describe thoroughly all the legal issues that relate directly to them, as the joint assets of spouses.

The discussed issues arise in between the family law and property law, as well as the constitutional law. Although the regulations of property protection and family asset protection delivers multithreaded research material, the problems raised and discussed in the dissertation

have not been subject to a separate monograph study before. The issues presented in the dissertation are an important element of the legal debate which has been going on in Poland for many years. The dissertation aims to explore the relationship between the above-mentioned branches of law.

The word 'family' is used in the title of the dissertation. This concept is sometimes understood differently both in the literature and in the sphere of law. The Family and Guardianship Code doesn't contain a definition of the term 'family'. According to it, however, a family is created by the spouses or spouses with children (both minor and those of legal age). In my work I always refer to the concept of a nuclear family consisting of the spouses, and spouses and their children. There is no need to refer to a wider circle of relatives.

Both property protection and family protection are constitutional values. The ownership right is not an absolute right and can be limited. This can be done, however, only by law and only as far as it does not affect the essence of the ownership right (Art. 31 paragraph. 3 and art. 64 paragraph. 3 of the Constitution). The question which requires an answer is whether restricting the exercise of ownership rights by the Code of Family and Guardianship meet the constitutional criteria; as well as, if the rights of the owner are limited due to the protection of the interests of the family. The dissertation answers the question, how family is protected in the context of real estate ownership rights. In other words, whether the legislator increases protection of the family and ownership rights, and if they can balance both of these values.

Protection of these values often clashes with yet another factor, namely with the speed and certainty of business transactions, as well as with the protection of the contractors who enter into transactions with the spouses. The problem of protection of the contractors will be limited to the points comprised in the topic of work. A detailed study regarding protection of the third parties, the families of the contractors and the ability to satisfy the property claims of the spouses, requires a separate analysis and goes beyond the scope of this publication.

When answering the question of which law among those mentioned above is a protected value, one should keep in mind the character of the total co-ownership. The exercise of the ownership right to a property that belongs to both of the spouses is different from the exercise of the ownership rights by fractional co-owners. The spouses, except from being tied by their shared property are also bound by personal ties. Marriage is based on cohabitation, mutual help, fidelity and cooperation for the well-being of the family, which the spouses establish through their relationship (Art. 23 Guardianship Code). For this reason, the rules governing the exercise of the ownership rights differ from managing objects belonging

to fractional owners.

II. The research problems.

Most of the objects acquired during the marriage are part of the community property. Mutual personal ties of the spouses lead to them being allowed more freedom to manage the object they share than fractional co-owners. The management rules are supposed to enhance sustainability of the marriage and community property. Fractional owners, in turn, may be total strangers and they don't necessarily have to like or trust each other.

Spouses acquire real estate on the basis of different legal events. This dissertation examines if categorizing the assets either as part of the community property or as personal property of the spouses, can be determined on the basis of the Family and Guardianship Code and to what extent should one consider the will of the spouses'. It also analyzes whether it can be concluded that the regulations provide for the presumption that real estate constitutes part of the community property. If so, how can this presumption be refuted. To determine how to exercise of the ownership right over the real estate of the spouses, one must first determine when they constitute part of the community property.

The exercise of the ownership right is an attribute of the owner. The rules governing management of the assets in community property were revised in 2004. Changes also included the property of the spouses. The requirement to obtain the consent of a spouse for activities exceeding the scope of ordinary management was replaced with an exhaustive list of activities which spouse cannot independently perform (Art. 37 Guardianship Code). The aim of the study is to determine whether current rules adequately protect the right to real estate ownership, as well as family interests. In the context of community property management a list of activities which require the consent of the spouse must be discussed. The work answers the question whether the current regulations are sufficient. And if not, how they should be extended. The management of the spouse's commercial real estate is also going to be analyzed here (Art. 36 § 3 of the Guardianship Code). The dissertation additionally addresses issues related to the possibility of obtaining substitute consent of the court to take legal actions (Art. 39 Guardianship Code) and depriving the spouse of his property rights (Art. 40 Guardianship Code). These are institutions that interfere with the right of ownership. It is necessary to determine whether the introduced restriction of property rights is proportionate to the objective, which the regulation is to achieve.

The problem of transferring real estate between the spouses is yet another important point regarding protection of spouses and their ownership rights. In the literature, there is no unified position regarding the possibilities and how to transfer real estate between the husband and the wife. The questions which require an answer are whether the ownership right of the spouses, which grants the freedom to manage their own rights, has been limited in the relation between the spouses; and how spouses can transfer real estate between each other.

Purchasing real estate by foreigners constitutes another issue discussed in this work. The thesis analyzes whether marriage improves the situation of a foreigner in the area of property acquisition and whether any restrictions on real estate acquisition contribute to better family protection. It needs to be determined whether the property acquisition agreement between the spouse who is a Polish citizen and a foreigner who does not hold a valid residence permit is invalid.

Protection of the family consists in the interference with the real estate ownership right, which only one spouse is entitled to, especially when it comes to the family home. What should be noted, however, is that the apartment where the family resides is treated as a 'family home', which is a special status in many European countries. In a situation where a real estate item belongs to the personal property of one of the spouses, the other is entitled to use that property in order to meet the needs of the family (Art. 281 Guardianship Code). The work will discuss the scope of entitlement of one of the spouse's to the other spouse's apartment, as well as the problem of protection of the family home. It will be also answered whether the current laws on the protection of housing protect the family sufficiently. If not, how should they be extended and, if the potential change in the rules would be in accordance with the constitutional principle of the protection of the ownership right.

Protection of ownership rights also takes place when the contents of the entry in the Land Register is inconsistent with reality. The power of both of the spouses to defend their statements need to be considered in the context of the documents that can form the basis of land registration and the legal institutions that ensure protection of property rights of both spouses. The possibility of establishing incompatibilities between the land registration and the factual legal status will be also analyzed in this work.

III. Methodological assumptions.

The subject of the dissertation requires the use of the legal dogmatic method. This method consists in a study of the regulations of substantive and procedural law, family law,

as well as ownership and constitutional law. Because it is situated somewhere in between the above mentioned categories, the normative basis of this work is a series of legal acts, which, among others, include the Constitution of the Republic of Poland, the Family and Guardianship Code, the Civil Code, the law on ownership of premises, the law on land and mortgage, the law on real estate acquisition by foreigners.

An important element of the research carried out in this dissertation was the analysis of the judicial decisions of the Supreme Court and the Constitutional Court. These decisions relate to some particular issues, such as family protection, the admissibility of interference with the ownership right, and the ownership of objects belonging to the community property, which were examined in this work.

All the above analysis took place with reference to the views of the representatives of the doctrine concerning particular aspects of the discussed issue as expressed in the comments, monographs, articles and votes.

In the paper the method of legal dogmatics has been applied. The references made in the dissertation relate only to European countries and are limited to the continental Europe, which uses the civil law system. Countries in which the common law has evolved do not have matrimonial regimes within the meaning of the continental system, and therefore do not have statutory regimes. The presentation of solutions occurring in such countries would not meet its purpose. Also comparing the legal solutions adopted by the United States of America would not be effective, due to the fact that the country does not have a uniform law on matrimonial property regimes but in every state there are different regulations. There is only one case when the USA is mentioned and that is when discussing the doctrine postulate to adopt the country's solutions in Polish law.

It would also be pointless to compare to the law of Asian, Arab or African countries, because they run on the basis of different rules, traditions and cultures.

The comparison will refer to matrimonial regimes which have been recognized as legal in the discussed countries. They will differ from the Polish community of property. The aim, however, is to determine whether the legislators in other countries took into account property and family protection in the context of the legal system.

In the study the historical method is also applied. It allows one to show the evolution regulations regarding the management of the spouses' property. Particular emphasis is placed on comparing of the current laws, with those from before the amendment to the Family and Guardianship Code of 2004.

IV. Conclusion.

The answer to the research problems will be presented in the last part of the dissertation. The conclusion will consist of a summary of the most important points and provide the solution to the research problem, which is to protection of the family in the context of the real estate ownership. The flaws of the existing regulations, which cause ambiguity will be enumerated and discussed. In order to introduce a better model for the protection of the constitutional values, a proposal to amend the regulations will be made and with respect to this suggestions *de lege ferenda* will be made.