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Robert Talaga
Voivodeship Administrative Court in Poznań
ORCID: 0000-0002-5281-2188
r.talaga@wsa.poznan.pl

Issues of Sources of Remuneration and Reimbursement of Expenses of the Curator of the Estate Appointed by the Administrative Court

Problematyka źródeł pokrycia wynagrodzenia oraz zwrotu wydatków kuratora spadku ustanowionego na wniosek sądu administracyjnego

SUMMARY

The curator of the estate may be established by a common court not only from office but also at the request of an administrative court. The rules determining the award of remuneration for actions taken before an administrative court in such a case come from procedural and material law provisions. However, they do not provide in an exhaustive way all the cases of granting remuneration to the curator of the estate in respect of the performed function. As a result, there is a need to solve such problems involving rules that are not explicitly expressed in the applicable regulations. This leaves the possibility to propose solutions for this kind of situation in practice. Due to the demand for consistency of the legal system, it is necessary to attempt to identify the entities responsible for covering receivables on the basis of the applicable regulations. Depending on the actions taken by the curator of the estate, this may be a court of inheritance or a governmental or local government administration body. Due to the postulate of legal certainty, it is necessary to postulate taking into account the legal opinions functioning in the literature in order to introduce regulations that will be considered exhaustive, from the point of view of entities applying the law.

Keywords: curator of the estate; rules for awarding remuneration; administrative courts

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INTRODUCTION

In view of the diversity of curatorship in the Polish legal system, there is no single universal definition of this concept. Specific regulations that govern particular kinds of curatorship are set forth in the Family and Guardianship Code[1], the Code of Civil Procedure[2] and other provisions of substantive civil law. A vast number of curatorship regulations hinder the formulation of clear common rules for the remuneration of curators and the reimbursement of their expenses. Notwithstanding the kind of curatorship, it is systemically connected with the principle of remuneration for activities undertaken in the performance of their duties[3]. The specificity of each kind of curatorship may result in specific problems related to the method of remunerating for the activities[4]. This particularly pertains to the determination of sources of the curator's remuneration which, *inter alia*, depend on the mode of his appointment and require several regulations that function simultaneously to be taken into account[5]. In practice, it is possible to appoint a curator of the estate *ex officio* or upon the request of an authorised person or institution (e.g. an administrative court). Depending on this aspect, it may be necessary to consider and appropriately adapt various views expressed in the doctrine and case-law. Obviously, in order to correctly reconstruct the procedure of remunerating the curator of the estate, it is necessary to analyse the solutions that remain permissible under various legal acts in the legal system.

The objective of this article is to analyse the applicable rules for determining the sources of remuneration of the curator of the estate for activities conducted in proceedings before the administrative court. The final result of the considerations is, in particular, an attempt to define a model of rules establishing the sequence

[1] The Act of 25 February 1964 – Family and Guardianship Code (Journal of Laws 2017, item 682, consolidated text), hereinafter referred to as FGC.

[2] The Act of 17 November 1964 – Code of Civil Procedure (Journal of Laws 2018, item 155, consolidated text), hereinafter referred to as CCP.

[3] K. Korzan, *Koszty procesu z udziałem kuratora*, „Palestra" 1968, nr 2, p. 28; H. Ciepła, [in:] H. Ciepła, J. Ignaczewski, J. Skibińska-Adamowicz, *Komentarz do spraw rodzinnych*, LEX/el.; G. Matusik, *Komentarz do art. 179 k.r.o.*, [in:] *Komentarze Prawa Prywatnego*, t. 5: *Kodeks rodzinny i opiekuńczy*, red. K. Osajda, Warszawa 2017, p. 1782; H. Haak, A. Haak-Trzuskawska, *Kodeks rodzinny i opiekuńczy. Komentarz do art. 145–184*, Toruń 2012, p. 253; Resolution of the Supreme Court of 13 March 2015, III CZP 4/15, OSNC 2016, No. 2, item 19.

[4] In this respect, it is necessary to exclude the rules for remunerating professional curators who conduct educational-rehabilitation, diagnostic, preventive and control activities related to the enforcement of court rulings under the Act of 27 July 2001 on Court-Appointed Curators (Journal of Laws 2018, item 1014, consolidated text).

[5] A. Łazarska, *Wynagrodzenie kuratora ustanowionego z urzędu*, „Monitor Prawniczy" 2016, nr 6, pp. 327–332; J. Studzińska, *Wynagrodzenie kuratora osoby prawnej ustanowionego z urzędu*, „Monitor Prawniczy" 2016, nr 14, pp. 754–762; D. Miotała, *Źródło pokrycia wynagrodzenia dla kuratora ustanowionego z urzędu*, „Monitor Prawniczy" 2017, nr 6, pp. 327–330.

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of remunerating the curator of the estate appointed by the administrative court for activities conducted in proceedings before the administrative court. Thus, this article supplements reference books that analyse this issue.

LEGAL BASIS FOR REMUNERATING THE CURATOR OF THE ESTATE FOR ACTIVITIES CONDUCTED IN PROCEEDINGS BEFORE ADMINISTRATIVE COURTS AND REIMBURSEMENT OF THE EXPENSES

Determining the legal nature of the curator is essential for remunerating him for his duties[6]. It is assumed that the legal nature of the curator of the estate is subject to the purpose of activities performed to achieve a specific task for which such curator was appointed, and not the legal basis on which such curator was appointed to carry out specific activities[7]. As a result, the curator of the estate, despite being appointed under procedural law, is in essence considered as a curator of substantive law[8]. Actions taken by the curator of the estate in the court proceedings (even if he is a professional representative) are not remunerated by the administrative court[9]. In this case, there is no legal basis for remunerating the curator of the estate for activities conducted before the administrative court[10]. The administrative court may only remunerate and reimburse any necessary and proved expenses to a professional representative appointed upon the request of the

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[6] D. Mróz-Szarmach, *Rozliczanie kosztów udziału kuratora procesowego w postępowaniu cywilnym*, „Pieniądze i Więź" 2017, nr 4, pp. 90–99.

[7] Resolution of the Supreme Court of 9 February 1989, III CZP 117/88, OSNCP 1990, No. 1, item 11. This rule applies to the appointment of other curators for the purpose of pending proceedings but it may result in different conclusions. Cf. S. Durczak-Żochowska, *Wynagrodzenie za czynności kuratora dla małoletniego w sprawach karnych (zagadnienia wybrane)*, „Państwo i Prawo" 2017, z. 1, pp. 92–93.

[8] Order of the Supreme Court of 26 November 2009, I CZ 75/09, OSNC (Additional Collection) 2010, No. 3, item 83; Order of the Supreme Court of 8 May 2015, III CZP 16/15, LEX No. 1749596; A. Łopuszyński, *Kurator w postępowaniu przed sądem rejestrowym*, „Monitor Prawniczy" 2006, nr 3, p. 132; M. Margoński, *Kurator spadku*, Warszawa 2009, p. 31, 60; P. Gorajewski, *Kurator, likwidator i syndyk masy upadłości w postępowaniu sądowoadministracyjnym*, [in:] *Spółki jako strony w postępowaniu sądowoadministracyjnym. Materiały z seminarium szkoleniowego dla asystentów. Naczelny Sąd Administracyjny, Warszawa, dnia 27 listopada 2017 roku*, „Materiały Szkoleniowe" 2018, nr 47, pp. 7–8; T.M. Niemiec, *Właściwość sądu w postępowaniu o ustanowienie przedstawiciela (kuratora)*, „Przegląd Prawa Publicznego" 2013, nr 6, p. 41.

[9] Order of the Voivodeship Administrative Court in Warszawa of 14 August 2014, I SA/WA 17/14, LEX No. 1541681.

[10] Order of the Voivodeship Administrative Court in Warszawa of 12 January 2018, I SA/WA 2045/17, LEX No. 2424369. Different point of view is represented in literature. See R. Zegadło, *Uwagi w sprawie wynagrodzenia oraz wydatków i nakładów kuratorów*, „Rodzina i Prawo" 2013, nr 25, pp. 53–54.

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curator of the estate under aid law[11]. Consequently, a court of law (probate court) is empowered to remunerate the curator of the estate for activities conducted in court-administrative proceedings[12].

In administrative cases (conducted before administrative authorities and administrative courts), the sequence of application of procedural and substantive rules for remunerating and reimbursing expenses to the curator of the estate is the same as in civil-law cases. As regards the remuneration and reimbursement of the curator's expenses, special provisions that govern the appointment and functioning of the curator of the estate primarily apply. Such provisions that are characteristic for the curator's remuneration (which in some extent "codify" a certain area of his activity) supersede general provisions set forth in Chapter III of the FGC.

As for the determination of the source of the curator's remuneration for his activities, it is essential to distinguish the mode of his appointment. In principle, the legislature assumed that the curator of the estate may be appointed "at any time when necessary" (Article 666 § 1 of the CCP). However, it should be taken into account that this wording is more specific as it is possible to appoint a curator *ex officio* by a probate court and upon the request of, *inter alia*, a qualified individual person, a qualified state authority or a non-governmental organisation[13]. First of all, the curator of the estate may be appointed *ex officio* as part of the performance of statutory duties and obligations of a court of law. The probate court is statutorily obliged to "guard" the entire unclaimed estate[14]. If necessary, this "guardianship" over the estate also includes the *ex officio* appointment of the

[11] Order of justices' clerk of the Voivodeship Administrative Court in Gdańsk of 30 June 2017, II SA/Gd 124/17, LEX No. 2311408; Order of justices' clerk of the Voivodeship Administrative Court in Gdańsk of 11 August 2015, III SA/Gd 1027/14, LEX No. 1776869; Order of justices' clerk of the Voivodeship Administrative Court in Warszawa of 18 November 2014, VII SA/Wa 2669/13, LEX No. 1594899.

[12] The probate court is a district court with jurisdiction over the last place of residence of the testator, and if the place of residence in Poland cannot be determined – a court with jurisdiction over the place where the estate or its part is located. If the aforesaid requirements are not observed, the probate court is the district court of Warsaw (Article 628 of the CCP). Cf. W. Siedlecki, *Postępowanie w sprawach z zakresu prawa spadkowego*, [in:] *System Prawa Procesowego Cywilnego*, red. Z. Resich, t. 2, Wrocław 1987, p. 747.

[13] J. Policzkiewicz, W. Siedlecki, E. Wengerek, *Wzory pism procesowych w sprawach cywilnych*, Warszawa 1980, p. 387 ff. (pattern No. 136).

[14] The estate is unclaimed, if none of the heirs have taken possession of it (administration, use, storage). Cf. Decision of the Supreme Court of 16 March 1952, C 1006/52, OSN 1953, No. 3, item 75; Decision of the Supreme Court of 5 April 1956, III CR 566/56, OSN 1956, No. 4, item 115. It may also appear that the estate is unclaimed, if the testator has not left the last will and testament and persons entitled to inherit by law who are known to the court declared to renounce the estate. Cf. Order of justices' clerk of the Voivodeship Administrative Court in Poznań of 22 January 2015, III SA/Po 932/11, LEX No. 1644220.

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curator of the estate[15]. In this case, a probate court makes an *ex officio* motion on the appointment of the curator of the estate[16]. A separate issue is the remuneration of the curator of the estate appointed upon the request of, *inter alia*, a state authority that considers the case in which a party to or a participant of the proceedings died. In this case, for instance, an administrative court may request that a curator of the estate be appointed by a probate court (civil-law court)[17]. However, this right may be exercised, if the curator of the estate has not been appointed within one year of the suspension of proceedings and any legal successors of the deceased party have not appeared or have not been appointed (Article 128 § 2 of the Law on Proceedings Before Administrative Courts[18]). In the first place, however, proceedings before the administrative court are suspended *ex officio* in the event of the death of the party or its statutory representative (Article 124 § 1 (1) of the LPAC). This is not the case, however, where the subject of proceedings solely pertains to rights and obligations closely related to the deceased (Article 124 § 3 of the LPAC).

[15] J. Gudowski, *Komentarz do art. 666 k.p.c.*, [in:] *Kodeks postępowania cywilnego. Komentarz*, t. 4: *Postępowanie rozpoznawcze. Postępowanie zabezpieczające*, red. T. Ereciński, Warszawa 2016, p. 536; T. Demendecki, *Komentarz do art. 666 k.p.c.*, [in:] *Kodeks postępowania cywilnego*, red. A. Jakubecki, Warszawa 2010, p. 831; L. Kaltenbek, W. Żurek, *Prawo spadkowe*, Warszawa 2011, p. 121.

[16] P. Pruś, *Komentarz do art. 666 k.p.c.*, [in:] *Kodeks postępowania cywilnego. Komentarz*, red. M. Manowska, Warszawa 2013, p. 1181.

[17] Not only is the court empowered to ask to appoint the curator of the estate, but also a justices' clerk under Article 128 § 2 of the Law on Proceedings Before Administrative Courts. See M. Sieniuć, *Nowe uprawnienia orzecznicze referendarza sądowego w postępowaniu sądowoadministracyjnym*, [in:] *Sądowa kontrola administracji publicznej. Doświadczenia, dylematy, perspektywy*, red. E. Wójcicka, Częstochowa 2017, p. 147; Order of justices' clerk of the Voivodeship Administrative Court in Warszawa of 28 April 2016, IV SA/Wa 353/14; Order of senior justices' clerk of the Voivodeship Administrative Court in Warszawa of 20 May 2016, III SA/Wa 2258/14; Order of justices' clerk of the Voivodeship Administrative Court in Szczecin of 15 November 2016, II SA/Sz 839/15; Order of senior justices' clerk of the Voivodeship Administrative Court in Gliwice of 13 April 2017, II SO/Gl 1/16; Order of senior justices' clerk of the Voivodeship Administrative Court in Gliwice of 1 June 2017, II SA/Gl 245/16; Order of senior justices' clerk of the Voivodeship Administrative Court in Warszawa of 28 June 2018, III SA/Wa 2475/15, LEX No. 2532803.

[18] The Act of 30 August 2002 – Law on Proceedings before Administrative Courts (Journal of Laws 2018, item 1302, consolidated text), hereinafter referred to as LPAC.

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THE SEQUENCE OF APPLICATION OF REGULATIONS THAT SPECIFY THE SOURCES OF REMUNERATION AND REIMBURSEMENT OF THE EXPENSES OF THE CURATOR OF THE ESTATE FOR ACTIVITIES CARRIED OUT IN PROCEEDINGS BEFORE ADMINISTRATIVE COURTS

1. Procedural regulations on management of real estate under enforcement proceedings

The rules for determining the remuneration of the curator of the estate have been implemented by the legislator by reference to the appropriate application of procedural regulations on the management of real estate under enforcement proceedings (Articles 931–941 of the CCP in connection with the second sentence of Article 667 § 2 of the CCP). In this way, the curator of the estate may request the remuneration and reimbursement of his expenses with respect to the management of the unclaimed estate (first sentence of Article 939 § 1 of the CCP). In practice, the amount of the curator's remuneration for the activities is determined by the judge[19]. At the same time, the legislator's stipulation that the remuneration and expenses of the curator of the estate are covered from the administered estate (Article 940 § 1 of the CCP) remains essential. However, the curator of the estate is not obliged to seek the testator's assets (which is part of the estate from which the remuneration may be paid). The initial state of the assets included in the estate should be specified in the estate inventory drawn up after the death of the testator[20]. Where such assets are found, the remuneration and reimbursement of the expenses incurred by the curator of the estate should primarily be covered from revenues generated by the estate. The amount of such revenues generated from the estate administered by the curator of the estate should also be specified in the estate administration report. At the same time, the curator of the estate may not dispose of the estate in order to cover any amounts that refer to his remuneration and reimbursement of expenses. Where the estate does not generate any income, the costs (amounts due) incurred by the curator of the estate should not be imposed on the curator of the estate, which means that it is necessary to determine the source of the payment of such amounts due[21].

If it is not possible to cover the remuneration of the curator of the estate and his expenses from the estate, it is not possible, however, to automatically oblige to pay such amounts by an entity which had a legal and actual interest in appointing

[19] Order of Court of District in Kraków of 21 August 2014, II Ca 594/14, LEX No. 1851521.

[20] Order of justices' clerk of the Voivodeship Administrative Court in Poznań of 22 January 2015, III SA/Po 932/11, LEX No. 1644220.

[21] Order of Court of District in Kraków of 9 September 2014, II Ca 901/14, LEX No. 1851601.

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such curator, considering him as a party to the proceedings, taking into account Article 520 of the CCP[22]. This view may be supported by the following arguments. First, the curator of the estate is not a party to the proceedings, although he represents one of the parties to the proceedings. However, even if that were the case, it would have been possible to settle the costs only in the final ruling. However, this would not be beneficial for the curator of the estate in view of the possibility of earlier determination of the remuneration of such curator for the activities performed and reimbursement of the expenses incurred. Secondly, if the curator of the estate is considered as a party to the proceedings, his interests may be disregarded as contrary to the interests of other parties to the proceedings. It is then also possible for the curator to incur the costs of the proceedings associated with his participation in the case, which could leave him with unpaid remuneration and expenses incurred. Thirdly, further attempts may be made to determine the obligation to recover such due amounts in accordance with the applicable law.

2. General legal and substantive regulations concerning the curator

If it is not possible to remunerate and reimburse the expenses incurred by the curator of the estate for his activities, Articles 931–941 of the CCP do not provide for any further rules for seeking sources of covering such amounts due. In this respect, the proper application of the regulation on the determination of remuneration and reimbursement of expenses incurred by curators appointed for a party in a civil-law case should be considered unjustified[23]. This regulation defines the principles of remunerating curators who carry out procedural activities, primarily, before courts of law. In addition, these regulations apply to procedural curators, *id est* curators appointed for a given party to proceedings in a specific case[24]. In this case, the problem should be handled in accordance with the directives of construction in the *lex generali* regulations because *lex specialis* regulations do not solve this problem. Such a solution seems to be consistent in terms of the system as the curator of the estate, despite being appointed on the basis of procedural regulations, is of a substantive and legal nature, even if he acts in court-administrative proceedings, assuming a functional procedural nature[25]. In the absence of procedural regulations that may be applied to the sources of the curator's remuneration, it seems justified

[22] *Ibidem*.

[23] Regulation of the Minister of Justice of 9 March 2018 on Stating Amount of Remuneration and Reimbursement of Expenses of the Curators Appointed in Civil Case (Journal of Laws 2018, item 536) issued on the base of Article 9 (3) the Act of 28 July 2005 on Judicial Costs in Civil Cases (Journal of Laws 2018, item 300 and 398).

[24] Order of the Supreme Court of 3 February 1970, II CZ 32/69, OSNAP 1970, No. 9, item 165; K. Korzan, *Glosa do postanowienia w sprawie II CZ 32/69*, OSPiKA 1970, nr 11, poz. 226.

[25] T.M. Niemiec, *op. cit.*, p. 41.

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to seek guidance in this respect in general provisions of substantive law regulating the curatorship (Article 178 § 2 of the FGC).

If no legal norms may automatically apply to the facts of a given case, it is allowed to "create" such a norm in the civil-law system[26]. In this way, it is possible to determine the sequence of sources of the curator's remuneration on the basis of substantive and legal regulations (second sentence of Article 179 § 1 of the FGC). As a result, this provision also applies to the curatorship regulated beyond the Family and Guardianship Code, if it is not in conflict with specific regulations[27]. As for the curator of the estate, there are no specific provisions that regulate the sources of covering his remuneration from sources other than the estate, which might be inconsistent with other regulations that determine the sources of the curator's remuneration in the Polish legal system. There is, therefore, no obstacle to the application of substantive law. According to these regulations, the remuneration of the curator of the estate should be primarily covered from the estate or the assets of actual owners of the estate, *id est* the heirs for whom the curator of the estate has been appointed. Nevertheless, it may appear that it is not possible to remunerate the curator of the estate from the aforesaid sources as the estate includes, *inter alia*, debts that exceed the value of assets included in the estate, or it is not possible to determine the heirs or their legal successors, or the heirs who have been found do not have any income or assets. In this case, the curator will not be obliged to seek the aforesaid heirs' assets from which his remuneration could be paid. Therefore, such remuneration should be paid by the person who has applied for the appointment of the curator. Then, the remuneration and reimbursement of expenses may result from revenues or assets of the person who has applied for the appointment of the curator. However, it should be taken into account that the applicant is not always willing to finance the prolonged activity of the curator of the estate. In practice, this may apply to a person who has realised his or her own interest (legal or financial) through the appointment of the curator.

In the event of the prolonged curatorship of the estate, the obligation to remunerate the curator and reimburse his expenses may also be effectively challenged by the person that applied for his appointment in the light of the principles of social coexistence[28]. In such a case, it may be considered to remunerate the curator of the estate from several sources in the sequence indicated in the second sentence of Article 179 § 1 of the FGC, depending on their exhaustion, *id est* to grant remuneration from the estate up to its amount, and in the remaining part from the

[26] M. Koszowski, *O lukach w prawie rzadko spotykanych słów kilka*, „Archiwum Filozofii Prawa i Filozofii Społecznej" 2013, nr 1, p. 113.

[27] G. Matusik, *Komentarz do art. 179 k.r.o.*, p. 1785.

[28] Order of Court of District in Kraków of 9 September 2014.

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assets of the person who applies for the appointment of the curator of the estate[29]. In literature, this mechanism is also used when the curator's remuneration is partly covered from the assets of the person for whom the curatorship was established and partly from the assets of the person applying for the appointment of the curator, and even partly by public funds[30]. Attempts to remunerate the curator of the estate in this way are justified by the fact that there are no general substantive and legal regulations which exhaustively define the sources of the curator's remuneration.

In practice, the lack of regulations pertaining to the sources of the curator's remuneration occurs in the following cases: firstly, in the absence of estate, when the person who applied for the appointment of the curator of the estate has no income or assets, and in exceptional situations he or she is not interested in financing the curator; secondly, in the absence of estate, when the curator of the estate was appointed upon the request of another state authority (e.g. an administrative court); thirdly, in the absence of estate, when the curator of the estate was appointed *ex officio*.

3. General legal and substantive regulations concerning the curatorship

The next step in the process of determining the sources of the curator's remuneration seems to be acceptable when the remuneration cannot be covered from the estate or from the entities applying for his appointment. In the absence of exhaustive general rules of a material and legal nature concerning the determination of the sources of the curator's remuneration, it is possible to consider the legitimacy of seeking further indications regarding the curator's remuneration in the provisions regulating the guardianship (Articles 145–177 of the FGC). Such provisions may be applied accordingly to the extent not regulated in relation to the curatorship (Article 178 § 2 of the FGC). In practice, the aforesaid provisions on curatorship may only be applied in the third step, *id est* only when the provisions on curatorship of the estate and general provisions on curatorship set forth in the Family and Guardianship Code do not provide for any solutions excluding the possibility of applying the provisions on curatorship and, at the same time, it is not contrary to the purpose of establishing the curatorship of the estate[31]. In practice, such a solution is not opposed by any regulations on curatorship that do not contain exhaustive rules on the sources of the remuneration of the curator of the estate. The reference to the application of the provisions on curatorship is connected with more extensive directives of the legislator, according to which in

[29] R. Zegadło, *op. cit.*, p. 53.

[30] N. Krej, *Komentarz do art. 597 k.p.c., pkt 5*, [in:] *Kodeks postępowania cywilnego. Komentarz*, red. E. Marszałkowska-Krześ, Legalis; G. Matusik, *Komentarz do art. 178 k.r.o.*, [in:] *Komentarze Prawa Prywatnego…*, p. 1783.

[31] G. Matusik, *Komentarz do art. 178 k.r.o.*, p. 1779.

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case of the lack of income or assets of the person for whom curatorship has been established, the remuneration for curatorship is covered from public funds under the provisions on social welfare (Article 162 § 3 of the FGC in connection with Article 178 § 2 of the FGC). However, the standpoint of literature is that there are no normative grounds for charging the State Treasury with the costs of curatorship when the curator is appointed *ex officio* and a person subject to curatorship does not have any assets[32]. Simultaneously, there is a position that there are no grounds for remunerating and reimbursing the curator appointed *ex officio* under Article 179 of the FGC from public funds[33]. Consequently, the curator appointed *ex officio* or by the administrative court would be in the same situation.

3.1. Special case of the curator of the estate appointed upon the request of the administrative court

A special case is when the curator of the estate is appointed upon the request of an administrative court. This situation also shows some similarities to the *ex officio* appointment of the curator of the estate by a probate court. In both cases, there is no person who could pay the curator's remuneration. Furthermore, if the estate cannot be used to remunerate the curator of the estate appointed upon the request of a state authority, as well as the curator appointed *ex officio*, there are no regulations which would straightforwardly indicate how to deal with such a case. There are, therefore, certain deficiencies in the legal status that may lead to the conclusion that there are no exhaustive (complete) legal regulations in this matter[34]. The norms of the legal system do not obviously provide for all situations that may occur in practice, hence it could be considered whether there is a legal loophole in this case[35]. The legislator provided for specific legal consequences such as the curator's entitlement to remuneration for his functions but it did not implement appropriate regulations that include a complete set of rules specifying how this right may be exercised in each factual situation[36]. There is no provision that indicates the source of remuneration of the curator of the estate when the person who applied for his appointment has no financial means. It was generally noticed in literature that

[32] S. Kalus, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, red. K. Piasecki, Warszawa 2011, pp. 1087–1095.

[33] J. Ignatowicz, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, red. K. Pietrzykowski, Warszawa 2010, p. 1208.

[34] J. Wróblewski, *Pojęcie systemu prawa*, [in:] W. Lang, J. Wróblewski, S. Zawadzki, *Teoria państwa i prawa*, Warszawa 1986, p. 407; *idem*, *Zagadnienie zupełności systemu prawa*, [in:] W. Lang, J. Wróblewski, S. Zawadzki, *op. cit*.

[35] E. Skorczyńska, *Luka w prawie. Istota zjawiska oraz jego znaczenie dla prawa administracyjnego*, Warszawa 2017, p. 27 ff.

[36] S. Wronkowska, [in:] S. Wronkowska, Z. Ziembiński, *Zarys teorii prawa*, Poznań 1997, p. 183.

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there is a legal loophole when a curator was appointed *ex officio* and the person under curatorship does not have any assets[37]. A similar situation occurs when the curator of the estate was appointed upon the request of the administrative court, and the estate (or assets of the heirs found) is not sufficient to cover the curator's remuneration.

It is obvious that attempts can be made to classify the case as, for instance, a technical loophole which, due to the lack or incompleteness of the procedural regulation, makes it impossible to make a certain type of decision[38]. Therefore, it may also be considered whether there is an *extra legem* loophole, due to the lack of an automatically applicable rule of law[39]. In the present case, *prima facie*, there is no rule of law which could automatically be applied to determine the source of remuneration of the curator of the estate appointed either *ex officio* or upon the request of the administrative court. Such a loophole is of an evaluative (axiological) nature and can be classified as the so-called apparent loopholes, *id est* there is no real absence of legal regulation, but this absence is only from someone's point of view[40]. It seems that such a case may be the source of remuneration of the curator of the estate. From his point of view, the right to receive remuneration in the Polish legal system is not exhaustively connected with a complete set of rules determining the rules of its granting.

The legislator's previous negligence or erroneous activity that resulted in the legal loophole may also be eliminated in the process of interpreting and applying the law. In practice, public authorities are obliged to correctly construe the applicable rules of law, which enables the use of different rules of linguistic, systemic, functional and teleological interpretation[41]. In case-law, it is acceptable to derogate from the principle of primacy of linguistic interpretation in favour of a systemic, functional and teleological one, even if the provision is clear and obvious[42]. In exceptional cases "for the removal of evident violations of constitutional law",

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[37] J. Zatorska, *Komentarz do zmiany art. 179*, [in:] *Komentarz do ustawy z 6.11.2008 roku o zmianie ustawy – Kodeks rodzinny i opiekuńczy oraz niektórych innych ustaw (Dz.U. 2008.220.1431)*, LEX/el.; A. Łazarska, *op. cit.*, p. 330.

[38] Z. Ziembiński, *Problemy podstawowe prawoznawstwa*, Warszawa 1980, pp. 223–224; L. Morawski, *Zasady wykładni prawa*, Toruń 2010, p. 149.

[39] M. Koszowski, *O lukach w prawie…*, pp. 109–122.

[40] S. Wronkowska, [in:] A. Redelbach, S. Wronkowska, Z. Ziembiński, *Zarys teorii państwa i prawa*, Warszawa 1994, p. 222; L. Morawski, *Zasady wykładni…*, p. 150; S. Wronkowska, *Podstawowe pojęcia prawa i prawoznawstwa*, Poznań 2005, pp. 104–105.

[41] L. Morawski, *Zasady wykładni…*, p. 71.

[42] Judgement of the Supreme Court of 6 November 2003, III RN 133/02, OSNP 2004, No. 15, item 254; judgement of the Voivodeship Administrative Court in Szczecin of 4 April 2012, II SA/Sz 72/12, LEX No. 1292019; judgement of the Voivodeship Administrative Court in Rzeszów of 19 December 2012, II SA/Rz 902/12, LEX No. 1312602.

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it is, therefore, acceptable to fill a legal loophole by using the analogy method[43]. On the basis of various types of cases, literature also contains views, according to which, the application of the analogy method remains systemically acceptable with respect to the procedural and material and legal regulations[44]. As a result, the search for regulations in the legal system which may constitute the basis for the curator's remuneration and reimbursement of his expenses by analogy may be considered as legitimate[45]. First of all, the so-called *analogia legis* should apply which "extends" the scope of the summative norm (automatically applicable) to the facts not covered by any normative regulation[46].

[43] Judgement of the Supreme Administrative Court of 24 October 2006, I FSK 93/06, OSP 2007, No. 12, item 137, LEX No. 279784; judgement of the Supreme Administrative Court of 19 December 2013, I OSK 2108/13, LEX No. 1528998; judgement of the Supreme Administrative Court of 19 December 2013, I OSK 2636/12, LEX No. 1529034; judgement of the Supreme Administrative Court of 19 December 2013, I OSK 2748/12, LEX No. 1529036; judgement of the Voivodeship Administrative Court in Szczecin of 22 February 2012, II SA/Sz 1372/11, LEX No. 1121510; judgement of the Voivodeship Administrative Court in Szczecin of 4 April 2012, II SA/Sz 72/12, LEX No. 1292019; judgement of the Voivodeship Administrative Court in Rzeszów of 19 December 2012, II SA/Rz 902/12, LEX No. 1312602; judgement of the Voivodeship Administrative Court in Warszawa of 10 July 2014, IV SA/Wa 930/14, LEX No. 1562909; judgement of the Voivodeship Administrative Court in Poznań of 27 August 2014, II SA/Po 549/14, LEX No. 1513476; judgement of the Voivodeship Administrative Court in Poznań of 9 December 2014, II SA/Po 769/14, LEX No. 1646269; judgement of the Voivodeship Administrative Court in Poznań of 22 January 2014, II SA/Po 602/14, LEX No. 1807402; judgement of the Voivodeship Administrative Court in Łodź of 12 May 2015, III SA/Łd 290/15, LEX No. 1793450; judgement of the Voivodeship Administrative Court in Gdańsk of 28 May 2015, III SA/Gd 344/15, LEX No. 1760958; judgement of the Voivodeship Administrative Court in Poznań of 30 June 2015, II SA/Po 255/15, LEX No. 1807334; judgement of the Voivodeship Administrative Court in Warszawa of 7 October 2015, VIII SA/Wa 155/15, LEX No. 1941520; judgement of the Voivodeship Administrative Court in Warszawa of 7 October 2015, VIII SA/Wa 288/15, LEX No. 1941535; judgement of the Voivodeship Administrative Court in Poznań of 16 March 2016, II SA/Po 38/16, LEX No. 2027120; judgement of the Voivodeship Administrative Court in Kielce of 20 July 2016, II SAB/Ke 40/16, LEX No. 2105461; judgement of the Voivodeship Administrative Court in Gliwice of 8 November 2016, IV SA/Gl 577/16, LEX No. 2159454; judgement of the Voivodship Administrative Court in Kraków of 20 December 2016, III SAB/Kr 59/16, LEX No. 2190245; judgement of the Voivodeship Administrative Court in Kraków of 20 April 2017, III SA/Kr 150/17, LEX No. 2285871; judgement of the Voivodeship Administrative Court in Gliwice of 10 January 2018, IV SA/Gl 529/17, LEX No. 2440244; judgement of the Voivodeship Administrative Court in Gdańsku of 19 January 2018, III SA/Gd 931/17, LEX No. 2439388; Order of the Voivodeship Administrative Court in Kraków of 29 January 2014, III SA/Kr 780/13, LEX No. 1584899; Order of the Voivodeship Administrative Court in Kraków of 15 February 2017, III SA/Kr 1668/16, LEX No. 2219444.

[44] B. Gawlik, *Glosa do uchwały SN z dnia 18 listopada 1994 r., sygn. III CZP 146/94*, OSN 1995, nr 7–8, poz. 160; J. Pazdan, *Wybór prawa właściwego dla pełnomocnictwa*, „Państwo i Prawo" 1991, z. 1, pp. 65–72; E. Łętowska, *Podstawy prawa cywilnego*, Warszawa 1994, p. 56; B. Brzeziński, *Szkice z wykładni prawa podatkowego*, Gdańsk 2002, pp. 63–80.

[45] J. Studzińska, *op. cit.*, p. 755; D. Miotała, *op. cit.*, p. 329.

[46] J. Nowacki, *Analogia legis*, Warszawa 1966, pp. 9–61; L. Morawski, *Wstęp do prawoznawstwa*, Toruń 2011, p. 160.

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This solution seems justified as there is no law that precludes the application of analogy in the interpretation and application of the law pertaining to the curator of the estate. Primarily, this seems to be advantageous to the curator of the estate, considering his claims for the performance of certain functions that will not await the implementation of relevant regulations. It is, therefore, possible to adapt the views formed with regard to the absence of sources of remuneration for other types of curators. In particular, the case-law has clearly confirmed (only in relation to the registry curator) that the legislator's intention was to include in the rule for the payment of remuneration from the State Treasury those cases that refer to the lack of grounds for payment of remuneration from the assets of a person subject to curatorship (e.g. a lack of assets of a legal person) or the lack of grounds for payment of remuneration from the assets of an applicant for its appointment[47]. In the literature there are also views (related to the registry curator) according to which, if the person for whom the curator was appointed has no assets, then it should be covered by the person requesting his appointment, and if such a person has no assets, then the remuneration should be covered by the State Treasury[48]. Literature on other branches of law includes similar trends when such costs of appointing the curator cannot be reimbursed otherwise. In criminal cases, for example, it is proposed to charge the State Treasury with the costs of remuneration of curators appointed for child victims, if such costs cannot be covered by persons represented in court[49]. Against this background, there are views that all costs related to the curator's activity should be covered by the State Treasury[50]. In the latter case, however, it is not possible to clearly define which regulations would form the basis for the application of such a solution. However, this does not change the general rule of Article 162 § 3 of the FGC, which enables the remuneration of the curator of the estate to be covered by the State Treasury. This will be the case, if there is no estate or income of the heirs found, and also if there is no property or no willingness to cover the remuneration of the curator of the estate by the person that applied for its appointment. Therefore, it may be assumed that the remuneration of the curator of the estate, in case of the inability to cover it under Article 179 § 1 of the FGC, may be covered by public funds on the basis of the appropriate application of the general rule expressed in relation to the curator's remuneration (Article 162 § 3 of the FGC in connection with Article 178 § 2 of the FGC)[51]. This rule also seems to be confirmed by the provisions on proceedings in cases of custody (Articles

[47] Resolution of the Supreme Court of 28 March 2014, III CZP 6/14, OSNC 2015, No. 1, item 5.

[48] A. Michnik, *Komentarz do art. 32*, [in:] *Krajowy Rejestr Sądowy. Komentarz*, LEX/el.

[49] A.Z. Krawiec, *Kurator jako podmiot reprezentujący małoletniego pokrzywdzonego w postępowaniu karnym*, „Prokuratura i Prawo" 2013, nr 11, p. 134; S. Durczak-Żochowska, *op. cit.*, p. 97.

[50] P. Suski, *Stowarzyszenia w prawie polskim*, Warszawa 2002, p. 174.

[51] Resolution of the Supreme Court of 28 March 2014, III CZP 6/14, OSNC 2015, No. 1, item 5; Order of the Supreme Court of 8 May 2015, III CZP 16/15, LEX No. 1749596; J. Gajda, *Komentarz*

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590–598 of the CCP), which may be applied in a subsidiary manner due to the reference to their appropriate application on part of procedural regulations concerning the establishment of curatorship (Article 605 of the CCP). Consequently, the court-appointed guardian may be authorised to collect remuneration from the income or assets of the dependant or to obtain remuneration from public funds (Article 597 § 1 of the CCP).

3.2. Proposals to define the method of covering the remuneration of the curator of the estate appointed *ex officio* or upon the request of a state authority – *de lege lata* postulates

From the point of view of the curator of the estate, the main issue is the granting of remuneration and reimbursement of expenses by the probate court, while the secondary issue is the source of funds to cover them. There is no doubt that the inability to determine entities obliged to cover the curator's remuneration and to reimburse the expenses incurred should not adversely affect the curator's entitlement to the remuneration and reimbursement of the expenses incurred. The legislator assumed that this obligation should be provided by the entity which granted it[52]. It is obvious that it is possible to systemically supplement the missing regulations regulating the curator's remuneration. Then, the State Treasury will be the only person obliged (forced) to cover them, as it is its duty to take care about the unclaimed estate[53]. First of all, in such a case (in the absence of estate) it is worth considering whether it is possible to cover the remuneration of the curator of the estate simultaneously from several sources, determining their share depending on their exhaustion as referred to in Article 179 of the FGC, *id est* to remunerate from the assets of the person who applies for the appointment of the curator of the estate up to the amount of such assets and the remaining part from public funds[54].

However, it is still doubtful from which public funds such remuneration should be paid. In this respect, different technical methods of remunerating the curator from public funds can be proposed. In this case, various options could be considered. When the heirs do not have any assets or full legal capacity, the curator's activities are similar to those carried out by the guardian, hence it seems acceptable to remunerate the curator of the estate from the funds earmarked for social assistance[55]. In this respect, there are views that the lack of funds to remunerate the curator results

do art. 179 k.r.o., [in:] J. Gajda, J. Ignatowicz, J. Pietrzykowski, K. Pietrzykowski, J. Winiarz, *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2018, o. 1106.

[52] A. Łazarska, *op. cit.*, p. 331.

[53] Order of Court of District in Kraków of 9 September 2014, II Ca 901/14, LEX No. 1851601.

[54] G. Matusik, *Komentarz do art. 179 k.r.o.*, p. 1783.

[55] The Act of 12 March 2004 on Social Welfare (Journal of Laws 2015, item 163, consolidated text).

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in remunerating him from public funds under the Social Welfare Act[56]. In this case, such remuneration is paid by a commune (Article 18 (1) (9) of the Social Welfare Act). On the other hand, in case of the heirs who do not have any assets but have full legal capacity to act, the reference to the appropriate application of the provisions on granting the remuneration from the funds earmarked for social welfare to the curator of the estate loses its *ratio legis* and seems unjustified[57]. Then, granting remuneration to the curator from public funds could be considered as a non-returnable state aid, which is a kind of benefit from the social welfare fund[58].

It is also worth considering the use of public funds used by the government administration (governor) in the field of the probate court's rulings. In such a case, the administration authority could pay an appropriate remuneration for the curatorship and reimburse the costs incurred, if the court of law decides to cover them from public funds that come from this source[59]. In such a situation, the public administration authority would only carry out a material and technical activity that includes the payment of remuneration[60]. Alternatively, the probate court that appointed the curator of the estate could remunerate the curator of the estate from the public funds of the State Treasury. In particular, the remuneration of the *ex officio* curator for a legal person who has no assets or income necessary to cover such remuneration is paid from public funds temporarily held by the registration court on behalf of the State Treasury[61]. The determination of the sources of the curator's remuneration appointed upon the request of the administrative court should be considered in a similar way.

CONCLUSIONS AND RECOMMENDATIONS

The appointment of the curator of the estate may be essential to ensure that the estate is properly administered and, consequently, that the court proceedings are properly conducted. The curator of the estate may be appointed by the probate court *ex officio* or upon the request. Depending on the entity applying for the appointment of the curator, this may have an impact on the manner in which the principles of remuneration for his activities are determined. In this respect, the regulations on the administration within the course of real estate enforcement apply in the first place,

[56] H. Ciepła, *op. cit*.

[57] It is not justified to use social welfare funds when determining the source of the register curator's remuneration, as in case of remuneration for the guardianship.

[58] R. Zegadło, *op. cit.*, p. 56.

[59] Judgement of the Voivodeship Administrative Court in Rzeszów of 19 December 2012, II SA/Rz 902/12, LEX No. 1312602.

[60] *Ibidem*.

[61] Resolution of the Supreme Court of 13 March 2015, III CZP 4/15, OSNC 2016, No. 2, item 19.

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and, alternatively, there may apply substantive regulations of a general nature included in the Family and Guardianship Code that govern curatorship and guardianship. In case of representation of unknown heirs, it is acceptable to apply general provisions of the Family and Guardianship Code that are corresponding to the curatorship[62]. Such a solution seems to be consistent in terms of the system as the curator of the estate, despite being appointed on the basis of procedural regulations, is of a substantive and legal nature, even if he acts in court-administrative proceedings, assuming a functional procedural nature. In the absence of provisions that specify the source of the curator's remuneration, such remuneration may be paid from public funds. In such a case, the probate court is obliged to determine who specifically will be obliged to pay the remuneration and reimburse the expenses incurred by the curator of the estate. Then, it is essential to specify the entity (institution) that will be obliged to pay them on behalf of the State Treasury (*statio fisci* or *statio municipi*). Depending on the activities carried out by the curator of the estate, the amounts available to the probate court or a public or self-government administrative authority may be paid out. This seems to be quite complex, but it is one of the ways of resolving the unclear issue of the curator's remuneration.

Attempts made in the article to solve problems arising from the determination of the source of the curator's remuneration are undoubtedly *de lege lata* postulates as they make it possible to satisfy the claims of persons acting as the curator of the estate according to the applicable regulations. In this case, decisions may be made on the remuneration of the curator of the estate through specifying the applicable rule of law of an abstract and general nature, which is connected with the potential application of a similar decision to similar cases in the future[63]. In this way, a judicial decision may – by analogy – be binding on similar cases in the future. Therefore, rulings made by the court in this respect may be precedents of a legislative nature in the future[64]. Although the precedent does not constitute an official source of law as it was not listed in the closed catalogue of written sources of statute law as referred to in Articles 87–94 of the Constitution of the Republic of Poland[65], it does not prevent circumstances not listed therein from being considered as legislative[66]. It is, therefore, necessary to take a broader systemic view on the discussed issue of transfer of remuneration and reimbursement of expenses of the curator of the estate,

[62] Order of the Supreme Court of 14 December 1998, III CKN 917/98, LEX No. 1215098.

[63] M. Koszowski, *Anglosaska doktryna precedensu. Porównanie z polską praktyką orzeczniczą*, Warszawa 2007, pp. 13–14, 141–142.

[64] M. Zirk-Sadowski, *Precedens a tzw. decyzja prawotwórcza*, „Państwo i Prawo" 1980, z. 6, pp. 69–79.

[65] The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, No. 78, item 483).

[66] M. Safjan, *Refleksje o roli zwyczaju*, [in:] *Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana Profesorowi Stanisławowi Sołtysińskiemu*, red. A. Nowicka, Poznań 2005, p. 90.

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taking into account general solutions applicable to other curators. In this respect of *de lege ferenda* the unification of the nature of curatorship based on the provisions of the Family and Guardianship Code can be promoted through recognising that each curatorship is of the nature of substantive law, and only exceptionally can it obtain the status of procedural law, if such a scope is designated by the court[67]. This view is certainly of an ordering nature within the concepts applicable to the applicable laws. Its adoption does not even entail the need to amend the remuneration regulations for various kinds of curators. As a rule, it does not change the monistic system for the appointment and remuneration of the curator of the estate by courts, even if procedural steps are taken before other authorities and courts.

The introduction of a single universal solution to the remuneration of all curators could certainly resolve many of the existing dogmatic and jurisprudence doubts. Such activities may be carried out either through amending the Family and Guardianship Code or through implementing the necessary regulations into the Act on Court Fees, which has already been repeatedly postulated for curators appointed on the basis of the Code of Civil Procedure and the Family and Guardianship Code[68]. Alternatively, it is also necessary to consider another view presented in literature[69], according to which the issue of remuneration for curatorship should be settled under procedural regulations of a special nature with respect to Article 179 of the FGC, as the authority that conducts the proceedings can best assess the procedural involvement of curators in their activities. In this case, however, it is necessary to implement into the legal system such provisions (specific to each procedure) that will contain specific rules for the payment of the remuneration of the curator of the estate.

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[67] K. Politowicz, *Kurator dla osoby nieobecnej w postępowaniu administracyjnym na tle innych postępowań. Część I: Ogólne przesłanki stosowania kurateli, kurator jako instytucja prawa cywilnego*, „Casus" 2012, nr 63, p. 47.

[68] K. Gonera, *Komentarz do ustawy o kosztach sądowych w sprawach cywilnych*, Warszawa 2006, pp. 76–77.

[69] R. Zegadło, *op. cit.*, pp. 53–54.

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STRESZCZENIE

Kurator spadku może zostać ustanowiony przez sąd powszechny nie tylko z urzędu, lecz także na wniosek sądu administracyjnego. Reguły określające przyznanie wynagrodzenia za czynności podejmowane przed sądem administracyjnym w takim przypadku pozostają zawarte w przepisach prawa procesowego oraz prawa materialnego prywatnego. Nie przewidują one jednak w sposób wyczerpujący wszystkich przypadków przyznania wynagrodzenia kuratorowi spadku z tytułu sprawowanej funkcji. W efekcie pojawia się potrzeba rozwiązania takich problemów za pośrednictwem reguł, które nie zostały wprost wyrażone w obowiązujących przepisach. Stwarza to zatem możliwość zaproponowania rozwiązań tego rodzaju sytuacji w praktyce. Z uwagi na postulat zachowania spójności systemu prawa należy podejmować próby określenia podmiotów odpowiedzialnych za pokrycie omawianych należności na podstawie obowiązujących regulacji. W zależności od czynności podejmowanych przez kuratora spadku może to być sąd spadku bądź organ administracji publicznej lub samorządowej. Z uwagi na postulat pewności prawa należy postulować uwzględnienie funkcjonujących w literaturze poglądów prawnych w celu wprowadzenia regulacji, które będą uznawane za wyczerpujące z punktu widzenia podmiotów stosujących prawo.

Słowa kluczowe: kurator spadku; zasady przyznawania wynagrodzenia; sądy administracyjne