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Abuse of Subjective Right in Cases of Establishing a Regime of Separate Property and Determining Unequal Shares in the Common Property

Nadużycie prawa podmiotowego w sprawach o ustanowienie rozdzielności majątkowej i ustalenie nierównych udziałów w majątku wspólnym

SUMMARY

The purpose of the study is to determine the scope of application of the construction of abuse of subjective rights in cases involving the establishment of a regime of separate property by the court and the determination of unequal shares in the common property. The prerequisite for both the establishment of the regime of separate property and the determination of unequal shares in the common property are "important reasons". In order to determine the admissibility of the application of Article 5 of the Polish Civil Code it is therefore necessary to define the meaning of the terms "important reasons" and "rules of social coexistence". It is assumed herein that general clauses are a kind of reference, in terms of the interpretation of provisions to generically defined norms and non-legal assessments, which have, in principle, an axiological moral justification and, consequently, that only evaluative phrases, as "rules of social coexistence" can be referred to using this term. "Important reasons", on the other hand, are not an evaluative phrase but an estimative phrase and therefore not a general clause. It was also considered that it could not be ruled the assessment, under Article 5 of the Polish Civil Code, of the request for the regime of separate property to be established by the court or the request for the establishment of unequal shares in the common property, taking into account the extent to which each of the spouses contributed to its creation.

Keywords: separate property; unequal shares in the common property; abuse of subjective right; rules of social coexistence; important reasons

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INTRODUCTION

The rights arising from existing relations between spouses are of a personal nature: property or non-property civil-law rights[1]. Matrimonial property rights, despite having a legal nature similar to property rights from civil-law relationships, are nevertheless characterized by a peculiar nature. The literature points out that the peculiarity of matrimonial property rights lies in the fact that they are rights closely linked to personal relations between spouses and are therefore effective only between them and are of a relative right nature. These rights are often shaped *ad usum familiae*, so their existence and content depend on the needs of the family, which distinguishes them from other property rights but at the same time make them more difficult to characterize[2]. Moreover, these rights appear to be much more subject to the operation of general clauses, in particular the rule of social coexistence, since they are created taking into account moral assumptions to a greater extent than other rights. That characteristic arises from the above-mentioned close link between matrimonial property relations and non-property relations[3].

Matrimonial property rights include, in particular, rights arising from the relationship matrimonial property community (whether statutory or contractual). Such a subjective right is the possibility for each spouse to demand the separate property regime to be established by the court (Article 52 § 1 of the Family and Guardianship Code[4]) and the possibility for each spouse to demand the determination of shares in the common property taking into account the extent to which each of them contributed to the creation of that property (Article 43 § 2 FGC)[5]. The prerequisite for both the establishment of the regime of separate property and the determination of unequal shares in the common property are important reasons. The use of the phrase "important reasons" by the legislature is intended to leave a certain degree of assessment discretion to the law-applying body. However, this phrase causes difficulties in interpretation[6]. In particular, this concerns the possibility of invok-

[1] Zob. M. Pyziak-Szafnicka, [in:] *System Prawa Prywatnego*, vol. 1: *Prawo cywilne – część ogólna*, ed. M. Safjan, Warszawa 2012, p. 825 ff.

[2] See, e.g., *ibidem*, p. 825, 835; J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warszawa 2016, p. 85; J. Winiarz, [in:] *Kodeks rodzinny i opiekuńczy z komentarzem*, ed. J. Pietrzykowski, Warszawa 1990, p. 14; idem, [in:] *System prawa rodzinnego i opiekuńczego*, ed. J.S. Piątowski, Wrocław 1985, p. 63.

[3] Cf. J. Ignatowicz, M. Nazar, *op. cit.*, p. 220.

[4] Act of 25 February 1964 – Family and Guardianship Code (consolidated text 2019, item 2089), hereinafter: FGC.

[5] Zob. M. Pyziak-Szafnicka, [in:] *System Prawa Prywatnego*, vol. 1, p. 835; J. Ignatowicz, M. Nazar, *op. cit.*, p. 85.

[6] See, e.g., Z. Radwański, A. Olejniczak, *Prawo cywilne – część ogólna*, Warszawa 2013, p. 44; A. Doliwa, *Prawo cywilne – część ogólna*, Warszawa 2004, p. 27; S. Grzybowski, [in:] *System Prawa Cywilnego. Część ogólna*, ed. S. Grzybowski, vol. 1, Wrocław 1985, p. 116 ff.

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ing the social coexistence rules clause in cases where the provisions setting out important reasons as a positive condition for a decision apply.

Both the questions of the understanding of the concept of important reasons and the application of Article 5 of the Civil Code[7] in the event the court is requested for the establishment of the separate property regime and for the establishment of unequal shares in the common property were and are addressed in both literature and judicature. However, the views presented are not uniform.

RESEARCH

Before considering the applicability of Article 5 CC to the exercise of the above-mentioned rights, it should be noted that the application of Article 5 CC, both in literature and in case law, is subject to the fulfilment of three essential conditions: the existence of a subjective right, the exercise of that right and the contradiction between its use and the rules of social coexistence or the socio-economic purpose of the right. It must be assumed, however, that the rightholder, in exercising his/her personal law, uses it consistent with the principles of social coexistence and with the socio-economic purpose of the right. It is only by establishing the specific circumstances of the case that it is possible to classify the enforcement and protection of the right as an abuse which does not merit protection[8]. Excessively liberal application of the construct of abuse of subjective law may lead to a challenge the certainty of legal transactions and a breach of the rule of law[9].

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[7] Act of 23 April 1964 – Civil Code (consolidated text Journal of Laws 2020, item 1740 as amended), hereinafter: CC.

[8] See judgement of the Supreme Court of 26 November 2004, I CK 279/04, LEX no. 277859. Cf., e.g., M. Pyziak-Szafnicka, [in:] *System Prawa Prywatnego*, vol. 1, p. 898 ff.; eadem, [in:] *Kodeks cywilny. Część ogólna*, ed. M. Pyziak-Szafnicka, Warszawa 2009, p. 99 ff.; S. Dmowski, R. Trzaskowski, [in:] *Kodeks cywilny. Komentarz. Część ogólna*, ed. J. Gudowski, Warszawa 2014, p. 52 ff.; A. Zbiegień-Turzańska, [in:] *Kodeks cywilny. Komentarz*, ed. K. Osajda, vol. 1, Warszawa 2013, p. 325 ff.; T. Sokołowski, [in:] *Kodeks cywilny. Komentarz*, vol. 1: *Część ogólna*, ed. A. Kidyba, Warszawa 2013, p. 41; T. Justyński, *Nadużycie prawa w polskim prawie cywilnym*, Kraków 2000, p. 66 ff.

[9] See, e.g., M. Pyziak-Szafnicka, [in:] *System Prawa Prywatnego*, vol. 1, p. 924 ff.; eadem, [in:] *Kodeks cywilny…*, p. 102 ff.; K. Pietrzykowski, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. K. Pietrzykowski, Warszawa 2015, p. 54 ff.; idem, *Nadużycie prawa podmiotowego w prawie cywilnym*, [in:] *Nadużycie prawa*, eds. H. Izdebski, A. Stępowski, Warszawa 2003, p. 126; Z. Radwański, A. Olejniczak, *op. cit.*, p. 108; A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne. Zarys wykładu*, Warszawa 2001, p. 152; resolution of the Supreme Court of 17 January 1974, III PZP 34/73, OSNCP 1975, no. 1, item 4; judgement of the Supreme Court of 28 November 1967, I PR 415/67, OSP 1968, no. 10, item 210; judgement of the Supreme Court of 11 September 1961, I CR 963/61, OSNCP 1963, no. 2, item 31.

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The construct of abuse of subjective rights regulated in Article 5 CC covers all normative forms of subjective rights: direct rights, claims and unilateral modification rights. The scope of Article 5 CC is very broad and covers all categories of civil-law relationships from all branches of civil law, in particular family law[10]. Such view is also expressed in the case law. The Supreme Court, in its judgement of 3 October 2000[11], stated that the content of Article 5 CC gives a possibility to assess compliance of the exercise of any subjective right with the rules of social coexistence, and in its judgement of 6 January 2005[12], the Supreme Court concluded that it was not apparent from the provision of Article 5 CC that its application was excluded in certain types of civil-law cases.

It seems, however, that matrimonial property rights, such as the right to demand the establishment of the separate property regime and to demand the establishment of unequal shares in common property, cannot be classified as one of the three typical forms of subjective rights (direct rights, claims, unilateral modification rights). However, they can be considered to be subjective rights which can be exercised through procedural steps, i.e. an action for the formation of a legal relationship. In such cases, the situation of the rightholder is similar to the situation of the holder of a unilateral modification right. This is so because the legislature grants the rightholder the possibility to form the legal relationship, but does not provide him/her with a possibility to independently and directly achieve such legal effect. However, it grants a substantive-law legitimacy to demand that the court rule on the matter[13]. Therefore, the rightholder has the possibility to shape the existing legal relationship, but it cannot be considered that in this case he/she has the unilateral-modification right in the commonly accepted sense[14]. Ultimately, it is the court, and not the rightholder, that decides on the content or existence of the

[10] More in, e.g., S. Grzybowski, [in:] *System Prawa Cywilnego…*, p. 268 ff.; M. Pyziak-Szafnicka, [in:] *System Prawa Prywatnego*, vol. 1, p. 886; eadem, [in:] *Kodeks cywilny…*, p. 70; K. Pietrzykowski, [in:] *Kodeks cywilny*, vol. 1: *Komentarz. Art. 1–449[10]*, ed. K. Pietrzykowski, Warszawa 2015, p. 53 ff.; P. Machnikowski, [in:] *Kodeks cywilny. Komentarz*, eds. E. Gniewek, P. Machnikowski, Warszawa 2014, p. 19 ff.; S. Dmowski, R. Trzaskowski, *op. cit.*, p. 52 ff.; A. Zbiegień-Turzańska, [in:] *Kodeks cywilny…*, p. 318; Z. Radwański, A. Olejniczak, *op. cit.*, p. 107 ff.; T. Justyński, *Nadużycie prawa w polskim prawie…*, p. 63 ff.; idem, *Konstrukcja nadużycia prawa jako instrument zapewnienia słuszności w związku ze sprawami małżeńskimi*, [in:] *Nam hoc natura aequum est… Księga Jubileuszowa ku czci Profesora Janusza Justyńskiego w siedemdziesięciolecie urodzin*, ed. A. Madej, Toruń 2012, p. 518 ff.; A. Zbiegień-Turzańska, *Zasady stosowania art. 5 Kodeksu cywilnego*, „Monitor Prawniczy" 2013, no. 21, p. 1130.

[11] I CKN 287/00, OSN 2001, no. 3, item 43.

[12] III CK 129/04, Legalis no. 76870.

[13] Cf. M. Pyziak-Szafnicka, [in:] *System Prawa Prywatnego*, vol. 1, p. 916 ff.; eadem, [in:] *Kodeks cywilny…*,, p. 75 ff.

[14] As regards unilateral-modification rights, see, e.g., eadem, [in:] *System Prawa Prywatnego*, vol. 1, p. 812 ff.; Z. Radwański, A. Olejniczak, *op. cit.*, p. 89 ff.; A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne. Zarys wykładu*, Warszawa 2001, p. 159 ff.; M. Machnikowski, [in:] *Zarys*

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legal relationship. However, adopting the classic approach to normative forms of subjective rights (direct subjective rights, claims and unilateral-modification rights, the particular form of which are pleas)[15] one may agree with the view expressed in the scholarly opinion that unilateral-modification right in the strict sense and in the broad sense should be distinguished, and in cases where the law grants the entity a legitimacy to bring an action for modification of a legal relationship, such rights should be classified as unilateral-modification right in the broad sense[16].

It is also pointed out in the literature, as a normative form of subjective law, the right resulting from substantive law to demand the legal relationship to be shaped by the court[17]. It is stressed that these rights cannot be considered either as claims or unilateral-modification rights. In such cases, a specific change in the legal relationship occurs only as a result of the court ruling. Prior to the issuance of a judgement, the rights and obligations of the parties have the content that was given to them by a legal act or by statutory provisions. Until a court decision is made, there can be no new or changed claim. Neither does the very declaration of will of a party change the content of the legal relationship as it happens in the case of unilateral-modification right. A demand to issue a ruling to shape the legal relationship is therefore considered to be a separate right, as it does not correspond in its construction to any normative form of subjective law in the classic sense. It is assumed that this is a different type of right: a procedural-law power, consisting in the possibility of bringing an action. It is also proposed to define this right as the right to request the shaping of a legal relationship by the court or as the right to bring an action for such shaping[18].

Nevertheless, apart from the proposed terminology and classification of the normative forms of subjective rights, it should be assumed that the demand to establish the separate property regime and the demand to establish unequal shares in the common property are subjective rights, and the rightholder makes use of his/her rights when bringing an action. As a consequence, the behaviour of the rightholder exercising his/her right in these situations may be subject to assessment under Article 5 CC, but provided that the content of Article 52 § 1 and Article 43

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prawa cywilnego, eds. E. Gniewek, P. Machnikowski, Warszawa 2014, p. 32 ff.; A. Berć, *Zarys prawa prywatnego. Część ogólna*, Warszawa 2012, p. 102 ff.

[15] See A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne. Zarys części…*, p. 156 ff. A different view in, e.g., S. Grzybowski, *Prawo cywilne. Zarys części ogólnej*, Warszawa 1985, p. 113 ff.; idem, [in:] *System Prawa Cywilnego…*, p. 216 ff.; Z. Radwański, A. Olejniczak, *op. cit.*, p. 84 ff.

[16] For more detail, see M. Pyziak-Szafnicka, [in:] *System Prawa Prywatnego*, vol. 1, p. 815 ff.

[17] See P. Machnikowski, [in:] *System Prawa Prywatnego*, vol. 5: *Prawo zobowiązań – część ogólna*, ed. E. Łętowska, Warszawa 2013, p. 165 ff.; idem, *Swoboda umów według art. 353[1] KC. Konstrukcja prawna*, Warszawa 2005, p. 96 ff.; idem, [in:] *Zarys prawa…*, p. 33.

[18] See P. idem, [in:] *System Prawa Prywatnego*, vol. 5, p. 165 ff.; idem, *Swoboda umów…*, p. 96 ff.; idem, [in:] *Zarys prawa…*, p. 33.

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§ 2 FGC does not take into account the assessment from the point of view of the rules of social coexistence. Otherwise, the recourse to the construct of an abuse of a subjective right would be not necessary[19]. The application of the provision of Article 5 CC is excluded due to e.g. the content of the provisions governing a given legal institution, against which an abuse of the subjective right could be found[20]. Therefore, it is not possible to apply Article 5 CC when the actual state of affairs and its legal assessment are fully regulated by the provisions of law that fully protect the shares of specific entities[21]. It is noted that

> […] the abuse of law may not be invoked when a given factual state is fully regulated in a specific legal provision, in particular in a provision in which we can notice a prior assessment of conduct and determination of the consequences thereof, taking into account the criteria contained in Article 5 CC or similar[22].

The Supreme Court, e.g. in the judgement of 4 October 1967[23], also indicated that the provision of Article 5 CC may not apply in a situation where the legislature itself determines, as to certain factual states, when the use of a subjective right should be deprived of legal protection due to the rules of social coexistence.

However, the content of the provisions of Article 52 § 1 and Article 43 § 2 FGC does not allow us, on the basis of general rules of application of Article 5 CC, to clearly recognize the admissibility of applying the construct of abuse of a subjective right to assess the demand to establish the separate property regime by the court and the demand to establish unequal shares in the common property.

Both in the literature and in the judicature, the views on the admissibility of the application of Article 5 CC in cases of the establishment of the separate property regime (formerly – cases of the abolition of matrimonial property community) under the provision of Article 52 § 1 FGC are divided. The advocates of one of

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[19] Cf. M. Pyziak-Szafnicka, [in:] *System Prawa Prywatnego*, vol. 1, p. 917; eadem, [in:] *Kodeks cywilny…*, p. 76.

[20] See eadem, [in:] *System Prawa Prywatnego*, vol. 1, p. 917 ff.; eadem, [in:] *Kodeks cywilny…*, p. 107.

[21] T. Justyński (*Nadużycie prawa w polskim prawie…*, p. 84) states that in such a case there is an exclusion of application of Article 5 CC due to *lex specialis*. However, a broader discussion of the issues related to the guideline *lex specialis derogat legi generali* goes beyond the scope of this article. See also, e.g., A. Szpunar, *Uwagi o nadużyciu prawa podmiotowego*, [in:] *II Kongres Notariuszy RP*, Poznań–Kluczbork 1999, p. 342; K. Pietrzykowski, [in:] *Kodeks cywilny*, vol. 1, p. 56; P. Machnikowski, [in:] *Kodeks cywilny…*, p. 21; A. Zbiegień-Turzańska, [in:] *Kodeks cywilny…*, p. 326; eadem, *Zasady stosowania…*, p. 1133.

[22] A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne. Zarys części…*, p. 180 and the case law referred to therein in footnote 99.

[23] II PR 340/67, PiP 1968, no. 12, p. 1080. Cf. also, e.g., judgement of the Supreme Court of 17 May 2002, I CKN 827/00, OSP 2003, no. 12, item 157; judgement of the Supreme Court of 29 November 2002, IV CKN 1549/00, Legalis no. 59158.

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these views point out that, in cases where a spouse strives, for important reasons, to establish the regime of separate property against his/her spouse by the court, Article 5 CC does not apply, since the assessment of such a demand from the point of view of the rules of social coexistence, in particular as regards the fault of the plaintiff and the protection of the family and the defendant spouse, must already be carried out as part of the determination of the important reasons justifying that demand[24]. Those authors, who exclude the application of Article 5 CC to the assessment of the request for the establishment of the separate property regime by the spouse, state that the general clause of important reasons contained in Article 52 § 1 FGC allows for a full and proper assessment of the overall situation of the spouses, taking into account the specific circumstances[25]. According to a different interpretative conclusion, the request for the establishment of the separate property regime (formerly – the abolition of matrimonial property community) is subject to an assessment considering the clause of the rules of social coexistence, so the provision of Article 5 CC may form a basis for the dismissal of an action brought pursuant to Article 52 § 1 FGC[26]. The Supreme Court, in the grounds for its judgement of 11 December 2008[27] stated that "the view expressed in the literature, which objects to the application of Article 5 CC to the request pursued under Article 52 FGC, because the assessment of the request from the point of view of the rules of social coexistence must be carried out in the context of the determination of an important reason justifying that request, does not merit acceptance". By contrast, in

[24] As viewed by, i.a., T. Justyński, *Nadużycie prawa w związku z żądaniem zniesienia współwłasności*, „Przegląd Sądowy" 2003, no. 5, p. 50; T. Sokołowski, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, eds. H. Dolecki, T. Sokołowski, Warszawa 2013, p. 365. Certain doubts regarding the application of Article 5 CC in the context of Article 52 § 1 FGC have also been presented by E. Skowrońska-Bocian referring the view of T. Sokołowski. See E. Skowrońska-Bocian, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. J. Wierciński, Warszawa 2014, p. 472; T. Smyczyński, *Prawo rodzinne i opiekuńcze*, Warszawa 2018, p. 147.

[25] See T. Sokołowski, [in:] *Kodeks rodzinny i opiekuńczy*..., p. 365. Cf. T. Smyczyński, *Prawo rodzinne*..., p. 147.

[26] As viewed by, i.a., J.S. Piątowski, [in:] *System prawa*..., p. 475 ff.; idem, *Glosa do orzeczenia SN z dnia 25 marca 1958 r., 3 CR 45/58*, „Państwo i Prawo" 1959, no. 1, p. 1077; L. Stecki, *Ustanie ustawowej wspólności małżeńskiej majątkowej*, Poznań 1986, p. 15 footnote 23; M. Wawiłowa, *Glosa do wyroku SN z dnia 6 listopada 1972 r., III CRN 250/72*, „Państwo i Prawo" 1974, no. 7, p. 169; B. Dobrzański, *Glosa do wyroku Sądu Najwyższego z dnia 6 listopada 1972 r., III CRN 250/72*, „Orzecznictwo Sądów Polskich" 1973, no. 1, p. 349; M. Sychowicz, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. K. Piasecki, Warszawa 2009, p. 332; J. Ignaczewski, [in:] *Małżeńskie prawo majątkowe. Komentarz*, ed. J. Ignaczewski, Warszawa 2014, p. 216 ff.; J. Pawliczak, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. K. Osajda, Warszawa 2017, p. 593; G. Jędrejek, [in:] *Meritum. Prawo rodzinne*, ed. G. Jędrejek, Warszawa 2017, p. 348. See also – despite some doubts – E. Skowrońska-Bocian, *op. cit.*, p. 472. Cf. K. Pietrzykowski, [in:] *Kodeks cywilny*, vol. 1, p. 61 ff. This view is also pointed to by A. Dyoniak (*Ustawowy ustrój majątkowy małżeński*, Wrocław 1985, p. 116 ff.).

[27] II CSK 371/08, OSNC 2009, no. 12, item 171,

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its judgement of 17 September 1999[28], the Supreme Court stated that "the fault of the spouse requesting the matrimonial property community to be abolished [now – the establishment of the regime of separate property] and the considerations of the good of the family or the defendant spouse must be taken into account only when assessing the request for the abolition of community [now – the establishment of the separate property regime] from the point of view of the rules of social coexistence (Article 5 CC). The dismissal of an action on the grounds of those circumstances can therefore only take place exceptionally where the request for the abolition of the matrimonial property community [now – the establishment of the separate property regime] has, in the specific circumstances, a nature of abuse of right".

If the application of Article 5 CC is admissible for the assessment of the request to determine shares in the common property, taking into account the degree of the spouses' contribution to the creation of this property (Article 43 § 2 FGC) it may be assumed that the same position is presented both in the case law and in the scholarly opinion. This is so because it is usually pointed out that important reasons within the meaning of this provision are moral considerations, which make the acceptance of equal shares of the spouses in the common property would contradict, in the situation under assessment, the rules of social coexistence[29]. The Supreme Court, in its decision of 21 November 2002[30], stated that important reasons are circumstances which, assessed from the point of view of the rules of social coexistence, preclude

[28] I CKN 129/99, Legalis no. 45959. Cf. judgement of the Supreme Court of 4 April 2014, II CSK 387/13, OSNC 2015, no. 4, item 46; judgement of the Supreme Court of 11 December 2008, II CSK 371/08, OSNC 2009, no. 12, item 171; judgement of the Supreme Court of 8 May 2003, II CKN 78/01, LEX no. 80245; judgement of the Supreme Court of 12 September 2000, III CKN 373/99, Legalis no. 56332; judgement of the Supreme Court of 27 January 2000, III CKN 426/98, Legalis no. 56331; judgement of the Supreme Court of 13 May 1997, III CKN 51/97, OSNC 1997, no. 12, item 194.

[29] See, e.g., J.S. Piątowski, [in:] *System prawa rodzinnego…*, p. 490 ff.; idem, *Udziały małżonków w majątku wspólnym*, [in:] *Studia z prawa cywilnego. Księga pamiątkowa dla uczczenia 50-lecia pracy naukowej Prof. dr. hab. Adama Szpunara*, ed. A. Rembieliński, Warszawa–Łódź 1983, p. 292 ff.; J. Pietrzykowski, [in:] *Kodeks rodzinny i opiekuńczy z komentarzem…*, p. 235; M. Sychowicz, *op. cit.*, p. 261; J. Ignaczewski, *op. cit.*, p. 142; K. Skiepko, [in:] *Komentarz do spraw o podział majątku wspólnego małżonków*, ed. J. Ignaczewski, Warszawa 2017, p. 293; J. Słyk, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. K. Osajda, p. 478; G. Jędrejek, *op. cit.*, p. 334; T. Sokołowski, [in:] *Kodeks rodzinny i opiekuńczy…*, p. 273; E. Skowrońska-Bocian, *op. cit.*, p. 401 ff.; K. Pietrzykowski, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz…*, p. 328 ff. As T. Justyński writes (*Nadużycie prawa w związku z żądaniem…*, p. 50 ff.), "the issue of admissibility of application of Article 5 CC to 'increase' the proportions of shares of the co-owners has been definitely negatively resolved. This conclusion in its entirety must concern also joint co-ownership. Also in this situation it would not be possible to use the construct of abuse of right to perform this kind of 'operation'".

[30] III CKN 1018/00, Legalis no. 57304. Similarly, e.g., decision of the Supreme Court of 22 September 1997, II CKN 306/97, Legalis no. 343297; decision of the Supreme Court of 28 April 1972, III CRN 626/71, Legalis no. 16220. See also the grounds for the decision of the Supreme Court of 19 December 2012, II CSK 259/12, Legalis no. 550174 and the grounds for the decision of the Supreme Court of 24 April 2013, IV CSK 553/12, Legalis no. 741808.

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granting to one of the spouses benefits from this part of the common property to which this spouse did not contribute.

Therefore, in the event of a request for establishing the separate property regime and a request for establishing unequal shares in the common property, to determine the admissibility of applying Article 5 CC it is first necessary to establish the meaning of the concepts of "important reasons" and "rules of social coexistence".

The legislature did not make the term of "important reasons" more specific. In the literature on family law, however, it is noted that this is an evaluative and ambiguous concept, as it takes on different content depending on the statutory context in which it occurs, which undoubtedly contributes to divergent interpretations[31]. At the same time, it is pointed out that important reasons within the meaning of Article 52 § 1 FGC cannot be equated with important reasons within the meaning of Article 43 § 2 FGC[32]. It is emphasized that the much more serious effects of establishing unequal shares in common property support a more restrictive interpretation of important reasons in the context of the regulation of Article 43 § 1 FGC. This is so because in the event of property separation, both spouses retain equal rights to the common property, and in the event of unequal shares being established, the rights of one of the spouses are permanently limited and may even be completely eliminated as a result of depriving this spouse of the entire share in the common property[33].

Generally, it is noted that while important reasons under Article 52 § 1 FGC are of a property nature, in Article 43 § 2 FGC the circumstances of a property nature are included in the prerequisite of the unequal contribution to the creation of common property and important reasons are of an ethical nature[34]. In turn, the Supreme Court, in its substantiation for the decision of 24 April 2013[35] stated that the criterion of "important reasons" under Article 43 § 2 FGC has not only a property aspect, but also an ethical one. The Supreme Court also argued that: 1) depending on the circumstances of the case, ethical considerations may speak against establishing

[31] See J.S. Piątowski, [in:] *System prawa rodzinnego…*, p. 473.

[32] See, e.g., *ibidem*, p. 490; idem, *Udziały małżonków…*, p. 292; J. Ignatowicz, M. Nazar, *op. cit.*, p. 309; J. Ignaczewski, *op. cit.*, p. 141; K. Skiepko, *op. cit.*, p. 293; T. Sokołowski, [in:] *Kodeks rodzinny i opiekuńczy…*, p. 274; E. Skowrońska-Bocian, *op. cit.*, p. 401. Cf. decision of the Supreme Court of 27 June 2003, IV CKN 278/01, Legalis no. 61009.

[33] See, e.g., J.S. Piątowski, [in:] *System prawa rodzinnego…*, p. 490; idem, *Udziały małżonków…*, p. 292; J. Ignatowicz, M. Nazar, *op. cit.*, p. 309; J. Ignaczewski, *op. cit.*, p. 141; K. Skiepko, *op. cit.*, p. 293; T. Sokołowski, [in:] *Kodeks rodzinny i opiekuńczy…*, p. 274; E. Skowrońska-Bocian, *op. cit.*, p. 401. Cf. decision of the Supreme Court of 27 June 2003, IV CKN 278/01, Legalis no. 61009.

[34] See J.S. Piątowski, [in:] *System prawa rodzinnego…*, p. 490; J. Ignaczewski, *op. cit.*, p. 142; K. Skiepko, *op. cit.*, p. 293; T. Sokołowski, [in:] *Kodeks rodzinny i opiekuńczy…*, p. 274; M. Sychowicz, *op. cit.*, p. 261; E. Skowrońska-Bocian, *op. cit.*, p. 401 ff. Cf. decision of the Supreme Court of 27 June 2003, IV CKN 278/01, Legalis no. 61009.

[35] IV CSK 553/12, Legalis no. 741808.

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unequal shares, but they may well prevent leaving equal shares; 2) the argument that "important reasons" should be understood as circumstances which, in the light of the rules of social co-existence, oppose granting one of the spouses the benefits from that part of the common property to which the spouse did not contribute; and 3) the assessment whether the conditions set out in Article 43 § 2 FGC are met cannot be schematic, but – taking into account the assumptions noted above – should be individualised and based on the analysis of specific circumstances of a given case.

Based on the views expressed in the literature and case law, it can be generally assumed that "important reasons" referred to in Article 52 § 1 FGC should be understood as circumstances causing that in a specific factual situation the existence of statutory matrimonial property community would lead to an infringement or serious threat to the property interest of the spouse applying for the establishment of property separation, as well as the economic foundation for the functioning of the family established by the spouses. Important reasons may be differences between spouses which make the administration of their common property impossible or very difficult[36]. Therefore, the catalogue of important reasons includes, *inter alia*, the misspending by one of the spouses as a result of mismanagement, alcoholism, gambling, avoidance of the duty to maintain and contribute to the common property, preventing the spouse from using the common property, actual separation of the spouses, which prevents them from cooperating in the management of the common property or independently assuming obligations that encumber the common property[37]. It should be stressed, however, that important reasons in the context of

[36] Cf., i.a., J.S. Piątowski, [in:] *System prawa rodzinnego…*, p. 474 ff.; J. Ignatowicz, M. Nazar, *op. cit.*, p. 331; T. Smyczyński, *Prawo rodzinne…*, p. 142; M. Sychowicz, *op. cit.*, p. 333; J. Ignaczewski, *op. cit.*, p. 218 ff.; J. Pawliczak, *op. cit.*, p. 589 ff.; G. Jędrejek, *op. cit.*, p. 394; T. Sokołowski, [in:] *Kodeks rodzinny i opiekuńczy…*, p. 365; E. Skowrońska-Bocian, *op. cit.*, p. 473; K. Pietrzykowski, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz…*, p. 372; A. Dyoniak, *Glosa do wyroku Sądu Najwyższego z dnia 24 maja 1994 r., I CRN 61/94*, „Orzecznictwo Sądów Polskich" 1995, item 96; judgement of the Supreme Court of 31 January 2003, IV CKN 1710/00, Legalis no. 59149.

[37] For more detail on important reasons under Article 52 § 1 FGC, see, i.a., J.S. Piątowski, [in:] *System prawa rodzinnego…*, p. 474 ff.; J. Pietrzykowski, [in:] *Kodeks rodzinny i opiekuńczy z komentarzem…*, p. 272 ff.; J. Ignatowicz, M. Nazar, *op. cit.*, p. 331; T. Smyczyński, *Prawo rodzinne…*, p. 142 ff.; M. Andrzejewski, *Prawo rodzinne i opiekuńcze*, Warszawa 2014, p. 88; M. Sychowicz, *op. cit.*, p. 333 ff.; J. Ignaczewski, *op. cit.*, p. 218 ff.; J. Pawliczak, *op. cit.*, p. 588 ff.; G. Jędrejek, *op. cit.*, p. 393 ff.; T. Sokołowski, [in:] *Kodeks rodzinny i opiekuńczy…*, p. 365 ff.; E. Skowrońska-Bocian, *op. cit.*, p. 472 ff.; K. Pietrzykowski, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz…*, p. 372 ff.; A. Lutkiewicz-Rucińska, *Odpowiedzialność majątkiem wspólnym za zobowiązania cywilnoprawne współmałżonka*, Bydgoszcz–Gdańsk 2003, p. 83 ff.; A. Oleszko, *Ważne powody jako przesłanka zniesienia wspólności majątkowej w czasie trwania małżeństwa w świetle orzecznictwa Sądu Najwyższego i doktryny*, „Palestra" 1978, no. 1, p. 6 ff. and the case law referred to therein.

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the provisions of Article 52 § 1 FGC should be of a property nature, although they may also result from personal discords between spouses[38].

The interpretations of Article 43 § 2 FGC indicate that "important reasons" mean circumstances which, when assessed from the point of view of the rules of social coexistence, oppose the granting to one of the spouses of a benefit from the common property to the extent in which he/she did not contribute to its creation[39]. However, in assessing the existence of important reasons, account must be taken of the entire behaviour of the spouses during the period of the property community as regards the performance of their obligations towards the family established through their relationship[40]. Examples of "important reasons" within the meaning of Article 43 § 2 FGC include: the gross and persistent failure to contribute to the common property according to their abilities and earning capacity; the gross and persistent violation of family obligations; prolonged actual separation of spouses, during which each spouse independently has built and disposed of the property; fault that may be attributed for the breakdown of their marriage[41].

Some family law scholars, when writing about the notion of "important reasons", point only generally to the fact that this is a general clause[42]. Others argue that "important reasons" is a vague phrase, also characterized as a referring clause

[38] See, e.g., M. Sychowicz, *op. cit.*, p. 334 ff.; J. Ignaczewski, *op. cit.*, p. 220 ff.; J. Pawliczak, *op. cit.*, p. 590; E. Skowrońska-Bocian, *op. cit.*, p. 474; K. Pietrzykowski, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz…*, p. 373; T. Smyczyński, *Prawo rodzinne…*, p. 143; B. Dobrzański, *op. cit.*, p. 346 ff. and the case law referred to therein.

[39] P. Szołdrowski notes that the term "important reasons" cannot be enclosed within the reference to the rules of social coexistence. The author emphasizes that if this was so, the legislature would refer in Article 43 § 2 FGC directly to the rules of social coexistence instead of using the clause of important reasons. See P. Szołdrowski, *Żądanie ustalenia nierównych udziałów w majątku wspólnym w postępowaniu o podział majątku wspólnego*, „Kwartalnik Prawa Prywatnego" 2019, no. 1, p. 165. Cf. T. Smyczyński, *Glosa do postanowienia SN z dnia 6 stycznia 2000 r., I CKN 320/98*, „Orzecznictwo Sądów Polskich" 2001, no. 9, p. 468.

[40] See, i.a., M. Sychowicz, *op. cit.*, p. 261; J. Ignaczewski, *op. cit.*, p. 142; J. Słyk, *op. cit.*, p. 478; G. Jędrejek, *op. cit.*, p. 334 ff.; T. Sokołowski, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz…*, p. 273. See also, i.a., grounds for the decision of the Supreme Court of 19 December 2012, II CSK 259/12, Legalis no. 550174; grounds for the decision of the Supreme Court of 21 November 2002, III CKN 1018/00, Legalis no. 57304; decision of the Supreme Court of 5 October 1974, III CRN 190/74, Legalis no. 18318.

[41] For more detail on important reasons under Article 43 § 2 FGC, see, i.a., J.S. Piątowski, [in:] *System prawa rodzinnego…*, p. 490 ff.; idem, *Udziały małżonków…*, p. 293 ff.; J. Pietrzykowski, [in:] *Kodeks rodzinny i opiekuńczy z komentarzem…*, p. 235 ff.; J. Ignatowicz, M. Nazar, *op. cit.*, p. 309; M. Sychowicz, *op. cit.*, p. 261 ff.; J. Ignaczewski, *op. cit.*, p. 142 ff.; K. Skiepko, *op. cit.*, p. 293 ff.; J. Słyk, *op. cit.*, p. 478 ff.; G. Jędrejek, *op. cit.*, p. 334 ff.; T. Sokołowski, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz…*, p. 273; E. Skowrońska-Bocian, *op. cit.*, p. 401 ff.; K. Pietrzykowski, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz…*, p. 328 ff. and the case law referred to therein.

[42] See, e.g., T. Sokołowski, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz…*, p. 365; T. Smyczyński, *Prawo rodzinne…*, p. 147; A. Oleszko, *op. cit.*, p. 15.

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or a general clause in a functional sense, the purpose of which is to provide the court with the necessary flexibility in the classification of facts[43].

It is usually noted that sometimes general clauses are equated with all vague phrases[44]. In the literature of civil law, general clause is defined as a vague phrase contained in a legal provision, denoting certain values or assessments functioning in a social group to which that provision refers by requiring them to be taken into account in finding the facts covered by a given norm. On the other hand, the assessments referred to by the general clauses include moral assessments (e.g. rules of social coexistence) and economic-type measures (e.g. socio-economic purpose of law) and rational measures (e.g. reason)[45].

Scholars in the field also emphasize that different meanings are attributed to the term "general clause"[46]. Law theorists, who point out that the literature distinguishes six approaches which in various ways relate to the scope of the concept of "general clause". According to the broad approach, it is assumed that the general clause should determine any normative basis for the discretion margin in the process of applying the law (general clauses in functional terms). The narrower approach emphasizes the indeterminate character of meaning of the phrase containing the clause, whether it refers to facts, norms or assessments. Another approach limits the reference field and includes only those references that require non-legal assessments to be included in the clauses. The next approach, which is a significant narrowing of the previous one, considers these evaluative indeterminate phrases, which refer the decision-maker to assessments and norms in a way that is oriented by the name of the non-legal criterion. Another approach limits the previous one by associating the concept of general clause only with such a reference to the assessment system, which additionally expresses a sort of guiding principle. The last approach, on the other hand, attaches importance to the very place of the reference in a legislative act, because the general clause is a reference which is contained in the general part of the normative act and can be used when applying various rules or bodies governed by that act[47].

Therefore, the understanding of the notion of general clause depends on which of the foregoing approaches we adopt, but in any case general clauses are vague phrases. However, there are two main groups among the vague phrases: estimative phrases and evaluative phrases. The estimative phrases express the criterion of assessing situations, the conduct of parties to legal relationships, the degree of severity of a phe-

[43] See J. Pawliczak, *op. cit.*, p. 588.

[44] See Z. Radwański, M. Zieliński, [in:] *System Prawa Prywatnego*, vol. 1, p. 391. In the literature on the subject, reference clauses are often called simply indeterminate phrases, vague phrases, evaluative phrases, reference phrases or – most often – general clauses. See L. Leszczyński, *Stosowanie generalnych klauzul odsyłających*, Kraków 2001, p. 21 ff.

[45] See Z. Radwański, A. Olejniczak, *op. cit.*, p. 45; Z. Radwański, M. Zieliński, *op. cit.*, p. 394.

[46] A. Doliwa, *op. cit.*, p. 27.

[47] For more detail, see L. Leszczyński, *op. cit.*, p. 28 ff. and the literature referred to therein.

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nomenon or state of affairs, covered the scope of application or regulation of a legal norm. They leave the law-applying body a necessary discretion margin in seeking the legal classification of a specific factual situation as set out in the legal norm. Such an estimative phrase is, for example, "important reasons". Evaluative phrases, on the other hand, define, together with other phrases contained in the provision, the scope of application or regulation of a legal norm. They also leave the law-applying body a discretion margin, but first and foremost they delineate the content of a legal norm adequate to the specific facts, so they constitute a determinant of the legal content. An example of such evaluative phrase is, for example, the "rules of social coexistence"[48].

Thus, assuming that general clauses are a kind of reference, in terms of the interpretation of provisions to generically defined norms and non-legal assessments, which have, in principle, an axiological moral justification, it should be stated that only evaluative phrases can be referred to with this term. On the other hand, "important reasons" are an estimative phrase and thus cannot be regarded as a general clause in the above sense[49].

Estimative phrases contain two elements, i.e. a description of the facts that need to be found in the decision-making process as actually occurring (e.g. circumstances, causes) and an evaluation statement that leads to the expression of a specific property (e.g. important, specific). The element of assessment indicates the need to estimate the degree of occurrence of a given condition (size, weight, intensity, etc.). This assessment is of an individual, situational nature. This situational character consists in that in a given situation it is necessary to determine the existence of not any reasons, but only important ones. The assessment does not refer directly to any normative system, although, as it is argued, certain norms, mainly moral ones, can be employed in estimating as an auxiliary measure. Nevertheless, it must be stated that estimative phrases are a category distinct from the category of references to the evaluation system[50].

Therefore, in order for the court to establish the separate property regime (Article 52 § 1 FGC) or to establish shares in common property taking into account the degree to which each of the spouses contributed to the creation of such property (Article 43 § 2 FGC), it must first find the existence of reasons behind the seeking of the decisions indicated and then estimate their importance. Determining the weight of the reasons indicated in the request for a decision is a prerequisite in both cases indicated.

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[48] See M. Nazar, [in:] T.A. Filipiak, J. Mojak, M. Nazar, E. Niezbecka, *Zarys prawa cywilnego*, Lublin 2010, p. 54. Cf. S. Grzybowski, [in:] *System Prawa Cywilnego…*, p. 118 ff.; Z. Radwański, A. Olejniczak, *op. cit.*, p. 44 ff.; Z. Radwański, M. Zieliński, *op. cit.*, p. 391 ff. For more detail, see L. Leszczyński, *op. cit.*, p. 25 ff.

[49] Cf. M. Nazar, *op. cit.*, p. 54. More broadly L. Leszczyński, *op. cit.*, p. 30 ff.

[50] See L. Leszczyński, *op. cit.*, p. 25 ff.

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CONCLUSION

As a conclusion, it should be pointed out that both the right to demand the establishment of the separate property regime and the determination of unequal shares in the common property may be exercised if there are important reasons. "Important reasons" is an estimative phrase. As it seems, the importance of reasons can be assessed from three points of reference: economic, praxeological and ethical[51]. Thus, important reasons regulated in Article 52 § 1 FGC can be assessed in an economic aspect (e.g. lack of cooperation in the creation of common property), praxeological aspect (e.g. lack of cooperation in the management of common property) and probably also ethical one (e.g. reprehensibility of the spouse's behaviour in the above-mentioned examples). In turn, in the provision of Article 43 § 2 FGC, the legislature formulated an additional prerequisite apart from important reasons, namely the degree of the spouses' contribution to the creation of the common property. Of course, the general rule of correct interpretation is to assign the same meaning to the same terms (especially in the same statutory act). However, the indication of an additional separate economic criterion suggests that important reasons should be determined with the ethical aspect taken into account. Thus, both in the case of a request for the establishment of the separate property regime and the determination of unequal shares in common property, the ethical aspect of important reasons is to be taken into account. However, this cannot preclude the application of Article 5 CC in both cases. Of course, Article 5 CC shall not apply if separate regulations allow for proper resolution of the case. It seems, however, that Article 52 § 1 and Article 43 § 2 FGC with the phrase "important reasons" do not, by themselves, ensure proper resolution. Although the content of the rules of social coexistence and important reasons may overlap to some extent, Article 5 CC has a much broader spectrum of content and reference to ethical assessments.

As a consequence, as it seems, it could not be ruled the assessment, under Article 5 CC, of the request for the regime of separate property to be established by the court or the request for the establishment of shares in the common property, taking into account the extent to which each of the spouses contributed to its creation. The prerequisites for finding an abuse of a subjective right should be, first of all, improper and reprehensible behaviour of the spouse who requests the establishment of the separate property regime or establishment of unequal shares, not worthy of protection, as well as the shares of the defendant spouse and the good of the family established by the spouses.

[51] Cf. *ibidem*, p. 26.

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STRESZCZENIE

Celem opracowania jest ustalenie zakresu stosowania konstrukcji nadużycia prawa podmiotowego w sprawach o ustanowienie rozdzielności majątkowej przez sąd i ustalanie nierównych udziałów w majątku wspólnym. Przesłanką zarówno ustanowienia rozdzielności majątkowej, jak i ustalenia nierównych udziałów w majątku wspólnym są „ważne powody". Do ustalenia dopuszczalności stosowania art. 5 Kodeksu cywilnego konieczne jest ustalenie zakresów znaczeniowych pojęć „ważne powody" i „zasady współżycia społecznego". W artykule przyjęto, że klauzule generalne to rodzaj odesłania w zakresie interpretacji przepisów do rodzajowo określonych norm i ocen pozaprawnych, mający co do zasady aksjologiczne uzasadnienie moralne, a co za tym idzie tylko zwroty wartościujące, jak „zasady współżycia społecznego", mogą być określane tym mianem. „Ważne powody" natomiast nie są zwrotem wartościującym, lecz zwrotem szacującym i tym samym nie są klauzulą generalną. Uznano również, że nie można wykluczyć oceny przez pryzmat przepisu art. 5 Kodeksu cywilnego żądania ustanowienia przez sąd rozdzielności majątkowej czy też żądania ustalenia nierównych udziałów w majątku wspólnym z uwzględnieniem stopnia, w którym każdy z małżonków przyczynił się do jego powstania.

Słowa kluczowe: rozdzielność majątkowa; nierówne udziały w majątku wspólnym; nadużycie prawa podmiotowego; zasady współżycia społecznego; ważne powody