Poland

THE RULES ON THE ADMINISTRATION OF COMMUNITY PROPERTY IN POLAND

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Résumé


1 INTRODUCTION

The most popular marital property regime in Europe is typically some form of community property. Poland is an example of limited community of property, which was introduced in 1965 by the Family and Guardianship Code (KRO) and was intended to benefit socialist marriage. Although there have been

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1 This is the default matrimonial property regime in countries including France, Italy, Spain (excepting Catalonia) and the Netherlands. The Netherlands is a particularly interesting example because, according to Dutch law, the default regime is complete community of property, which is a unique approach in Europe. As Katherina Boele-Woelki suggested, the question is whether such a matrimonial property regime is in harmony with the views on the equal and independent positions of husband and wife (K Boele-Woelki 'The Road Towards a European Family Law' vol 1.1 Electronic Journal of Comparative Law (November 1997) available at www.ejcl.org/11/art11-1.html, p 12 (accessed June 2012)).

2 Act of 25 February 1964 (JL No 9, item 59 with amendments) (hereinafter KRO).

3 D Lasok Polish Family Law (Leyden: AW Sijthoff, 1968) 89.
significant societal and legal changes since then – including the disappearance of socialist marriage into the darkness of history – community property remains the default property regime by which spouses hold property in Poland, unless there is a premarital agreement. However, given both the limited contractual freedom in premarital agreements and their relative unpopularity despite their increasing numbers, most marriages remain in the statutorily mandated community property system. When spouses do contract for a different marital property regime, the trend across Europe favours the regime of separation of property.

The Polish Family and Guardianship Code, which introduced limited community of property, finally underwent significant change in 2005. At the time, scholars debated whether separation of property or a separation of property with equalisation of surpluses should replace community property as the default marital property regime, but Polish society was unprepared for the change and remained strongly attached to community of property. The model of the family in Poland was another important reason for the continuation of community property as the default regime. Although the number of working mothers continues to grow and fathers increasingly share caretaking responsibilities, such trends are predominant mostly among young and educated people and do not represent the majority of households, which remain similar to the households of the recent past. The traditional family arrangement inevitably leads to the conclusion that community of property is a

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4 Spouses can choose among only four contractual regimes and are able to make only minor changes to them, within the limits imposed by law. Pursuant to art 47 of the KRO, spouses may limit or expand the community of property or establish a separation of property or a separation of property with equalisation of surpluses. The marital agreement should be concluded in a notarial deed.


7 The reasons for introducing separation of property vary, with the main reason being that this regime is the most simple one during marriage, as well as upon divorce. People who have decided to start a commercial activity or have notable property want to make their property relations as simple as possible without any complications, particularly in regard to the co-operation of the spouses in property management or subsequent problems with classifying the property as separate or common.

8 The other name for this type of regime is the ‘sharing of accruals’. See A Stepień-Sporek ‘Sharing of Accruals as the Best Solution for Marriage’ in B Verschraegen (ed) Family Finances (Vienna: Jan Stramek: Verlag, 2009) 371.


10 Polish women have a lower rate of employment than other women in the European Union, especially when compared to countries such as Denmark, the Netherlands, Sweden, Germany, Finland, Austria and Great Britain. In the last decade, there has been a systematic increase of the number of working women, but the rate of working women is still lower than that of working men. See www.stat.gov.pl/cps/rde/xbrf/gus/PUBL_f_kob_mez_na_ryn_prac_2010.pdf (accessed June 2012).
good marital property regime for families by providing wives the same rights to property as husbands.\textsuperscript{11} As long as the dominant model of the family does not change, it is difficult to justify the introduction of a new default marital property regime.\textsuperscript{12}

The first part of this chapter reviews the regime of community of property in Poland. The second part introduces readers to the field of the administration of common property – which forms the bulk of the spouses’ assets – so as to illustrate the rules of management. Finally, the last part offers concluding observations regarding preferable approaches to the administration of common property.

\section*{II COMMUNITY OF PROPERTY}

The community of property system seeks to guarantee equal property rights for both spouses, especially useful for women in the traditional family model. The community of property begins from the moment a couple marries and ends with the termination of the marriage, the conclusion of a marital property agreement, the decision of the court to impose a separation of property, or a compulsory property regime of separation of property triggered by operation of law (for example, legal incapacitation or declaration of insolvency).\textsuperscript{13}

All of the spouses’ property is divided into three types,\textsuperscript{14} each addressed by the Family and Guardianship Code: the separate property of the wife, the separate property of the husband and common property. There is a presumption that all property not deemed separate property is common property. Article 31 of the KRO also provides a list of common property, which includes earnings received for work or other personal services performed by either spouse, income from both common and separate property and amounts collected in an account or an employee pension fund for either of the spouses.\textsuperscript{15}

On the other hand, there is a numeros clausus of items that constitute the spouses’ separate property, which includes chattels acquired before marriage, chattels acquired by inheritance or donation record (unless the testator or donor determined otherwise),\textsuperscript{16} joint property rights that are fully covered under separate provisions, inalienable rights that may be exercised only by one person, property that is used exclusively to satisfy the personal needs of one

\begin{footnotesize}
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\item[12] Ibid 17–18.
\item[13] Articles 52–54 of the KRO.
\item[15] The Polish approach is similar to the French one, but different from the Italian one. In Italy, income from separate property belongs to the separate property of each spouse. See W Piętens ‘Europeanisation of Family Law’ in K Boele-Woelki (ed) Perspectives for the Unification and Harmonisation of Family Law in Europe (Oxford/New York/ Antwerp: Intersentia, 2003) 10.
\item[16] See the decision of the Supreme Court of 11 March 2011 (II CSK 405/10, LEX nr 794576).
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spouse, compensation for personal injury (except a pension for complete or partial loss of earning capacity), debts concerning remuneration of one of the spouses, prizes for personal achievements of one of the spouses, royalties for literary or industrial work or inventions, and finally, property acquired in exchange for elements of personal assets, unless particular provisions permit otherwise.

Common property is a species of co-ownership different from the type of co-ownership governed by property law. Common property co-ownership is created by operation of law and is applied exclusively to marriages. Its key characteristic is that neither spouse has a definite share in the common property, but each has equal rights to the whole property. Neither spouse can apply to divide the common property, but each spouse is entitled to apply for a court order that introduces separation of property, by which the common property is divided and each spouse has separate property. The rules on the spouses’ management of common property are strictly prescribed by law. Spouses cannot change the rules, even through marital agreements.

III THE OLD VERSUS NEW RULES

The basic rule of Polish family law is equality between a husband and a wife who are to have the same rights to common property. Pursuant to art 36(1) of the KRO, spouses should co-operate in the management of common property, but this is a general rule that does not require all actions regarding common property to be taken by both spouses.

Before 2005, all actions of the spouses were divided into two groups: ordinary actions and extraordinary actions. Ordinary actions, which each spouse was entitled to undertake, were defined as ‘transactions of an everyday occurrence involving no risk to the household and to which no reasonable spouse would object’. Extraordinary actions, which demanded strict co-operation of both spouses, were ‘ones involving a certain amount of risk’.

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17 The law of property is regulated by the Civil Code – Act of 23 March 1964.
18 See art 52 of the KRO.
19 On the contrary, in the Netherlands where the system of total community of property exists, spouses are able to change the general rule of administration in a marriage contract (K Boele-Woelki, F Schonewille and W Schrama ‘Dutch report concerning the CEFL questioner on property relations between spouses in’ K Boele-Woelki, B Braat and I Curry-Sumner (eds) European Family Law in Action (Antwerp/Oxford/Portland: Intersentia, 2009) 438).
20 Pursuant to art 23 of the KRO, spouses have equal rights and obligations in marriage.
21 Compare to art 180 of the Italian Civil Code, which permits each spouse to act solely as regard to ordinary administration, but to act jointly as regard to extraordinary administration. Actions of ordinary administration concern regular enjoyment of property and its maintenance. Meanwhile, extraordinary actions include a modification of the composition of the patrimonial estate. See S Patti, C Caricatio, C Itri, MA Iannicelli, MF Serra, P Di Stefano, Z Csenge Pető and T Bortoli in K Boele-Woelki, B Braat and I Curry-Sumner (eds) European Family Law in Action (Antwerp/Oxford/Portland: Intersentia, 2009) 436.
23 Compare Portuguese Law. See G de Oliveira, R Martins and P Vitor ‘Portuguese report
actions done without the consent of the other spouse were void. Although consent could be given after the transaction, the validity of the transaction depended upon the ratification by the other spouse. When consent was not forthcoming, the third party might set a time-limit by which the other spouse had to decide whether to consent to the action. If no consent was given, the third party was no longer contractually obliged after the expiration of the time-limit.

The main problem with the old rules was their failure to clearly define ordinary actions and extraordinary actions. For example, an extraordinary action for one marriage might be an ordinary one for another marriage. The lack of objective statutory criteria for distinguishing between these two types of actions made it impossible to clearly and explicitly classify each action of the spouses, thereby jeopardising legal certainty.\(^{25}\) In its various decisions, the Polish Supreme Court explained the actions to be considered ordinary and those to be considered extraordinary. Jurisprudence and doctrine therefore tried to develop a catalogue of criteria that was taken into account when characterising an action as either ordinary or extraordinary, such as the size of common property,\(^{26}\) the relation between the value of debts or claims and the value of common property,\(^{27}\) the earning capacity of each spouse and the security of legal transactions. It was suggested that the higher the economic activity of the spouses and the higher the level of their affluence from the activity, the wider the scope of ordinary actions imputed to the spouses ought to be.\(^{28}\) However, the problem in practice was that the same action could be classified differently. Furthermore, the court characterised each action ex post, which was good for neither the spouses nor the creditors: spouses did not know the limits of their sole management, while creditors were unsure whether an action was valid and effective.\(^{29}\) This situation created a constant state of uncertainty that negatively impacted on the security of legal transactions.

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24 Ibid 94.
26 See the Decision of the Supreme Court of 21 January 2009, LEX 562977. The Supreme Court classified a spouse's sale of shares for the price of 265,900 PLN as an ordinary action because the common property of the spouses was worth about 2,000,000 PLN.
27 See the Decision of the Supreme Court of 10 January 2001, LEX 52417. For example, a guaranty assuring payment of a loan of 35.00 USD granted in Poland in 1992 was treated in that specific case as an extraordinary action – see: Decision of the Supreme Court of 28 July 1998, LEX 376146. A guaranty of 20,000 PLN (about 7.500 USD) granted in Poland in 1996 was classified in another case as an extraordinary action as well – see: Decision of the Supreme Court of 28 November 2002, LEX 75343. However, the Supreme Court stated that a guaranty of a bank loan of 9,000,000 PLN did not predetermine that the action had been an extraordinary one because the person who incurred the debt had been one of the richest men in Poland (Decision of the Supreme Court of 14 February 2008, LEX 457863).
28 See the Resolution of the Supreme Court of 25 March 1994, LEX 4025.
This situation changed in 2005, with the main goal being the adjustment of matrimonial property relations to the new social-economic realities, which had started to significantly change after 1989. According to the new rules on the topic, each spouse could solely administer common property with the exception of several actions, which were explicitly listed in art 37 of the KRO and required the consent of the other spouse, without which the actions were null and void. Importantly, this legal reform included a definition of the administration of common property, which resolved certain practical problems. Pursuant to art 36(2) of the KRO, the administration of common property encompasses actions as to assets included in common property.

IV SPOUSAL POWER TO MANAGE PROPERTY SEPARATELY UNDER THE NEW RULES

As discussed, the property of the spouses is divided into their common property and the separate property of each the wife and the husband. There are no limits on the spouses’ actions regarding their separate property because each spouse is the sole owner of his or her separate property. Surprisingly, a spouse is therefore able to dispose of his or her home if it is separate property, even if it is the family home. Of course, such a disposal can be contrary to the non-pecuniary obligations of spouses, but this does not automatically mean that the action of the spouse is void or can be annulled.

A key issue in the new rules, however, is the autonomy and independence of the spouses in administering common property. According to art 36(2) of the KRO, each spouse can solely manage the assets of common property, unless

30 T Mroż Teresa Zgoda małżonka na dokonanie czynności prawnej w ustroju majątkowej wspólności ustawowej, LEX 2011, no 132317.
31 For example, there had been a debate prior to the legal reform on whether increasing a loan is an ordinary or extraordinary action. This debate is now moot because such an action does not currently belong to the administration of common property as it does not concern assets from common property. See M Olczyk [in:] Komentarz do ustawy z dnia 17 czerwca 2004 r. o zmianie ustawy – Kodeks rodziny i opiekuńczy oraz niektórych innych ustaw (Dz.U.64.162.1691), w zakresie zmian do ustawy z dnia 25 lutego 1964 r. – Kodeks rodziny i opiekuńczy (Dz.U.64.9.59), LEX 2005, no 79767.
33 There is only one rule when a single spouse is entitled to the residential premises: the other spouse has the right to use the premises to cater for family needs (art 28(1) of the KRO). Another provision concerns the spouses’ rights to residential premises leased during the marriage to accommodate the family (see art 68(1) of the Polish Civil Code). Meanwhile, art 1320 of the Spanish Civil Code states that disposal of the principal residence, even if it belongs only to one spouse, requires the other spouse’s consent or judicial permission. Although the action concerns private property of the spouse, the other spouse can demand annulment of the act (see art 1322 of the Spanish Civil Code).
34 For example, the obligation of spouses to work together for the good of the family that the marriage has created (art 23 of the KRO) and to contribute to meeting the needs of the family founded by the marriage (art 27 of the KRO).
otherwise provided in special rules.\textsuperscript{35} Irrespective of this rule, art 36(3) of the KRO guarantees that property used by one spouse for professional or commercial activities can be solely administered by that spouse – only in the case of transient obstacles can the other spouse object.

Sole management of common property by one spouse is limited by the objection of the other spouse. The objection need not take any particular form, but a written one more easily proves the objection.\textsuperscript{36} A spouse may object to an envisaged act of the other spouse, and this objection is valid to third parties if they knew about the objection before the act was performed.\textsuperscript{37} If the act is performed despite the objection, it is null and void.\textsuperscript{38} However, the objection cannot regard minor acts done in everyday life, actions aimed at fulfilling the ordinary needs of the family or acts connected to a commercial activity of a spouse. This last group of actions is noteworthy because the regime of common property with the co-operation of both spouses can be seen as an obstacle to entrepreneurship. However, the impossibility of spousal objections related to commercial activities confirms that it is possible to start a commercial activity without the need for a premarital agreement that introduces the separation of property as the marital property regime.

There is also another limit on a spouse’s ability to solely manage common property under the new rules. At the request of one spouse, a court may deny the other spouse the independent right of administration. Such a decision can be made for important reasons pursuant to art 40 of the KRO, which occur when a spouse is unable to undertake, in accordance with the good of the family, decisions concerning the management of common property, exposing the property to substantial harm. Such reasons could include a spouse’s alcoholism, stupefaction, improper administration due to carelessness or incompetence or actions such as hiding components of common property, the lack of co-operation in management of common property, or the actual separation of the spouses.\textsuperscript{39}

\textsuperscript{35} This regulation is similar to French law. According to art 1421 of the French Civil Code, each spouse has in principle a power to individually administer and dispose of common assets. See F Ferrand and B Bratt ‘French report covering the CEFL questionnaire on property relations between spouses’ in K Boele-Woelki, B Braat and I Curry-Sumner (eds) \textit{European Family Law in Action} (Antwerp/Oxford/Portland: Intersentia, 2009) 433.

\textsuperscript{36} See the decision of the Appeal Court in Katowice of 20 February 2009, LEX no 508515.


\textsuperscript{38} Although the result of such objection was not explicitly mentioned in art 36(1) of the KRO, the opinion that such an act is null and void seems to be currently dominant in Polish jurisprudence. See: T Snyczyński \textit{System Prawa Prywatnego}, vol 11, (Warsaw: Wydawnictwo CH Beck, 2009) 487.

V ACTIONS REQUIRING SPOUSAL CO-OPERATION UNDER THE NEW RULES

The new rules on the administration of common property have introduced a group of actions that require the co-operation of both spouses.\textsuperscript{40} In other words, the spouse who wants to act needs to receive the consent of the other spouse. The list of actions is in art 37 of the KRO, and includes:

(1) actions leading to the disposal of, indebting or acquisition of immovable property for payment, providing immovable property for use or usufruct;

(2) actions leading to the disposal of, indebting or acquisition of property for payment regarding a building or living premises;

(3) actions leading to the disposal of, indebting or acquisition of property for payment or leasing of a farm or an enterprise; and

(4) donations, apart from minor donations.\textsuperscript{41}

The validity of a contract concluded by one spouse without the required consent of the other depends on the other spouse’s affirmation of the contract. The contractual party of one spouse may impose a deadline by which the other spouse, whose consent is required, affirms the contract. The contracting party becomes free after the deadline’s expiration and the contract becomes void. A unilateral act performed without the required consent of the other spouse is invalid without the possibility of reformation. The best practice for a contracting party, therefore, is to obtain the consent of the non-contracting spouse before the agreement is concluded. The main goal of obligatory consent is to protect the common property that is a base for the family.\textsuperscript{42}

Finally, it is noteworthy that the court may determine that, to carry out the actions listed in art 37(1) of the KRO, judicial permission can be a substitute for the spouse’s permission. In these cases, instead of seeking the consent of the spouse, a person needs to obtain the permission of the court. Similarly, if one spouse refuses to provide the consent required by law, or if it is difficult to compromise with that spouse,\textsuperscript{43} the other spouse may apply to the court for permission to carry out operations. The court will grant the authorisation if the action is good for the family, pursuant to art 39 of the KRO.\textsuperscript{44}

\textsuperscript{40} A similar rule can be found in French law, which offers a list of transactions that are subject to the joint administration of spouses. See arts 1424-1425.


\textsuperscript{43} For example, due to sickness or lack of contact with the other spouse.

\textsuperscript{44} A similar rule can be found in Spanish law. See art 1376 of the Spanish Civil Code.
VI CONCLUSION

It is difficult to create statutory rules governing the administration of common property that would sufficiently secure the common property of the spouses and also take into account the interests of the creditors who enter into legal relationships with one of the spouses. In considering the preferable model of the administration of common property, one possibility is to allow joint management limited to ordinary actions and require the consent of a spouse in other actions. Another approach is to introduce the principle of self-management of property provided, however, there is a group of particularly important actions that require the consent of the other spouse for their validity. This latter approach is employed today in Poland, while the former was in force prior to 2005.

Neither of these approaches is free from shortcomings. Having indeterminate actions that are extraordinary and in excess of ordinary management activities may raise doubt as to the legal certainty of transactions – it seems difficult to establish general and objective criteria that could be applied in the process of distinguishing extraordinary actions from ordinary ones. Previous jurisprudence and doctrine include several guidelines that were helpful in this regard but were very general, increasing the importance of the judge’s role because whether or not an action was valid depended on judicial decision. On the other hand, clearly outlining a directory of actions requiring the consent of the other spouse carries the risk of insufficiency.

With the introduction of art 37(1) of the KRO, lawmakers seemed to have taken into account the most important components of the assets of spouses. At the same time, however, it seems that they have not recognised that the current composition of spousal property includes items other than those included a few decades ago. For example, shares and bonds are currently included in common property. Separate administration means that each spouse can sell them without the consent of the other, even though they are a very important component of common property. Such spousal action will be valid even if not in accordance with the interests of the family. On the other hand, if a spouse decides to sell a small piece of real estate, the consent of the other spouse is indispensable. This is a consequence of the statutory presumption that the type of action determines its legal efficiency, depending on the way the administration of common property is being performed (separately or jointly) instead of the value of the action. On the other hand, the introduction of thresholds based on the value of a specific action seems to be impractical because it would require determining the value of the transaction, which could lead to disagreement and preclude sufficient legal certainty of transactions. Parties to such transactions can also avoid the necessity of the other spouse’s

45 Compare the list of transactions included in common property to those in the French Civil Code. Transactions concerning non-negotiable securities (partnership share) are subject to joint administration.
consent by dividing transactions into several smaller ones or underrating their value. In conclusion, value-based criteria would not be much better than the previous regulation based on an individual assessment of spousal action as ordinary or extraordinary.

However, the new rules governing the administration of property seem to be preferable to the more flexible but occasionally ambiguous rules based on the dichotomy between ordinary and extraordinary actions. The most important advantages resulting from the current regulations are the higher level of stability for legal relationships based on one spouse's actions and the easier identification of actions requiring joint management.

Nonetheless, the new rules do not eliminate all of the practical problems with the administration of common property. This prompts the question of whether it is even possible to eliminate all of the problems concerning the administration of common property: guaranteeing the spouses relative autonomy in the management of common property while guaranteeing creditors certainty in transactions. It is also the choice between, on the one hand, formulating an expansive and detailed list of actions requiring a spouse's consent that can lead to extensive regulation despite drawbacks and, on the other hand, formulating a short list that takes into account the most popular actions that are typically most important for families. The second solution seems preferable, but the introduction of such a list should be preceded by detailed analysis and the resulting list should be reviewed at least once every decade, if not more frequently. Unfortunately, after 7 years of the binding force of the new rules on the topic, there are still few relevant court decisions and resolutions of the Supreme Court that could provide guidelines. This increases the importance of analysing foreign regulations limiting the separate administration of common property.

It seems that in the creation of a revised list of actions requiring the other spouse's consent, the following additional actions should be considered:

1. actions leading to the disposal of, indebting or acquisition of a registered ship or a ship under construction for payment, as well as those actions leading to the ship being given for use or for usufruct; and

2. actions leading to the disposal of, indebting or acquisition of entire common property for payment, as well as those actions leading to the entire common property being given for use or for usufruct.

There are already Polish regulations that treat a registered ship or a ship under construction similarly to real estate (eg regulations concerning the sale of

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46 If a component of common property could be partially disposed, eg shares.
47 Compare to art 1424 of the German Civil Code. The disposal of registered ships and ships under construction is treated the same as the disposal of real estate.
48 Compare art 1423 of the German Civil Code, which requires the consent of the other spouse if the entire common property is to be disposed.
property in insolvency proceedings). The value of such ships is usually higher than typical residential property, and there is no logic in classifying the sale of a small flat worth, for example, 100,000 PLN as a potentially more dangerous action for common property than the sale of a ship worth 1,000,000 PLN.

Introducing a higher level of protection for the entire common property should also be considered. Article 37 of the KRO protects the most important components of such property, but the protection does not cover the entire property. This could be particularly significant for marriages where the spouses do not own any real estate, farm or enterprise: one spouse’s sale of whole common property – unless real estate, farm or enterprise – would be valid even when not in accordance with the good of the family.

Apart from possible amendments concerning the administration of common property, it might be necessary to introduce a regulation that limits spousal actions over the separate property of each spouse. For example, if a spouse is the sole owner of the principal residence of the family, disposal of the residence ought to be approved by the other spouse. Otherwise, the spouse who did not grant consent would be able to demand the judicial annulment of the action. To achieve the balance between the good of the family and the security of legal transactions, there ought to be a deadline by which to annul such an action; for example, a spouse could have a limit of 2 years to institute relevant legal proceedings. The good faith of the other party to the transaction, however, should be protected as well.

Finally, it should be noted that the harmonisation of certain aspects of family law is currently being discussed in the European Union. Any resulting developments in European regulations on common property could therefore influence Polish law. Nonetheless, the extent to which harmonisation can standardise the rules on the administration of marital property is unclear. Certain specific legal approaches to common property law that result from different historic and economic conditions, as well as different cultural and religious traditions, could properly exist in one country without a realistic chance of adoption in another.

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49 See arts 316–324 of the Polish Bankruptcy and Rehabilitation Law dated 28 February 2003.