

ENTRANCE OF HEIRS OF THE DECEASED PARTNER INTO A CIVIL-LAW PARTNERSHIP

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Summary. The first sentence of Article 872 of the Polish Civil Code concerns entrance of the deceased partner's heirs into a civil-law partnership. It has numerous interpretative doubts which concerns the nature of joining a civil-law partnership by the deceased partner's heir. There are two competitive proposals devised in German law which can be potentially applied under Polish law on account of their similarity between Polish and German regulations. According to the first one, entrance of the deceased partner's heir into a partnership takes place on the basis of an agreement between those who live, that is contractual stipulation to a third party. According to the second one, the basis of joining a partnership by the deceased partner's heir is company's share inheritance. In the article advantages and disadvantages of both concepts have been assessed, as well as a new proposal in that regard has been formulated.

Key words: civil-law partnership, partner's death, share in civil-law partnership

1. INTRODUCTION

The first sentence of Article 872 of the Polish Civil Code allowing a stipulation according to which the partner's heirs shall replace him in a civil-law partnership, raises substantial interpretative doubts concerning in particular the legal classification of that stipulation, its parties and the legal nature of heirs' entrance into a civil-law partnership¹. Similar doubts can be found in German regulations involving a civil-law partnership², which have become

¹ I have widely discussed those issues: P. Zakrzewski, *Wejście spadkobierców wspólnika do spółki cywilnej na jego miejsce*, in: *Non omnis moriar. Osobiste i majątkowe aspekty śmierci człowieka. Zagadnienia wybrane*, ed. J. Gołaczyński, J. Mazurkiewicz, J. Turłukowski [et al.], Oficyna Prawnicza, Wrocław 2015, pp. 874 and following; Idem, *Udział spółkowy wspólnika spółki cywilnej jako przedmiot następstwa prawnego mortis causa pod tytułem szczególnym*, "Przegląd Prawa Handlowego" 5 (2013), pp. 17 and following.

² See: H. Brox, W.D. Walker, *Erbrecht*, Verlag C.H. Beck, München 2010, pp. 428, 430; W. Schlüter, *Erbrecht*, Verlag C.H. Beck, München 2000, pp. 472, 474; W. Edenhofer, *Kommentar zu § 1922*, in: *Palandt. Bürgerliches Gesetzbuch*, Verlag C.H. Beck, München 2010, § 1922, margin number 16; R. Stürner, *Kommentar zu § 2032*, in: *Bürgerliches Gesetzbuch mit*

a model for the later Polish regulation of a civil-law partnership, included initially in Article 546-591 of a Code of Obligations³, and then in Article 860-875 of a Civil Code⁴. However, it shall be indicated that paragraph 727, passage 1 of the German Civil Code⁵ includes different content than the first sentence of Article 872 of the Polish Civil Code, to wit, it does not provide that partnerships dissolve with the death of one partner unless otherwise specified in a partnership agreement. In the German Civil Code there is also an institution unknown for Polish law, the contract in favor of a third party due to death (§ 331 G.C.C.), which is an alteration of an institution known in Polish law as the contract in favor of a third party (Art. 393 P.C.C.). Both those German provisions are fundamental for solving the problem mentioned above concerning the legal classification of a stipulation on heirs entering into a civil-law partnership after the partner's death. Taking into account a difference between paragraph 727, passage 1 of the German Civil Code, and the first sentence of Article 872 of the Polish Civil Code, as well as paragraph 331 of the German Civil Code and Article 393 of the Polish Civil Code, the views of German legal literature on the problem mentioned above may constitute a starting point only for considerations, but they cannot be fully and automatically transposed into Polish law. Therefore, an aim of this article is to formulate a proposal on this subject.

2. CONTRACTUAL CLAUSE – THE SO-CALLED CORPORATE SOLUTION

The first proposal of interpretation of Article 872 of the Polish Civil Code relates to the views of German legal literature⁶. It provides that entrance of heirs into a civil-law partnership after the partner's death is effected on the basis of a partnership agreement, and therefore independently on the provisions of the inheritance law⁷. This raises the first question, namely between whom and whom a contractual clause whereby heirs of the deceased partner enter into his place into a civil-law partnership is agreed? The provision referred to above is lapidary and states only "it may be stipulated". However, it is not disputed that heirs of the deceased partner who are supposed to enter in his place into

Rom-I, Rom-II, Rom-III-VO, EG-UntVO/HuntPrpt und EuErbVO. Kommentar, ed. R. Stürmer, ed. 16, Verlag C.H. Beck, München 2015, pp. 2078–2079.

³ Decree of the President of Republic of Poland from 27th October 1933, Code of Obligations, "Journal of Laws of RP" No. 82, item 598 changed.

⁴ Act of April 23, 1964, Civil Code, i.e. "Journal of Laws" of 2017, item 459, 933, 1132.

⁵ Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2.01.2002, BGBl. I S. 42, ber. German Civil Code, i.e. of January 2, 2002, "Federal Journal of Laws" I, p. 42 changed.

⁶ See also: W. Schlüter, *Erbrecht*, p. 472; H. Brox, W.D. Walker, *Erbrecht*, p. 440.

⁷ See: P. Zakrzewski, *Wejście*, p. 881 and following; Idem, *Udział*, p. 18.

a civil-law partnership, are not treated as a party of such a proceeding but they are regarded as beneficiaries. But if a legal provision states that it may be stipulated, then it means that such a stipulation may be accomplished by a partner who wants his company share to be given to his heirs upon death, as well as by other shareholders.

It is similar to the contractual claim to a third party with the effect of *in personam* regulated in Article 393 of the Polish Civil Code. It constitutes a construction variant which enriches other types of contractual obligations. A civil-law partnership agreement is an obligation agreement, that is why it potentially opens a way to accept that in the first sentence of Article 872 of the Polish Civil Code such a construction has been referred to.

Consequently, it can be hypothetically assumed that in the first sentence of Article 872 of the Polish Civil Code there is present a classical construction variant of a contractual reservation in favor of a third party fitted in a civil-law partnership agreement. A partner who wants to give their own shares to their heirs is a stipulator, the other shareholders act as promissors, and the heirs are beneficiaries, i.e. third parties who are entitled to demand from promissors specific behavior, that is to pass shares belonging to a deceased partner⁸.

Assuming that on the basis of the first sentence of Article 872 of the Polish Civil Code we are dealing with a contract in favor of a third party makes it possible to distinguish two different concepts of that contract, namely a contract in favor of a third party with the obligation effect, and at least potentially a contract in favor of a third party with the disposing effect.

As far as the first concept is considered, it is not possible to accept it due to the following reasons. A contractual stipulation providing the claim to a third party known from Article 393 P.C.C. causes only obligation effects. It has to be assumed that the same applies to the stipulation appearing in a specific regulation of the first sentence of Article 872 P.C.C. It would mean that third parties – heirs could acquire only the claim against the other shareholders for transferring shares belonging to the deceased partner to them. Therefore, in order to enter into a civil-law partnership, the heirs would need an additional agreement, so-called the transfer of the membership agreement, also called a disposal of partnership shares or a transfer of rights and obligations of a partner⁹, which is performance of an agreement of a civil-law partnership modified by a stipulation on the provision for a heir or heirs. Whereas the first sentence of Article 872 of the Polish Civil Code explicitly states that it is possible for heirs to enter into a partnership under the contractual stipulation with no additional legal steps of theirs, in particular without concluding a transfer of the membership agreement by them. Another obstacle is a kind of a fiction,

⁸ See: P. Zakrzewski, *Wejście*, pp. 882–883 and following; Idem, *Udział*, p. 19.

⁹ See, on the names of this agreement: A. Herbet, *Spółka cywilna. Konstrukcja prawna*, Wydawnictwo C.H. Beck, Warszawa 2008, p. 437.

namely it is assumed that other shareholders have the rights to the deceased partner's own share beforehand, and then, by performing an agreement of provision for heirs they transfer the share for their benefit concluding a separate agreement of a transfer of the membership.

In the first sentence of Article 872 of the Polish Civil Code we cannot therefore find a stipulation of the provision for heirs with obligation effects, but there appears a question whether partners of a civil-law partnership based on the principle of freedom of contracts would be able to modify a civil-law partnership agreement of a stipulation included in Article 393 of the Polish Civil Code? The answer for this question sounds negatively since own share of the deceased partner shall cease as a result of his death, except for the situation referred to in the first sentence of Article 872 of the Polish Civil Code. Consequently, a divergent contractual provision from which it would result that a third party would have a claim for transferring the deceased partner's own share for their benefit, is incompatible with the *ius cogens* provisions regulating a civil-law partnership¹⁰.

So if the first sentence of Article 872 of the Polish Civil Code states about entrance of the deceased partner's heirs into a civil-law partnership, the question arises whether in this case we are not dealing with an agreement between a partner and other shareholders for the benefit of third parties, i.e. heirs, resulting in the disposing effect in the form of transferring company's own share of the deceased partner?

The basic problem that arises while trying to qualify a clause of the first sentence of Article 872 of the Polish Civil Code as an agreement for the benefit of the third party with the disposing effect is that the Civil Code does not know such a contractual stipulation. A contractual stipulation from Article 393 P.C.C. may be applied only to obligation agreements. Very popular is also an opinion that this provision cannot be applied, either adequately or by analogy to agreements other than obligation agreements, for example, to disposing agreements¹¹.

¹⁰ P. Zakrzewski, *Wejście*, p. 883 and following; Idem, *Udział*, p. 119.

¹¹ Z. Radwański, *Umowy odnoszące się do osób trzecich*, in: *System prawa cywilnego. Prawo zobowiązań – część ogólna*, ed. Z. Radwański, Zakład Narodowy im. Ossolińskich, Wydawnictwo Polskiej Akademii Nauk, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1981, p. 446; P. Machnikowski, *Komentarz do art. 393*, in: *Kodeks cywilny. Komentarz*, eds. E. Gniewek, P. Machnikowski, ed. 7, Wydawnictwo C.H. Beck, Warszawa 2016, Article 393, margin number 4; W. Popiołek, *Komentarz do art. 393*, in: *Kodeks cywilny. Komentarz do artykułów 1-44911*, ed. K. Pietrzykowski, vol. I, ed. 5, Wydawnictwo C.H. Beck, Warszawa 2008, p. 1160; M. Bednarek, *Umowa o świadczenie na rzecz osoby trzeciej*, in: *System prawa prywatnego. Prawo zobowiązań – część ogólna*, ed. E. Łętowska, vol. V, Wydawnictwo C.H. Beck, Warszawa 2006, p. 893; compare A. Olejniczak, *Komentarz do art. 393*, in: *Kodeks cywilny. Komentarz. T. III. Zobowiązania – część ogólna*, ed. A. Kidyba, Wolters Kluwer Polska, Warszawa 2010, p. 273; R. Morek, *Komentarz do art. 393*, in: *Kodeks cywilny. Komentarz. Zobowiązania*,

Regardless of the above, there are other obstacles that are mentioned in German literature. An agreement for the benefit of a third party with the disposing effects would breach the basic assumptions of the civil law, namely due to a conclusion of such an agreement heir's autonomy would be breached since such a person would acquire company's share, that is rights and obligations against his or her will¹². This objection, however, can be partly diminished by pointing that a heir always has a right to reject a legacy, thus shall lose a status of being a heir, which as a consequence shall cause that they cannot enter into a civil-law partnership since entering resulting from the first sentence of Article 872 of the Polish Civil Code is reserved only for persons having a status of being a heir. Therefore, it is not sufficient to have a status of an ordinary legatee or a vindicatory one¹³.

Another objection, also raised in German literature is decisive, namely if the subject of an agreement for the benefit of a third party with the disposing effect is company's share, that is rights and obligations of the deceased partner, such an agreement would become partly an agreement of a third party's liability, and that is unacceptable since that agreement does not exist in Polish law on account of infringement of the principle of the autonomy. Therefore, a viewpoint that on the base of Article 872 of the Polish Civil Code we are dealing with a clause for the benefit of a third party with the disposing effects should be rejected¹⁴.

3. INHERITANCE CLAUSE – SO-CALLED INHERITANCE SOLUTION

The predominant opinion in Polish literature concerning Article 872 of the Polish Civil Code seems to be as following: company's own share of a partner of a civil-law partnership is generally inheritable, but as a result of introducing an applicable provision to a civil-law partnership agreement, it can become heritable and be passed on to the deceased partner's heirs¹⁵.

ed. K. Osajda, vol. II, Wydawnictwo C.H. Beck, Warszawa 2013, Article 393, margin number 3. In German literature more popular is an opinion denying such a possibility – see: W. Schlüter, *Erbrecht*, p. 473; H. Sprau, *Kommentar zu § 727*, in: *Palandt. Bürgerliches Gesetzbuch*, § 727, margin number 3. Contrariwise H. Brox, W.D. Walker, *Erbrecht*, p. 428.

¹² H. Brox, W.D. Walker, *Erbrecht*, p. 440. P. Zakrzewski, *Udział*, p. 20.

¹³ P. Zakrzewski, *Udział*, p. 24. Contrariwise J. Turłukowski, *Instytucja zapisu windykacyjnego w prawie polskim. Wybrane zagadnienia*, LexisNexis Polska, Warszawa 2014, p. 238.

¹⁴ H. Brox, W.D. Walker, *Erbrecht*, p. 440. P. Zakrzewski, *Udział*, p. 20.

¹⁵ See: J. Pietrzykowski, *Komentarz do art. 922*, in: *Kodeks cywilny. Komentarz. T. III. Księga czwarta – spadki. Przepisy wprowadzające Kodeks cywilny*, red. J. Pietrzykowski, Wydawnictwo Prawnicze, Warszawa 1972, p. 1822; E. Skowrońska-Bocian, *Prawo spadkowe*, ed. 8, Wydawnictwo C.H. Beck, Warszawa 2011, p. 13; Idem, *Komentarz do Kodeksu cywilnego. Księga czwarta. Spadki*, ed. 10, LexisNexis Polska, Warszawa 2011, p. 26; J.S. Piątowski, *Prawo spadkowe. Zarys wykładu*, ed. 5 updated and completed by B. Kordasiewicz, Wydawnictwo

And here raises a question of a role of a contractual stipulation referred to in the first sentence of Article 872 of the Polish Civil Code, which causes that company's share shall become heritable. According to the first proposal, a provision introduced into a civil-law partnership agreement and providing that company's own share of the deceased partner shall be passed on to their heirs is an agreement as to succession. According to the second one, a provision introduced into a civil-law partnership agreement has an effect of recasting inheritable share into a heritable one, thus a civil-law partnership's share is, so-called relationship of rights and obligations relatively heritable.

Turning towards the first matter under consideration, it should be noted that a provision included in Article 872 of the Polish Civil Code in the light of this concept would be legal proceeding *mortis causa*. Such proceedings are characterized by the fact that their efficiency depends on a testator's death as well as whether the testator is survived by his or her beneficiaries. They do not create for a beneficiary any rights or obligations of assets which they shall receive after the testator's death when he or she is still alive. Therefore, a testator is not restricted in disposing the assets when he or she is still alive.

However, such a qualification of a stipulation included in the first sentence of Article 872 of the Polish Civil Code should be rejected. It would not be an agreement as to succession *sensu stricte* indeed, since its subject shall be only a single company's share, i.e. certain rights and obligations and not an inheritance or inheritance division. Potentially it could be an agreement as to succession *sensu largo*, that is, the one which would mean laying down an ordinary provision or a vindicatory one. That proposal should be rejected since an ordinary provision causes only the obligation effects, and those are not referred to in the first sentence of Article 872 of the Polish Civil Code. In the contrary, vindicatory bequest shall be limited in terms of scope, which means that company's share being a conglomerate of rights and obligations is not included in the catalogue of scope of vindicatory bequest (Article 981¹

Prawnicze LexisNexis, Warszawa 2002, p. 38; K. Pietrzykowski, *Komentarz do art. 872*, in: *Kodeks cywilny. T. II. Komentarz do art. 450-1088*, ed. K. Pietrzykowski, ed. 5, Wydawnictwo C.H. Beck, Warszawa 2009, Article 872, margin number 2; J. Kremis, *Komentarz do art. 922*, in: *Kodeks cywilny. Komentarz*, eds. E. Gniewek, P. Machnikowski, Article 922, margin number 109; E. Niezbecka, *Kodeks cywilny. Komentarz. T. IV. Spadki*, ed. A. Kidyba, ed. 3, Wolters Kluwer Polska, Warszawa 2012, pp. 22, 27 who, however, draws attention to Article 922 P.C.C. stating that it does not give a basis to distinguish a category of rights relatively inheritable; W. Borysiak, *Dziedziczenie. Konstrukcja prawna i ochrona*, LexisNexis Polska, Warszawa 2013, pp. 325–326, 329; S. Babiaryz, *Spadek i darowizna w prawie cywilnym i podatkowym*, Wydawnictwo Prawnicze LexisNexis, Warszawa 2008, p. 29; R. Uliasz, *Komentarz do art. 860-875 ustawy z dnia 23 kwietnia 1964 r. Kodeks cywilny (Dz.U.64.16.93)*, LEX/el. 2010, Article 872, margin number 2; J. Ignaczewski, *Prawo spadkowe. Art. 922-1088 KC. Komentarz*, C.H. Beck, Warszawa 2004, p. 42; P. Książak, *Prawo spadkowe*, Wolters Kluwer, Warszawa 2017, p. 76–77.

§ 2 P.C.C.)¹⁶. An interpretation perceiving an agreement as to succession *sensu largo* in the first sentence of Article 872 of the Polish Civil Code is contradictory to Article 1047 of the Polish Civil Code, in which conclusions of agreements as to successions are forbidden. Furthermore, a stipulation referred to in the first sentence of Article 872 of the Polish Civil Code may be done only in a partnership agreement, not in a testament.

The idea mentioned above assumes recasting inheritable share into a heritable one. It causes that all the heirs or legatees shall enter into a civil-law partnership if appropriate stipulation is included in a civil-law partnership agreement. However, as prohibited in the light of this view should be considered entering based on the first sentence of Article 872 of the Polish Civil Code into a civil-law partnership only some of beneficiaries from the circle of heirs. This concept would mean that usefulness of the clause from the first sentence of Article 872 of the Polish Civil Code would be limited, since partners as a rule, are interested in a case that only one chosen heir enters into a civil-law partnership, the one having the right qualifications approved of by the shareholders, but not all the heirs.

An approach assuming conditional bequest of company's own share of a partner of a civil-law partnership should be rejected on the ground that it leads to a contradiction between the inheritance law and the company law, which has been rightly pointed out in German literature¹⁷. It appears between provisions regulating joint property of inheritance, that is Article 1035 of the Polish Civil Code and the second sentence of Article 872 of the Polish Civil Code, as well as among provisions referring to heirs' liability for inherited debts [the liability may be limited either to the value of inheritance or to the value established in the inventory of assets of inheritance (the first sentence of Article 1030 and Article 1031 § 2 P.C.C.)], and Article 864 of the Polish Civil Code providing that for partnership's liabilities all the partners are liable jointly and severally, without limitations. However, it should be noted that in the literature views on admissibility of referring by heirs entering into a civil-law partnership on the base of Article 872 of the Polish Civil Code to inheritance legislation restricting liability for inherited debts (Article 1031 § 2 P.C.C.) with reference to civil-law partnership's debts incurred prior to heirs entering into a partnership are varied¹⁸.

¹⁶ Ł. Mleko, *O zapisie windykacyjnym i wprowadzeniu do systemu prawnego darowizny na wypadek śmierci*, "Legal Forum" 4-5 (2011), p. 98; P. Zakrzewski, *Zapis windykacyjny*, "Przegląd Sądowy" 2 (2012), p. 12; P. Książak, *Zapis windykacyjny*, LexisNexis Polska, Warszawa 2012, pp. 104–105; compare J. Turłukowski, *Instytucja zapisu windykacyjnego*, p. 237.

¹⁷ Zob. W. Schlüter, *Erbrecht*, p. 473; W. Edenhofer, *Kommentar zu § 1922*, § 1922, margin number 18; H. Brox, W.D. Walker, *Erbrecht*, p. 441; H. Sprau, *Kommentar zu § 717*, § 717 margin number 1.

¹⁸ In favor of admissibility of referring to Article 1030 and following of P.C.C. are: A. Herbet, *Spółka cywilna*, p. 429; W. Borysiak, *Dziedziczenie*, p. 330. Those who disapprove of this idea

The contradiction between company law and inheritance law mentioned above would be present whenever a few heirs would inherit company's share. In that case under Article 1035 of the Polish Civil Code, the reference on joint property management, disposal of the share in company's share with the approval of the remaining heirs (Article 1036 P.C.C.), demand on the abolition of commonality share of inheritance by court decision or by agreement (Articles 1037-1038 and Articles 210-212 P.C.C) should be relevantly applied.

However, there is a fundamental doubt if Article 1035 of the Polish Civil Code may be applied to company's share that is attributable to the heirs? The first sentence of Article 872 of the Polish Civil Code provides that such heirs should indicate to the company one person who shall perform their rights. In legal literature it is assumed that we are dealing then with, so-called corporate partner¹⁹. It is difficult, therefore, to agree to the acquisition of company's share of the deceased partner, referred to in Article 872 of the Polish Civil Code, being made on the basis of inheritance when a substantial part of the provisions concerning inheritance, that is Article 1035 of the Polish Civil Code, shall not be applied due to exclusion by *lex specialis*, which is Article 872 of the Polish Civil Code. The application of other provisions, for example Articles 1036-1037 of the Polish Civil Code, seems to be difficult to reconcile with assumptions of company law. It would be thus inheritance to which inheritance provisions shall not be to a large extent applied, for example company's share cannot be a subject of ordinary and vindicatory legacy.

4. MODIFIED INHERITANCE CLAUSE

Rejection of the concept of heredity share allows to quote another concept developed in German literature, which provides that the clause of joining a civil-law partnership from Article 872 of the Polish Civil Code is a statutory condition, which means that if it occurs the deceased partner's share is designated to heirs indicated in the clause beyond universal succession *mortis causa*, which is inheritance²⁰. Consequently, inheritance law provisions concerning, in particular, the legal situation of the heirs after the succession has been opened (Articles 1035-1037 P.C.C) shall not be applied. If the mentioned condition occurs, the deceased partner's company's share of a civil-law partnership is transferred to indicated persons *ex lege*.

are: J. Ciszewski, *Spółka cywilna*, Wydawnictwo Ars Boni et Aequi, Poznań, 2000, p. 170; A. Kidyba, K. Kopaczyńska-Pieczniak, *Komentarz do art. 872*, in: *Kodeks cywilny. Komentarz. T. III. Zobowiązania – część szczególna*, ed. A. Kidyba, Wolters Kluwer Polska, Warszawa 2010, p. 1134; P. Zakrzewski, *Udział*, p. 23.

¹⁹ See also: A. Kidyba, K. Kopaczyńska-Pieczniak, *Komentarz do art. 872*, p. 1134.

²⁰ See: W. Edenhofer, *Kommentar zu § 1922*, § 1922, margin number 18; H. Sprau, *Kommentar zu § 717*, § 717 margin number 1; W. Schlüter, *Erbrecht*, p. 473.

A weakness of that concept is its artificiality. The fact of the matter is that the contractual clause included in Article 872 of the Polish Civil Code does not have legal effects provided in a declaration of will as it usually happens in case of such legal facts, but it obtains the status of the condition the legislation relates legal effects to.

That is why accepting an essential feature of the last view, it has to be largely modified. In my opinion the contractual clause of entering included in the first sentence of Article 872 of the Polish Civil Code has a legal effect consisting in a civil-law partnership's existing after the death of a partner but in amended composition of shareholders. Moreover, the contractual clause has another effect, which is that regardless of how many heirs will join a civil-law partnership in the place of the deceased partner, a settlement between a civil-law partnership and the deceased partner's heirs on the base of Article 871 of the Polish Civil Code shall be excluded. Instead, a legal effect of entrance of heirs into a civil-law partnership does not happen under a stipulation included in a partnership agreement, but it is a statutory consequence (see Article 56 of the P.C.C.). In other words, a stipulation only results in a continuation of a civil-law partnership in amended composition of shareholders after the partner's death, as well as it shall exclude a settlement with his heirs from Article 871 of the Polish Civil Code, which is additionally, by law, accompanied by another legal effect in the form of entrance of particular heirs into a civil-law partnership²¹.

5. REPRESENTATIVE OF HEIRS-PARTNERS IN A CIVIL PARTNERSHIP

The second sentence of Article 872 of the Polish Civil Code which imposes on the heirs joining a civil-law partnership an obligation of indicating a person exercising their rights has also important interpretation doubts. They concern the nature of that person. There are two different opinions competing with each other. More popular one assumes that an indicated person is heirs' procurator²², or that provisions on representation (Article 95 and the following of the Polish Civil Code) should be applied towards them²³. It would mean a necessity of granting legitimacy to that person by heirs. This idea is to some

²¹ P. Zakrzewski, *Wejście*, p. 898.

²² S. Grzybowski, *Spółka cywilna*, in: *System prawa cywilnego. T. III. Cz. 2. Prawo zobowiązań – część szczegółowa*, ed. W. Czachórski, volume ed. S. Grzybowski, Zakład Narodowy im. Ossolińskich, Wrocław 1976, p. 831; J. Ciszewski, *Spółka cywilna*, p. 169; A. Kidyba, K. Kopaczyńska-Pieczniak, *Komentarz do art. 872*, p. 1134.

²³ L. Stecki, *Komentarz do art. 872*, in: *Kodeks cywilny z komentarzem*, ed. J. Winiarz, ed. 2, Wydawnictwo Prawnicze, Warszawa 1989, p. 785.

extent based on Article 184 of the Polish Code of Commercial Companies²⁴, which provides that co-owners due to their share in a limited liability company exercise their rights by a representative. Another view provides that a legal title on the base of which that person acts can be either authorization or other rights, for example entitling to joint property managing²⁵. There is also a popular opinion that such a person can but does not have to be one of the successors who have entered into a civil-law partnership²⁶.

REFERENCES

- Babiarz, Stefan. 2008. *Spadek i darowizna w prawie cywilnym i podatkowym*. Warszawa: Wydawnictwo Prawnicze LexisNexis.
- Bednarek, Małgorzata. 2006. "Umowa o świadczenie na rzecz osoby trzeciej." In *System prawa prywatnego. Prawo zobowiązań – część ogólna*, edited by Ewa Łętowska, vol. V, 867–905. Warszawa: Wydawnictwo C.H. Beck.
- Borysiak, Witold. 2013. *Dziedziczenie. Konstrukcja prawna i ochrona*. Warszawa: LexisNexis Polska.
- Brox, Hans, and Wolf D. Walker. 2010. *Erbrecht*. München: Verlag C.H. Beck.
- Ciszewski, Jerzy. 2000. *Spółka cywilna*. Poznań: Wydawnictwo Ars Boni et Aequi.
- Edenhofer, Wolfgang. 2010. "Kommentar zu § 1922." In *Palandt. Bürgerliches Gesetzbuch*, 2146–2154. München: Verlag C.H. Beck.
- Grzybowski, Stefan. 1976. "Spółka cywilna." In *System prawa cywilnego. T. III. Cz. 2. Prawo zobowiązań – część szczegółowa*, edited by Witold Czachórski, volume edited by Stefan Grzybowski, 801–840. Wrocław: Zakład Narodowy im. Ossolińskich.
- Herbet, Andrzej. 2008. *Spółka cywilna. Konstrukcja prawna*. Warszawa: Wydawnictwo C.H. Beck.
- Ignaczewski, Jacek. 2004. *Prawo spadkowe. Art. 922-1088 KC. Komentarz*. Warszawa: C.H. Beck.
- Kidyba, Andrzej, and Katarzyna Kopaczyńska-Pieczniak. 2010. "Komentarz do art. 872." In *Kodeks cywilny. Komentarz. T. III. Zobowiązania – część szczegółowa*, edited by Andrzej Kidyba, 1132–1136. Warszawa: Wolters Kluwer Polska.
- Kremis, Józef. 2016. "Komentarz do art. 922." In *Kodeks cywilny. Komentarz*, edited by Edward Gniewek, and Piotr Machnikowski, 1674–1692. Ed. 7. Warszawa: Wydawnictwo C.H. Beck.
- Księżak, Paweł. 2012. *Zapis windykacyjny*. Warszawa: LexisNexis Polska.
- Księżak, Paweł. 2017. *Prawo spadkowe*. Warszawa: Wolters Kluwer.

²⁴ Act of September 15, 2000, Code of Commercial Companies, i.e. "Journal of Laws" of 2016, item 1578, 1579, 2255, 2260, of 2017, item 791, 1089, 1133.

²⁵ A. Herbet, *Spółka cywilna*, p. 428.

²⁶ S. Grzybowski, *Spółka cywilna*, p. 831; J. Ciszewski, *Spółka cywilna*, p. 169; A. Kidyba, K. Kopaczyńska-Pieczniak, *Komentarz do art. 872*, p. 1134. Contrariwise compare W. Borysiak, *Dziedziczenie*, p. 327, gloss 441. Another varied view is introduced by T. Sójka, R. Szyszko, *Komentarz do art. 872*, in: *Kodeks cywilny. T. II. Komentarz do art. 450-1088*, ed. M. Gutowski, Wydawnictwo C.H. Beck, Warszawa 2016, Article 872, margin number 5. According to them this person has to be the one from beyond the heirs.

- Machnikowski, Piotr. 2016. "Komentarz do art. 393." In *Kodeks cywilny. Komentarz*, edited by Edward Gniewek, and Piotr Machnikowski, 739–743. Ed. 7. Warszawa: Wydawnictwo C.H. Beck.
- Mleko, Łukasz. 2011. "O zapisie windykacyjnym i wprowadzeniu do systemu prawnego darowizny na wypadek śmierci." *Legal Forum* 4-5:94–111.
- Morek, Rafał. 2013. "Komentarz do art. 393." In *Kodeks cywilny. Komentarz. Zobowiązania*, edited by Konrad Osajda, vol. II, 250–257. Warszawa: Wydawnictwo C.H. Beck.
- Niezebecka, Elżbieta. 2012. *Kodeks cywilny. Komentarz. T. IV. Spadki*, edited by Andrzej Kidyba. Ed. 3. Warszawa: Wolters Kluwer Polska.
- Olejniczak, Adam. 2010. "Komentarz do art. 393." In *Kodeks cywilny. Komentarz. T. III. Zobowiązania – część ogólna*, edited by Andrzej Kidyba, 272–278. Warszawa: Wolters Kluwer Polska.
- Piątowski, Stanisław J. 2002. *Prawo spadkowe. Zarys wykładu*. Ed. 5 updated and completed by Bogudar Kordasiewicz. Warszawa: Wydawnictwo Prawnicze LexisNexis.
- Pietrzykowski, Janusz. 1972. "Komentarz do art. 922." In *Kodeks cywilny. Komentarz. T. III. Księga czwarta – spadki. Przepisy wprowadzające Kodeks cywilny*, edited by Janusz Pietrzykowski, 1817–1830. Warszawa: Wydawnictwo Prawnicze.
- Pietrzykowski, Krzysztof. 2009. "Komentarz do art. 872." In *Kodeks cywilny. T. II. Komentarz do art. 450-1088*, edited by Krzysztof Pietrzykowski, 805. Ed. 5. Warszawa: Wydawnictwo C.H. Beck.
- Popiołek, Wojciech. 2008. "Komentarz do art. 393." In *Kodeks cywilny. Komentarz do artykułów 1-449¹¹*, edited by Krzysztof Pietrzykowski, vol. I, 1155–1163. Ed. 5. Warszawa: Wydawnictwo C.H. Beck.
- Radwański, Zbigniew. 1981. "Umowy odnoszące się do osób trzecich." In *System prawa cywilnego. Prawo zobowiązań – część ogólna*, edited by Zbigniew Radwański, 442–458. Wrocław–Warszawa–Kraków–Gdańsk–Łódź: Zakład Narodowy im. Ossolińskich, Wydawnictwo Polskiej Akademii Nauk.
- Schlüter, Wilfried. 2000. *Erbrecht*. München: Verlag C.H. Beck.
- Skowrońska-Bocian, Ewa. 2011. *Komentarz do Kodeksu cywilnego. Księga czwarta. Spadki*. Ed. 10. Warszawa: LexisNexis Polska.
- Skowrońska-Bocian, Ewa. 2011. *Prawo spadkowe*. Ed. 8. Warszawa: Wydawnictwo C.H. Beck.
- Sójka, Tomasz, and Robert Szyszko. 2016. "Komentarz do art. 872." In *Kodeks cywilny. T. II. Komentarz do art. 450-1088*, edited by Maciej Gutowski, 1211. Warszawa: Wydawnictwo C.H. Beck.
- Sprau, Hartwig. 2010. "Kommentar zu § 727." In *Palandt. Bürgerliches Gesetzbuch*, 1173–1174. München: Verlag C.H. Beck.
- Stecki, Lech. 1989. "Komentarz do art. 872." In *Kodeks cywilny z komentarzem*, edited by Jan Winiarz, 785. Ed. 2. Warszawa: Wydawnictwo Prawnicze.
- Stürner, Rolf. 2015. "Kommentar zu § 2032." In *Bürgerliches Gesetzbuch mit Rom-I, Rom-II, Rom-III-VO, EG-UntVO/HuntPrpt und EuErbVO. Kommentar*, Hrsg. Rolf Stürner, 2076–2079. Ed. 16. München: Verlag C.H. Beck.
- Turłukowski, Jarosław. 2014. *Instytucja zapisu windykacyjnego w prawie polskim. Wybrane zagadnienia*. Warszawa: LexisNexis Polska.
- Uliasz, Roman. 2010. *Komentarz do art. 860-875 ustawy z dnia 23 kwietnia 1964 r. Kodeks cywilny (Dz.U.64.16.93)*. LEX/el.
- Zakrzewski, Piotr. 2012. "Zapis windykacyjny." *Przegląd Sądowy* 2:7–24.
- Zakrzewski, Piotr. 2013. "Udział spółkowy współnika spółki cywilnej jako przedmiot następstwa prawnego mortis causa pod tytułem szczególnym." *Przegląd Prawa Handlowego* 5:17–25.

Zakrzewski, Piotr. 2015. "Wejście spadkobierców wspólnika do spółki cywilnej na jego miejsce." In *Non omnis moriar*: Osobiste i majątkowe aspekty śmierci człowieka. Zagadnienia wybrane, edited by Jacek Gołaczyński, Jacek Mazurkiewicz, Jarosław Turłukowski, Daniel Kalkut, 874–900. Wrocław: Oficyna Prawnicza.

WEJŚCIE SPADKOBIERCÓW ZMARŁEGO WSPÓLNIKA DO SPÓŁKI CYWILNEJ

Streszczenie. Artykuł 872 zd. 1 k.c. dotyczy wstąpienia spadkobierców zmarłego wspólnika do spółki cywilnej. Wywołuje on liczne wątpliwości interpretacyjne, które dotyczą charakteru wstąpienia spadkobiercy zmarłego wspólnika do spółki cywilnej. Konkurują tu dwie propozycje wypracowane w prawie niemieckim, które ze względu na podobieństwo polskiej regulacji do niemieckiej, dają się potencjalnie zastosować na gruncie prawa polskiego. Według pierwszej, wstąpienie spadkobiercy zmarłego wspólnika do spółki następuje na podstawie umowy między żyjącymi, tj. umownego zastrzeżenia na rzecz osoby trzeciej. Według drugiej, podstawą wstąpienia do spółki spadkobiercy zmarłego wspólnika jest dziedziczenie udziału spółkowego. W artykule oceniono zalety i wady obu tych koncepcji oraz sformułowano nową propozycję w tym zakresie.

Słowa kluczowe: spółka cywilna, udział wspólnika spółki cywilnej, śmierć wspólnika, dziedziczenie udziału