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ON THE NECESSITY TO RESPECT THE SPECIAL FAMILY-LAW POSITION OF THE SPOUSE IN THE PROVISIONS RELATING TO STATUTORY INHERITANCE (AGAINST THE BACKGROUNDS OF THE GERMAN, AUSTRIAN, AND SWISS LAWS)**

Abstract

Under the Family and Guardianship Code, the highest position in the family hierarchy is taken by the spouse. However, de lege lata this high position does not find sufficient reflection in the provisions of the Civil Code relating to statutory inheritance. The analysis of the regulations of the German, Austrian, and Swiss laws justifies the demand to strengthen the inheritance position of the spouse under the Polish law. De lege ferenda the spouse, inheriting concurrently with the descendants, should obtain a permanent share at the amount of ½ of the estate, and concurrently with the parents (one of the parents) always ¾ of the estate. In turn, the inheritance of siblings should be limited only to the situation in which there are, both, no parents and no spouse of the testator. In consequence, the present concurrence of inheriting of the spouse with the siblings would not take place. The effect of introducing of the demands suggested in the present paper would be strengthening of the position of the spouse also on the ground of the provisions relating to legitim (Article 991 of the Civil Code).

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Keywords

marital rights and obligations – order of statutory inheritance – spouse as the statutory heir – family law – inheritance law – maintenance obligation

I. Introduction

Among statutory heirs included in the Civil Code[1] (referred to hereinafter as CC) the spouse of the testator is treated in a particular manner (Articles 931–933 of CC). However, the question arises, whether in the light of the current regulation, his/her position is sufficiently strong. It seems that the basic (if not exclusive) point of reference to make the assessment in this scope should be the provisions of the Family and Guardianship Code (referred to hereinafter as FGC),[2] that classify the family members according to a specific hierarchy.[3]

Making the assessment of the provisions relating to the statutory inheritance of the spouse in the light of FGC requires presenting the outline of regulations pertaining to marital rights and obligations, as well as the statutory system of property rights in marriage in the Polish law, and also (owing to the similarity of construction used) in the German, Austrian, and Swiss laws. In the presented family-law context, the norms relating to statutory inheritance of the testator's spouse are presented in all the legislations indicated above. In the last part of this paper, the provisions of the Polish law are subjected to critical analysis. Furthermore suggestions about introducing the changes relating to the statutory order of inheritance are presented.

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[1] The Act of 23rd April 1964, The Civil Code, unified text of 2nd August 2023, Journal of Laws 2023, item 1610, 1615.

[2] Family and Guardianship Code of 25th February 1964, unified text of 15th July 2020, Journal of Laws of 2020, item 1359.

[3] As to the relations between family-law position of a spouse and their inheritance-law situation, compare for instance B. Styka, „Problemy regulacji uprawnień spadkowych pozostałego przy życiu małżonka", *Rzeszowskie Zeszyty Naukowe Prawo – Ekonomia (seria prawnicza)*, 1998, vol. XXIII, pp. 101–102. See also E. Kremer, „Ewolucja pozycji prawnej małżonka spadkodawcy jako spadkobiercy ustawowego" in M. Małecki (ed.), *Świat, Europa, Mała Ojczyzna. Studia ofiarowane Profesorowi Stanisławowi Grodziskiemu w 80-lecie urodzin*, Bielsko-Biała, 2009, p. 1047.

In assessing the legal position of the spouse within the framework of the provisions on statutory succession, the provisions on contractual marital regimes are omitted. It seems that the legal position of the spouse within the provisions on statutory inheritance should primarily correspond to the provisions on the statutory property regime, as this is a model regime that optimally shapes the property relations between spouses, and not on contractual regimes, which in principle strengthen or weaken this optimal position.

The study uses a formal-dogmatic and legal-comparative method. The provisions of the Polish law are analysed, as well as the solutions provided by the German, Austrian, and Swiss laws. The justification for the application of the legal-comparative method covering the indicated foreign legislations is the legislative differences that shape the situation of the testator's spouse (as a statutory heir) in a more favourable way in relation to the Polish law, which may provide inspiration for the Polish legislator. In addition, the historical-legal method was used incidentally with regard to the Polish law. The statistical data cited in the work provide an important argument in the discussion of the shape of the legislation on the legal situation of the spouse (most often the widow of the testator) as a statutory heir.

II. Outline of the Legal Relations Between Spouses in the Light of the Family Law Provisions

1. German Law

On the grounds of the German law, marital rights and obligations have been regulated in Bürgerliches Gesetzbuch (referred to hereinafter as BGB),[4] in provisions on the effects of marriage in general (§ 1353 and subsequent of BGB). Pursuant to subpara. 1 § 1353 of BGB, the married couple is obliged to conjugal union (the duty to live together). It is worth noticing, that the indicated notion is recognised as a general clause. The scope of obligations resulting therefrom depends thus on individual

[4] Bürgerliches Gesetzbuch of 18.08.1986, BGBl. I 2003, S. 738 as amended.

cases, and so on the relation that binds given spouses.[5] The duty to live together includes, among others, the duty to be faithful[6] and the duty to run the household together (*häusliche Gemeinschaft*).[7] The last duty, in turn, implies the necessity to provide the spouse with the possibility to co-use the apartment and the items of the household that make up the exclusive property of one of the spouses.[8] Furthermore, the spouses should maintain a physical bond (*Geschlechtsgemeinschaft*).[9] They are also burdened with the duty to help and take care of each other (*Beistand und Fürsorge*).[10] The spouses are also obliged to show respect to each other.[11]

The normative concretization of the duty to live together is § 1357 of BGB, according to which, each spouse is entitled to enter into transactions serving to appropriately provide the necessities of life of the family (*Lebensbedarf der Familie*), with effect also for the other spouse.[12]

However, § 1360 and subsequent of BGB impose on the spouses the duty to appropriately maintain the family. The spouses are entitled to claim for maintenance from each other basically, also in the situation in which they live apart (see also § 1361 of BGB). Subsequent regulations relate to the division of the household items (§ 1361a of BGB) and using the apartment (§ 1361b of BGB) in the case of factual separation.

In accordance with § 1363 of BGB the statutory system of property rights between the married couple, contrary to the Polish law, has been based on community of accrued gains (system of separated estates in matrimony with compensating of gained assets, *Zugewinngemeinschaft*).

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[5] R. Voppel, in M. Coester (ed.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Buch 4. Familienrecht. § 1353–1362*, Berlin, 2018, p. 16.

[6] *Ibid*., p. 20.

[7] D. Hahn, in H. G. Bamberger, H. Roth (eds), *Kommentar zum Bürgerlichen Gesetzbuch. Band 3. §§ 1297–2385*. München, 2012, p. 56.

[8] *Ibid*.

[9] *Ibid*., p. 57.

[10] *Ibid*., p. 59.

[11] *Ibid*., p. 63.

[12] The legal figure applied by the German legislator has a *sui generis* nature – *Ibid*., p. 84.

2. Swiss Law

In the Swiss law, the marital rights and obligations have been regulated in Zivilgesetzbuch (referred to hereinafter ZGB),[13] i.e. in Article 159–179 of ZGB. The spouses are, most of all, obliged to take care of the newly created marital community (Article159 of ZGB), understood in the traditional manner, i.e. as the community characterized by physical, spiritual – mental and economic community.[14] At the same time, the spouses are to be helpful and faithful to each other, whereas the duty to be faithful contains in its scope absolute loyalty and also emotional, mental and spiritual, as well as, economic fields.[15]

Furthermore, concluding the marriage, the spouses may retain or change their surname (see also Article 160 of ZGB),[16] and as well they should together decide on the choice of the apartment (Article 162 of ZGB).[17]

They are also burdened with the maintenance obligation towards the family (Article 163 of ZGB). In this context, spouses are obliged to agree on the division of tasks related, in particular, to providing of funds, running the household, taking care of the children, or providing assistance to the spouse in his/her professional or business activities.[18] At the same time, a spouse without income who runs a household, takes care of children, or provides assistance to his/her spouse in his/her professional or business activities may demand that their spouse regularly provides him/her with an reasonable allowance to be freely used thereby (Article 164 of ZGB).[19] A spouse who has provided assis-

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[13] Schweizerisches Zivilgesetzbuch of 10.12.1907, AS 24 233.

[14] A. Zeiter, M. Schlumpf, in P. Breitschmid, A. Jungo (eds), *Handkommentar zum Schweizer Privatrecht, Personen – und Familienrecht. Partnerschaftsgesetz*, Zürich–Basel–Genf, 2016, p. 523.

[15] *Ibid*., pp. 524–525.

[16] See more R. Frankhauser, in A. Büchler, D. Jakob (eds), *Kurzkommentar ZGB*, Basel, 2018, pp. 430–433.

[17] See more I. Schwander, in H. Honsell, N. P. Vogt, T. Geiser (eds), *Besler Kommentar. Zivilgesetzbuch I. Art. 1–456*, Basel, 2014, pp. 989–991.

[18] See more B. Isenring, M. A. Kessler, in H. Honsell, N. P. Vogt, T. Geiser (eds), *Besler Kommentar. Zivilgesetzbuch I. Art. 1–456*, Basel, 2014, pp. 991–1004.

[19] See more Zeiter, Schlumpf, *supra* note 14, pp. 538–541.

tance to his/her spouse in the performance of his/her profession or in running a business to an extent that significantly exceeds the scope of his/her obligation to contribute to the maintenance of the family is entitled to a claim for compensation against the spouse. It will also occur in the situation in which the spouse has met the family's needs from his/her income or property to an extent that significantly exceeds the scope of obligation burdening him or her (Article 165 of ZGB).[20]

Spouses are representatives for each other when performing legal acts to meet the day-to-day needs of the family, and exceptionally also other needs of the family. Thus, in the indicated matters, the spouse acts, not only on his or her own behalf, but also on behalf of his/her spouse, and the representation also involves the spouses' joint and several liability for such obligations (Article 166 of ZGB).[21]

When choosing and pursuing a profession or business activity, the Swiss legislator also obliges spouses to take into account both other spouse and the welfare of the marital union (Art. 167 of ZGB).[22]

Marriage generally does not limit the capacity to legal transactions of the spouses.[23] As a consequence, spouses have the right to perform legal transactions, not only in their mutual relations, but also with third parties. However, exceptionally, the Act may provide otherwise (Article 168 of ZGB).[24] Pursuant to Article 169 of ZGB, a transaction resulting in the loss of the apartment or limitation of the right to the apartment requires the consent of the spouse.[25] Furthermore, the spouses may request, from each other, information regarding income, assets and debts (Article 170 of ZGB).[26] However, the provisions of Articles 171–179 of ZGB contain regulations regarding the protection of the marital community implemented in administrative and judicial mode. They relate to, among others: fulfillment of the maintenance obligation (Articles 173

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[20] See more Frankhauser, *supra* note 16, pp. 444–447.

[21] See more Zeiter, Schlumpf, *supra* note 14, pp. 544–548.

[22] See more Isenring, Kessler, *supra* note 18, pp. 1021–1024.

[23] The same Zeiter, Schlumpf, *supra* note 14, p. 550.

[24] See more *Ibid*., pp. 549–552.

[25] See more Frankhauser, *supra* note 16, pp. 456–460.

[26] See more T. Göksu, P. Breitschmid, in P. Breitschmid, A. Jungo (eds), *Handkommentar zum Schweizer Privatrecht, Personen – und Familienrecht. Partnerschaftsgesetz*, Zürich–Basel–Genf, 2016, pp. 555–559.

and 177 of ZGB),[27] deprivation of the right to represent the spouse (Article 174 of ZGB),[28] separate residence by the spouses (Articles 175 and 176 of ZGB)[29] and restrictions as to the power to dispose of property items that exceed a certain value (Article 178 of ZGB).[30]

In accordance with Article 181 ZGB, the statutory system of property rights between the married couple, contrary to the Polish law, has been based on provisions governing participation in acquired property (system of separated estates in matrimony with compensating of gained assets, *Errungenschaftsbeteiligung*).

3. Austrian Law

In Austria marital rights and obligations have been regulated in Allgemeines Bürgerliches Gesetzbuch (referred to hereinafter ABGB),[31] i.e. in § 89–100 of ABGB[32] and they are based on the principle of equality (§ 89 of ABGB). Constituted in § 90 of ABGB, the duty to live together (*eheliche Lebensgemeinschaft*) covers by its scope spiritual (*geistige Gemeinschaft*), physical (*körperliche Gemeinschaft*) and economic community (*wirtschaftliche Gemeinschaft*).[33] The spouses are also burdened with the expressed *explicite* duty to be faithful,[34] the duty to behave decently in mutual relations (*anständige Begegnungspflicht*)[35] and the duty to provide assistance to each other (*Beistandspflicht*).[36] In the context of the duty to provide assistance, supporting the spouse in their paid work is also mentioned (§ 90 subpara. 2 of ABGB, § 98–100 of ABGB),[37] as well as

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[27] *Ibid*., pp. 562–565, as well as pp. 577–578.

[28] *Ibid*., pp. 565–568.

[29] See more *Ibid*., pp. 568–570 and *Ibid*., pp. 571–576.

[30] See more Isenring, Kessler, *supra* note 18, pp. 1074–1078.

[31] Allgemeines Bürgerliches Gesetzbuch of 1.06.1811, JGS No. 946/1811 as amended.

[32] See M. Hinteregger, *Familienrecht*, Wien, 2013, p. 45.

[33] See *Ibid*., p. 49.

[34] See A. Deixler-Hübner, *Scheidung, Ehe und Lebensgemeinschaft. Rechtliche Folgen der Ehescheidung und Auflösung einer Lebensgemeinschaft*, Wien, 2016, p. 9.

[35] *Ibid*., p. 10.

[36] See more Hinteregger, *supra* note 32, p. 49.

[37] See more Deixler-Hübner, *supra* note 34, pp. 12–13; G. Hopf, G. Kathrein, *Eherecht. Kurzkommentar*, Wien, 1997, p. 16.

supporting the spouse in caring for his/her children, i.e. stepchildren (§ 90 subpara. 3 of ABGB).[38]

The concretization of the spouses' relationship in the scope relating to their living together, and in particular to running the household (see also § 95 ABGB) and gainful activity, was made subject to the spouses' autonomy. According to the assumption adopted by the Austrian legislator, spouses should form these relations together, taking into account the other spouse and the best interests of the children (§ 91 of ABGB).[39]

Persons getting married have the right to keep their surname or change it (§ 93–93c of ABGB);[40] they are burdened with maintenance obligation (§ 94 of ABGB).[41] If additional prerequisites are met, the spouse also has the right to perform transactions of everyday life on behalf of the other spouse. Failure by the spouse to disclose the relationship of representation towards a third party results in joint and several liability of the spouses for the obligation incurred (§ 96 of ABGB).[42] Moreover, if one of the spouses meets his/her housing needs using the apartment that his/her spouse may dispose of, he/she may demand that the other spouse entitled to the apartment behaves in such a way that the apartment used by him/her is not lost (§ 97 of ABGB).[43]

Contrary to the Polish law, in Austria in accordance with § 1237 ABGB there exists the system of separated property (*System der Gütertrennung*).

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[38] Hinteregger, *supra* note 32, p. 49.

[39] Deixler-Hübner, *supra* note 34, pp. 5–6; Hopf, Kathrein, *supra* note 37, pp. 18–20.

[40] See more Hinteregger, *supra* note 32, pp. 47–49.

[41] See more *Ibid*., pp. 55–66; M. Schwimann, S. Ferrari, in M. Schwimann, G. Kodek (eds), *ABGB Praxiskommentar*, Wien, 2013, pp. 28–72.

[42] See more Deixler-Hübner, *supra* note 34, p. 11; Hopf, Kathrein, *supra* note 37, p. 67 et seq.

[43] See more Hinteregger, *supra* note 32, pp. 68–73; Hopf, Kathrein, *supra* note 37, p. 70 et seq.

4. Polish Law

In Poland marital rights and obligations have been regulated in Articles 23–30 of FGC. In the personal dimension, spouses are primarily obliged to live together (*i.e.* to maintain economic, physical, and spiritual bonds), to provide mutual assistance (in the non-property sense), and to be faithful, as well as to cooperate for the good of the family they have established through their relationship (Article 23 of FGC). At the same time, spouses are entitled to change or keep their surname (Article 25 of FGC), and are obliged to jointly decide on important family matters (Article 24 of FGC).[44]

On the basis of such shaped obligations pertaining to personal relations between spouses, numerous rights and obligations of a property nature have been formulated, which include the spouses' obligation to provide mutual financial assistance (in the property sense, Article 23 of FGC), the maintenance obligation to contribute towards meeting the needs of the family (Article 27 of FGC), the right to use the spouse's apartment in order to meet the needs of the family (Article 28^1 of FGC), the right to act for the other spouse in matters of ordinary management of his/her personal property (Article 29 of FGC) and the obligation to bear joint and several liability for obligations related to meeting the ordinary needs of the family (Article 30 of FGC).[45]

At the same time, property relations deepen further while the spouses remain in the statutory joint property regime, which, according to the FGC, is a model system. It is based on the construction of joint property, i.e. property without distincted shares (shareless joint property).[46]

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[44] On the non-property marital obligations, see more T. Smyczyński, in T. Smyczyński (ed.), *Prawo rodzinne i opiekuńcze. System Prawa Prywatnego. Tom 11*, Warszawa 2014, pp. 219–224.

[45] As to property marital obligations, see more *Ibid*., pp. 225–241.

[46] The construction of joint property without the shares is presented, among others, by M. Nazar, in T. Smyczyński (ed.), *Prawo rodzinne i opiekuńcze. System Prawa Prywatnego. Tom 11*, Warszawa 2014, pp. 262–270.

III. Protection of the Testator's Spouse in the Light of the Provisions Relating to Statutory Inheritance

1. German Law

BGB regulates the order of statutory inheritance in § 1924 et seq., whereas, § 1931 is devoted to the testator's spouse. According to this provision, the amount of the spouse's share depends on the group with which they inherit. The further the relationship of the heirs to the testator, the greater the spouse's share is. Consequently, concurrently with the testator's relatives, the spouse inherits from ¼ to a maximum of 7/8 of the estate. If the spouse is entitled to statutory inheritance alongside first-degree relatives, i.e. the testator's descendants, his/her share is the least, i.e. ¼ of the estate. In the event of inheriting concurrently with second-degree relatives, i.e. the testator's parents and their descendants, or with grandparents (third-degree relatives), the spouse inherits half of the estate. However, if one of the grandparents at the time of the devolution of an inheritance (opening of the succession) is no longer alive, but left his/her descendants, his/her share, *i.e.* 1/8 of the inheritance, falls to the spouse. In turn, the share of the grandparent who left no descendants increases the share of the longer-living grandparent. If neither one of both grandparents lived until the moment of opening of the succession, and they have not left any descendants, then each of the second pair of grandparents inherits ¼ share of the estate each. If one of the second pair of grandparents did not live until the opening of the estate, but left descendants, the spouse's share increases by ¼. If there are no descendants, the surviving grandparent inherits ½ of the estate.[47]

At the same time, spouses who are subjected to the statutory system of community of accrued gains are additionally protected in § 1371 of BGB. According to this provision, the equalization of accrued gains, in the event when the property regime ceases to exist as a result of death of one of the spouses, takes place by increasing of the spouse's share by ¼ of the estate (see § 1931 subpara. 3 of BGB). It is irrelevant that the de-

[47] See more D. Leipold, *Erbrecht*, Tübingen, 2022, pp. 62–63.

ceased spouse's accrued gains were lower than the accrued gains of the spouse who is the heir.[48] Also the share of the longer-living spouse, who remained with the testator in a contractual marital system of separation of property, is increased. If he/she inherits concurrently with one or two of the testator's children, instead of ¼, he/she inherits, respectively, ½ or 1/3 of the estate (§ 1931 subpara. 4 of BGB).[49]

2. Swiss Law

Under the Swiss law, the order of statutory inheritance has been regulated by the provisions of Articles 457–466 of ZGB. Article 462 of ZGB has been devoted to the legal position of the spouse. According to this Article the spouse is entitled to half of the estate if he/she inherits concurrently with the first group of heirs, i.e. the testator's descendants. In the event of inheriting concurrently with the second group of heirs, which includes the testator's parents and their descendants, the spouse now inherits ¾ of the estate. If at the time of the testator's death only their grandparents or descendants of the testator's grandparents are alive, the spouse inherits the entire estate.[50]

3. Austrian Law

In the Austrian law the regulation relating to the statutory inheritance is contained in § 727–755 of ABGB. The legal position of the spouse of the testator is defined within § 744 of ABGB.[51] According to the regula-

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[48] *Ibid*., pp. 64–66.

[49] D. Olzen, D. Looschelders, *Erbrecht*, Berlin–Boston, 2020, p. 56.

[50] See more S. Wolf, G.S. Genna, in S. Wolf (ed.) *Schweizarisches Privatrecht. Band 4. Erbrecht. Erster Teilband*, Basel, 2012, pp. 125–126.

[51] § 744 of ABGB has been introduced by Erbrechts-Änderungsgesetz 2015–ErbRÄG 2015 of 30.07.2015, BGBl. I, No. 87/2015. Pursuant to the previously binding § 757 of ABGB the spouse inherited, not only concurrently with the parents of the testator, but also with subsequent groups of heirs, i.e. with siblings and grandparents of the testator – see R. Welser, in P. Rummel, M. Lukas (eds), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch mit wichtigen Nebengesetzen und EU – Verordnungen. Teilband §§ 531–824 ABGB (Erbrecht)*, Wien, 2014, p. 172.

tion, the spouse inheriting concurrently with the children and further descendants of the testator receives 1/3 of the estate. When he/she inherits concurrently with the parents, the spouse now receives 2/3 of the estate. If one of the parents did not live until the opening of the inheritance, in such case the share to which he/shewould be entitled increases the share of the longer living spouse. However, if the testator has left only further next of kin, for instance siblings, the spouse inherits the whole estate.[52]

4. Polish Law

In the Polish law, the regulation relating to statutory inheritance has been included in Articles 931–940 of CC. The spouse has been included in the first, second, and third group of statutory heirs. In the first group, he/she inherits concurrently with the testator's descendants. In this group, the estate is inherited by the heirs in equal parts, whereas the spouse's share cannot be less than ¼ of the estate. If there are no descendants, the spouse inherits concurrently with the testator's parents, and his/her share is fixed and amounts to ½ of the estate. In turn, each parent inherits ¼ of the estate. If the paternity of the parent has not been established, the inheritance share of the testator's mother, who inherits concurrently with decedent's spouse, amounts to half of the estate. However, if the third group includes the spouse, one of the parents, siblings, and descendants of the siblings, the share of the spouse inheriting concurrently with the above-mentioned persons invariably corresponds to ½ of the estate. The entire estate falls to the testator's spouse, in the absence of testator's descendants, parents, siblings, and siblings' descendants (see Articles 931–933 of CC).[53]

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[52] See P. Apathy, G. Musger, in H. Koziol, P. Bydlinski, R. Bollenberger (eds), *Kurzkommentar zum ABGB*, Wien, 2017, pp. 687–688.

[53] See A. Kawałko, J.S. Piątowski, H. Witczak, in B. Kordasiewicz (ed.), *Prawo spadkowe. System Prawa Prywatnego. Tom 10,* Warszawa, 2015, pp. 229–241. The latest amendment of the provisions relating to the statutory inheritance excluded great-grandchildren and even more remote descendants from the circle of grandparents' heirs – see ustawa o zmianie ustawy – Kodeks cywilny oraz niektórych innych ustaw of 28.07.2023, Journal of Laws of 2023, item 1615. The critical assesment of the proposed amendments was presented by T. Justyński, E. Kabza, Uwagi na marginesie projektowanych zmian

IV. Conclusion

The previous considerations lead to the conclusion that the scope of matter covered by the provisions on marital rights and obligations is essentially similar in the analysed legislations. The differences, however, relate to the manner in which individual marital rights and obligations are regulated and the legal structures used. It should be noted that the most extensive regulation in the indicated area is contained in the Swiss law.

The statutory models of matrimonial property systems are also different. And so, in the German and Swiss laws, property relations between spouses are based on the system of separated matrimonial property with compensating of gained property (community of accrued gains).In the Austrian law they are based on the system of separated property, while in the Polish law on the system of statutory joint property regime. Therefore, in the Polish law the position of the spouse in this respect is undoubtedly stronger than in the German, Austrian, and Swiss laws. Nevertheless, both models, i.e. the system of separated matrimonial property with compensating of gained property and the system of statutory joint property regime, include solutions confirming the privileged position of the spouse in relation to other relatives. In the system of statutory joint property regime these solutions are expressed (among others) in the existence of joint marital property, as well as in the creation of substantially equal shares in this property upon the termination of that system. In turn, the privileging of the spouse in the system of separation of property with compensating of gained property is manifested by the obligation to compensate the gained property upon termination of the property system in question. It is only in the Austrian system of separation of property without compensating of gained property that the position of the spouse does not differ from the situation of other relatives only in the Austrian system of separation of property without the compensating of gained property.

In turn, comparing the provisions on statutory inheritance leads to the conclusion that the Polish law, unlike the German, Austrian, and

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w prawie spadkowym, *Krakowski Przegląd Notarialny* 2022, No. 1, pp. 22–23, as well as T. Justyński, E. Kabza, O potrzebie zmian w prawie spadkowym w kontekście projektu ustawy z dnia 15 grudnia 2021 r., *Przegląd Legislacyjny* 2022, No. 1, pp. 18–19.

Swiss laws, generally provides a lower degree of protection of the property interests of the longer-living spouse. This issue will be the subject of broader considerations later in the last part of this paper.

V. Statutory Inheritance of the Testator's Spouse – *De Lege Ferenda* Comments

1. General Remarks

In the light of the analysis carried out it is justified to state that with respect to matrimonial rights and obligations the foreign laws discussed above regulate the subject matter in a similar manner to the Polish law. In turn, with regard to statutory succession, the Polish law grants a lower degree of protection to the property interests of the longer-living spouse than the German, Austrian, and Swiss laws. In addition, the Polish law, unlike the German, Austrian, and Swiss laws, provides a lower degree of protection for the property interests of the longer-living spouse under the provisions on statutory succession. Thus, it becomes reasonable to formulate *de lege ferenda* remarks aimed at improving the legal position of the spouse as a statutory heir under the Polish law. In this context, attention should be paid to cases of succession of the spouse in concurrence with the testator's siblings, parents, and descendants. The issue of possible inheritance of a spouse concurently with the testator's grandparents also requires separate attention.

2. the Question of Inheriting of a Spouse Concurrently with the Testator's Grandparents

In the German law, contrary to the Polish, Austrian, and Swiss laws, the spouse inherits concurrently with the testator's grandparents. Thus, the question arises whether the Polish law requires a change in this scope, following the German template. It seems, however, there is no need to introduce amendments of such type, as the grandparents have, at their disposal, the (unknown to the German law) separate maintenance claim

towards chosen statutory heirs (see Article 938 of CC).[54] The addressee of this claim may be in particular the spouse. Thus there are no *de lege lata* reasons for which the position of the testator's spouse should be weakened to the advantage of the grandparents of the testator.

3. Critical Remarks on the Succession of the Spouse in Concurrence with the Testator's Siblings

The German and Swiss laws allow inheriting of the spouse concurrently with the testator's siblings, whereas, the spouse acquires, respectively, ½ and ¾ of the estate. At the same time, under the German law, the share of the longer-living spouse, remaining with the testator in the community of accrued gains is, as a rule, complemented by ¼ owing to compensation of property gained, which, as in the Swiss law, gives a total of ¾ of the estate (unless § 1371 subpara. 1 of BGB is not applicable, then – ½).

In turn, under the Austrian law, the spouse does not inherit the estate at all concurrently with the testator's siblings, meaning, in consequence, that in the absence of parents, the spouse inherits the entire estate. Thus, under the Austrian law, the testator's siblings are rather marginalized among the statutory heirs, to the benefit of the longer-living spouse.

As already mentioned, the Polish law, similarly to the Swiss and German laws, also foresees the spouse's inheritance concurrently with the testator's siblings, which should be assessed critically. The optimal solution should consist in strengthening of the position of the spouse by amending the provisions on statutory inheritance in such a way that siblings and descendants of siblings could inherit only in the absence of the testator's spouse and parents.[55] The Austrian law could be a model

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[54] Kawałko, Piątowski, Witczak, *supra* note 53, pp. 294–302.

[55] The same M. Habdas, „Kontrowersje wokół dziedziczenia ustawowego małżonka spadkodawcy", in A. Dańko-Roesler, J. Jacyszyn, M. Pazdan, W. Popiołek (eds), *Rozprawy z prawa prywatnego. Księga pamiątkowa dedykowana Profesorowi Aleksandrowi Oleszce*, Warszawa, 2012, p. 192. Such an assumption was also made in one of the drafts of the Civil Code – A. Moszyńska, *Geneza prawa spadkowego w polskim kodeksie cywilnym z 1964 r.*,

for the Polish legislator in this respect. The following arguments support the introduction of such amendments.

First of all, the testator should provide his or her spouse with a sense of property safety (stabilization), while the inheritance of siblings (siblings' descendants) should not take place at the expense of achieving this goal. It is true that siblings are also among the testator's closest relatives, but in the light of the provisions on marital rights and obligations, the spouse occupies an incomparably more important position. Moreover, the siblings are not particularly burdened with obligations towards the testator during his/her life. As the maintenance obligation of the testator's siblings is fulfilled only as a last resort, whereby due to the additional conditions provided for in Article 134 of FGC (which prevents the creation of a maintenance obligation in the event of excessive damage to the obliged person or his/her immediate family) this obligation is limited. It can therefore be concluded that the only justification for the inheritance of siblings concurrently with the spouse are the kinship ties existing between them and the testator. However, they are not close enough to justify furnishing the siblings with as strong position as they currently have under the provisions on statutory inheritance. It is worth noting that if the testator has only one brother or one sister, which in practice, taken into account the decreasing number of births, will happen more and more often,[56] in the absence of parents, the position of the siblings will be equal to the position of the spouse, so that both indicated persons, i.e. the spouse and the brother (sister), will inherit ½ of the estate each.[57]

Toruń, 2019, pp. 189–190. In the opinion of M. Pazdan, "Projektowane zmiany w unormowaniu dziedziczenia ustawowego", *Rejent* 2008, No. 4, p. 13, it needs considering *de lege ferenda* whether the spouse should not be advancing the siblings and the descendants of the siblings. In turn, J. Gwiazdomorski, "Dziedziczenie ustawowe w projekcie kodeksu cywilnego PRL", in J. Wasilkowski (ed.), *Materiały dyskusyjne do projektu kodeksu cywilnego Polskiej Rzeczypospolitej Ludowej,* Warszawa, 1955, p. 233, questioned the concurrence of the spouse and the descendants of the siblings inheriting.

[56] Compare the data of the Statistical Office (GUS) on the falling number of live births when compared year to year – Główny Urząd Statystyczny, *Rocznik Demograficzny*, Warszawa, 2022, p. 250.

[57] The indicated case has been also noticed by Gwiazdomorski, *supra* note 55, p. 233, during the work over the Civil Code. In his opinion: "naming of the living spouse as the heir of only half of the estate concurrently with only brother or only sister of the testa-

Secondly, allowing siblings to inherit concurrently with the spouse amounts to consent for the siblings to take the property position of the deceased spouse with reference to essentially ¼ (or 1/8, if the inheritance also covers one of the testator's parents) of the joint property.[58] It must be decided whether such consequences can be accepted in the case of siblings. In other words, is the sibling's interest so important and worthy of protection as to justify depriving the longer-living spouse of the property safety. The loss of part of the joint property is associated with the possibility for the newly entitled persons to exercise their rights in relation to the inherited property items to the extent specified in the provisions of Article 1035 et seq. of CC and Article 195 et seq. of CC. The necessity of the surviving spouse to share the property items included in the estate with the testator's siblings relates also to the real estate included in the joint property in which the spouses had run a household. Consequently, except for Article 923 of CC – the longer-living spouse is obliged to allow specified persons to co-possess and co-use the apartment. For the longer-living spouse, this would make up an exceptional burden as he/she must tolerate the presence of his/her relatives (i.e. the testator's siblings) in his/her home. Moreover, the scope of their rights regarding the inheritance property is much broader and includes also the right to exercise management, which is undoubtedly an extremely uncomfortable situation for the spouse.

Although the existence of joint property between the longer-living spouse and other heirs may last for years, it is by its nature temporary. The final division of the joint property and the division of the estate[59] may lead to an essential change in the structure of the assets of the longer-living spouse, also as regards the apartment. In consequence, it may happen that the spouse will lose his/her title to the apartment and

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tor probably would not be right". The same Styka, *supra* note 3, p. 102. Critically about the spouse inheriting ½ of the estate concurrently with only one member of the further family of the testator also J. Biernat, *Ochrona osób bliskich spadkodawcy w prawie spadkowym*, Toruń, 2002, p. 50.

[58] Assuming that the spouses' shares in the joint property are equal.

[59] In accordance with the dominant opinion of the jurisprudence the share of the estate basically requires simultaneous or previous carrying out of the division of the joint property – compare the resolution of the Supreme Court of 2.03.1972, III CZP 100/71, OSNCP 1972, No. 7-8, item. 129.

will have to move out.[60] This situation increases the spouse's sense of life destabilization, which is already strong after the death of his/her spouse. The situation in which the longer-living spouse retains the title to the property, but is burdened with the obligation to make additional payments or repayments for the sake of the siblings, should be assessed equally negatively.

Thirdly, in this context, it is worth noting that from the statistical point of view the average life expectancy for men according to data from 2021 is 71.8 years, while for women it is 79.7 years.[61] Assuming that people getting married are of a similar age, this means that the issue of inheritance of a spouse concurrently with siblings (siblings' descendants) concerns mainly women aged approximately 72 years, who would have to devote the last years of their lives, i.e. statistically from 7.9 years, to taking actions to re-normalize their property situation. From this perspective, it seems justified to say that the older a single spouse is, the more inheritance concurrently with siblings will violate the principle of equity. It should be added that statistically the husband is usually the same age as the wife, or older. However, the opposite situation, in which the man is younger than his wife, is much less common.[62] This confirms the thesis that widowhood affects mainly women.

Fourthly, the currently binding regulations are also difficult to reconcile with the concept that the order of statutory inheritance should, to some extent, reflect the probable (alleged, hypothetical) will of the average testator.[63] In Polish social relations, it is generally not accepted

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[60] T. Justyński, "Testament we dwoje wart rozważenia", *Rzeczpospolita* 2023, No. 109, p. A12, pays attention to the existence of such type of risk in a case when the spouse inherits concurrently with the next of kin of the testator.

[61] Główny Urząd Statystyczny, *Trwanie życia w 2021 r.*, Warszawa 2022, p. 7.

[62] Compare in this scope – GUS data of 2021 – Główny Urząd Statystyczny, *supra* note 57, p. 209.

[63] The significance of the alleged will of the testator for the shaping of the order of statutory inheritance was also pointed out by the Constitutional Tribunal in its sentence of 31.01.2001, P. 4/99, OTK ZU 2001, No. 1, item 5; M. Pazdan, "O potrzebie i kierunkach zmian dziedziczenia ustawowego w polskim prawie cywilnym", *Rejent* 2005, No. 9, p. 43; J. Wierciński, "Uwagi o teoretycznych założeniach dziedziczenia ustawowego", *Studia Prawa Prywatnego*, 2009, No. 2, p. 87; J. Waszczuk-Napiórkowska, "Opinia prawna o zmianie ustawy – Kodeks cywilny – zmiany w kręgu dziedziczenia nie testamentowego", *Zeszyty Prawnicze Biura Analiz Sejmowych*, 2009, No. 2, p. 164; Kawałko, Piątowski, Witczak, *supra* note 53, p. 218. Compare also the statement of reasons of the gov-

that the will of an average testator, understood in this way, also covers his/her siblings. It is solely aimed at securing property of the surviving spouse. The true property security for a widowed person will, as a rule, be his/her personal property and the property he/she inherits from his/her spouse. The situation of widowed spouses, especially women, is therefore particularly difficult and very different from the situation of married couples with children, who can generally count on their help, both in the form of personal efforts and property benefits as part of the fulfilment of maintenance obligation. Childlessness, however, forces the indicated persons to remain completely self-sufficient in all respects, and most of all in terms of property. Obtaining of such self-sufficiency is significantly more difficult if siblings are allowed to inherit concurrently with the surviving spouse.

Fifthly, in the light of the applicable provisions of the Polish law, joint property is the property gained together by the spouses. Its size and composition are the result of actions taken only by them (without the participation of extended family including siblings). The situation is similar with personal property, generated essentially by the spouse himself/herself. The exception in this respect are property items acquired most often from parents by way of inheritance, legacy, and donation. In this context, it can of course be considered whether the family property received from the closest ascendants should be inherited only by the testator's spouse, or whether it should remain in the family to a greater extent, which is currently ensured by the provisions on statutory inheritance of the spouse concurrently with the testator's siblings. It seems that this circumstance primarily determined the need to include siblings in the order of statutory inheritance in the group together with the spouse. This assessment is justified because, statistically speaking, the provisions in such shape affect, as already mentioned, primarily childless widowed women who usually outlive their husbands. If that was

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ernment project of the amendment to the Act – the Civil Code (Druk sejmowy nr 1541) – https://orka.sejm.gov.pl/proc6.nsf/projekty/1541_p.htm. As to the correlation between the hypothetical will and the other criteria for shaping the statutory inheritance, see M. Habdas, *supra* note 56, p. 192; A. Mączyński, "Konstytucyjne prawo dziedziczenia" in L. Ogiegło, W. Popiołek, M. Szpunar (eds), *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*, Kraków, 2005, p. 1173; Wierciński, *supra* note 63, p. 87; Justyński, Kabza, *supra* note 53, p. 19.

the *ratio legis* of the analysed regulation, it may be stated only that such solution does not fit the current family relations and therefore seems anachronistic.[64] The perception of the spouse as a foreign element was already characteristic of Roman law, which allowed the spouse to inherit only in the last place, i.e. after collateral relatives.[65]

Sixthly, it is difficult to understand a situation in which within one group of statutory heirs, both persons entitled to legitim (*i.e.* the testator's spouse) and persons who do not have such right (*i.e.* the testator's siblings) inherit. This solution essentially undermines the hierarchy of persons close to the testator adopted under the provisions relating to legitim.

4. Critical Remarks on the Succession of the Spouse Inheriting Concurrently with the Testator's Parents

However, the provisions relating to the spouse inheriting concurrently with the testator's parents should be assessed generally positively. It is so as the parents take a special place in the testator's family life, undoubtedly more important than siblings. This is especially reflected in the provisions on the maintenance obligation, in which the descendant is charged with the maintenance obligation in the first place. Moreover, they owe their parents support in the first period of their life, as well as raising and proper emotional and spiritual development.[66]

It must be noted that the inheritance of the parents concurrently with the spouse is especially justified in a situation where the testator is their only child. In such case, the inheritance property they inherit replaces the broadly understood assistance that they would normally receive from the testator in old age.[67] However, from a legal point of view,

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[64] In the opinion of M. Pazdan, *supra* note 55, p. 13, the situation when the family property is included in the estate is currently rare.

[65] See K. Kolańczyk, *Prawo rzymskie*, Warszawa, 1976, pp. 481–483. In the same manner the spouse had been treated in Napoleon's Code – see in this scope Kawałko, Piątowski, Witczak, *supra* note 53, p. 220.

[66] See in this subject Pazdan, *supra* note 63, pp. 44–46.

[67] The indicated circumstance is also pointed out by M. Pazdan, *Ibid*., p. 45.

the testator's spouse is not obliged to provide such assistance to his/her parents-in-law, at least in the form of maintenance.

Finally, it is worth noting that the issue of the spouse inheriting concurrently with the testator's parents is becoming increasingly less important. This is evidenced by the already mentioned statistics on the life expectancy of men and women, as well as the increasing period separating subsequent generations.[68] Both of these circumstances mean that the spouse inheriting concurrently with the testator's parents concerns rather rare situations in which the testator does not die at the age of 71.8 or 79.7 years, but much earlier, when his parents, as a rule, are no longer alive.

The above-mentioned circumstances are also important because the inheritance of a spouse concurrently with the testator's parents in practice concerns the case when the surviving spouse at the time of the testator's death is still relatively young, works professionally, and is generally able to "bear the burden of co – inheritance", i.e. concurrently with their parents-in-law. His/her property situation may even improve if he/she marries again, as will certainly be facilitated by his/her childlessness.

It is worth noting that under the German law the spouse inherits ¾ of the estate concurrently with the parents (unless § 1371 subpara. of BGB is not applicable, then – ½), under Swiss law ¾ of the inheritance, and under the Austrian law 2/3 of the estate. It seems that Polish solutions rightly guarantee each parent inheriting concurrently with the spouse ¼ of the estate,[69] although any principle of equity would still be maintained if the spouse's share was increased to 2/3 or even ¾ of the estate.[70] Such an approach would certainly serve to emphasize the

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[68] According to the data by GUS, the average age of women at the moment of giving birth to their first child was 28.8 years in 2022, whereas in 1990 this age was at average of 22.7 years – Główny Urząd Statystyczny, *Polska w liczbach 2023*, Warszawa, 2023, p. 3.

[69] See Pazdan, *supra* note 63, pp. 44–46; M. Załucki, "Krąg spadkobierców ustawowych de lege lata i de lege ferenda", *Przegląd Sądowy,* 2008, No. 1, pp. 103–104.

[70] See M. Habdas, "Pozycja prawna małżonka spadkodawcy na tle prawnoporównawczym", *Rejent* 2006, No. 2, p. 75, in the opinion of whom, the current amount of share falling to the spouse inheriting concurrently with the parents of the testator does not rise to major controversies. However, see Habdas, *supra* note 55, p. 192, where *de lege ferenda* she recognizes the solution in which the spouse, in the lack of the testator's descendants may decide to accept ½ or the whole of the estate as worth considering. Accepting the whole estate would have to be connected, in the opinion of the authoress,

uniqueness of the relationship between spouses and its legal advantage over other interpersonal relationships, including those between parents and children. In order to properly balance the interests of individual persons, the solution that could be considered is simultaneously charging the spouse with an appropriate inheritance-law obligation to pay maintenance for the sake of the testator's parents, if there were no other obligated persons, whereas the spouse's liability should be appropriately limited (e.g. to ¼ of the value of the estate).[71] As it seems, the state of poverty on the part of the parents makes up a limit, the exceeding of which cannot be justified by the privileged position of the spouse.

At the same time, the position of the parents should be strengthened at the expense of the testator's siblings. In the absence of one parent, his/her share should therefore be transferred to the other parent who is still alive.[72] The spouse would then inherit ¾ and the parent ¼ of the estate. However, it does not seem justified to adopt a solution according to which, in the absence of one parent, his/her share is transferred to the

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with the creating of the maintenance obligation for the sake of the parents of the testator. Also Kazimierz Przybyłowski, as the rapporteur of the Inheritance Law Sub-Comittee of the Codification Committee in 1939 presented to the Sub-Committee the basic principles of inheritance law project, in which the spouse inheriting concurrently with the further next of kin of the testator would inherit ¾ of the estate (thesis 5) – see on the subject B. Walaszek, "Dziedziczenie ustawowe pozostałego przy życiu małżonka wedle polskiego prawa spadkowego", in W. Osuchowski, M. Sośniak, B. Walaszek (eds), *Rozprawy prawnicze. Księga pamiątkowa dla uczczenia pracy naukowej Kazimierza Przybyłowskiego*, Kraków–Warszawa, 1964, p. 428, in the light of Przybyłowski's account – K. Przybyłowski, "Polskie międzywojenne prace kodyfikacyjne w dziedzinie prawa spadkowego", in J. Jodłowski, W. Berutowicz, J. Fiema, W. Siedlecki, W. Wengerek (eds), *Księga pamiątkowa ku czci Kamila Stefki*, Warszawa–Wrocław, 1967, pp. 268–269.

[71] In the opinion of W. Borysiak, "Dziedziczenie ustawowe w świetle nowelizacji Kodeksu cywilnego", *Przegląd Sądowy* 2011, No. 2, p. 68, *de lege ferenda* it would be advisable to grant maintenance claim to the parents of the testator who do not inherit after the testator's death, similarly to Art. 938 of the Civil Code and 966 of the Civil Code.

[72] Załucki, *supra* note 69, pp. 103–104, in turn is of the opinion that the said share should fall to the siblings. In the opinion of Habdas, *supra* note 55, p. 192, the assessment whether the said share, in the absence of one of the parents should fall to the spouse or to the longer living parent would be easier if appropriate sociological research had been conducted. In turn, W. Żukowski, "Projektowana nowelizacja przepisów regulujących dziedziczenie ustawowe", *Kwartalnik Prawa Prywatnego* 2008, No. 1, p. 267, notices the justification for the concept assuming of inheritance of the siblings in the same group as the parents and the spouse of the testator.

spouse. It operates under Austrian law, although under different legal conditions – concurrently with parents, the spouse inherits 2/3 of the estate. However, in the absence of parents, the spouse should inherit – following the example of the Austrian law – the entire estate.

5. Critical Remarks on the Succession of the Spouse Inheriting Concurrently with the Testator's Descendants

It is difficult to recognise the binding provisions relating to the spouse inheriting concurrently with the descendants of the testator as controversial. However, it should be noted that the solutions adopted in the Polish law, as to principle, are less favourable compared with foreign solutions. It is so as in the German, Swiss, and Austrian laws: the share of the spouse inheriting concurrently with descendants of the testators amounts, respectively, to ½ (unless § 1371 of BGB is not applicable, then - ¼), ½ and 1/3 of the estate. The exception in this matter is provided by the Austrian law which guarantees the spouse the share of 1/3 of the estate, which is relatively unfavourable for him/her if the testator left only one descendant. However, if they were three or more, in such case, the longer living spouse would inherit a larger share in the estate than he/she would inherit under the Polish law.

Thus *de lege lata* the equity principle is not infringed,[73] however, this status would not be changed in the case of increasing the share of the

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[73] The relevance of the adopted solution is also noticed by Załucki, *supra* note 69, p. 103; M. Łączkowska, "Dziedziczenie ustawowe członków rodziny spadkodawcy", *Rejent* 2012, No. 5, p. 26. However, see Pazdan, *supra* note 63, pp. 44–46, in the opinion of whom, if the surviving spouse would get, as a result of the division of the joint property, part of this property he/she should not inherit the remaining part concurrently with the descendants, which makes up the referral to Art. 25 of the Decree Inheritance Law. The same, J. Policzkiewicz, "Głos w dyskusji nad księgą piątą projektu kodeksu cywilnego", *Państwo i Prawo*, 1960, No. 7, pp. 115–116. This opinion was subjected to criticism by Habdas, *supra* note 70, p. 75; see also R. Zegadło, "Czy polskie prawo zapewnia wystarczającą ochronę prawną małżonka po śmierci współmałżonka", in M. Andrzejewski, M. Łączkowska, L. Kociucki, A. N. Schulz (eds), *Księga Jubileuszowa Profesora Tadeusza Smyczyńskiego*, Toruń, 2008, p. 448. The indicated matter was recognized as requiring consideration during codification works – compare M. Pazdan, in Z. Radwański (ed.), *Zielona księga. Optymalna wizja Kodeksu cywilnego w Rzeczpospolitej Polskiej*, Warszawa, 2006, pp. 188–189. However, finally, it was assessed negatively – compare Pazdan, *supra*

spouse inheriting concurrently with descendants. Nonetheless, this would require adopting the presumption on the necessity to strengthen the inheritance-law position of the spouse to the expense of the testator's descendants. It seems there are grounds for taking into consideration binding family-law regulations.

The essential allegation which the supporters of such changes would have to face would, as is obvious, relate to threatening the property interest of the testator's descendants. In particular, it could be easily rebutted by referring to the provisions of maintenance obligation, especially with reference to the minor descendants. In most of the cases, the testator's descendants are also the descendants of the living longer spouse. Thus, if the needs of the descendants would not be satisfied to a sufficient extend as a result of inheritance, then, with the occurring of appropriate prerequisites, they could expect assistance from the testator's spouse recalling his/her maintenance obligation.[74] Similar maintenance protection is ensured by the legislator also to the children of the testator who remained only in the relationship of affinity with the testator's spouse (Article 144 of FGC). Thus, it may be stated that the provisions relating to the maintenance obligation have the potential to balance the property interest of individual heirs, opening the way to possible modification of the amount of share to the advantage of the spouse.[75]

There is only one matter to be resolved, which is the degree to which the share of the spouse should be increased. It is difficult to look for inspiration on the ground of the Austrian law in this scope, as it gives to the spouse inheriting concurrently with the testator's descendants only 1/3 of the estate. The solution adopted in the Swiss and German laws should be advocated (unless § 1371 subpara. 1 of BGB is not applicable,

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note 55, p. 13. Styka, *supra* note 3, p. 107, considers as worth copying the solution from Art. 25 of the Decree Inheritance Law, with the reservation, however, that it should be applied only in the case when the spouse inherits concurrently with the descendants who are minors. Compare also Biernat, *supra* note 57, pp. 48–49, W. Baran-Kozłowski, *Dziedziczenie ustawowe w Polsce*, Piotrków Trybunalski, 2014, p. 42 and Styka, *supra* note 3, pp. 108–113, who subjected to criticism the existing solutions that assume privileging of the spouse inheriting concurrently with the descendants of the testator by the determining of their share at the level of at least of ¼ of the estate.

[74] Habdas, *supra* note 55, p. 188.

[75] See also § 1371 subpara 4 of BGB.

then – ¼), according to which, in this case, the share of the spouse has been established on a permanent level of ½ of the estate.[76]

Conclusion

The comparative legal research conducted leads to the conclusion that the scope of matter covered by the provisions on marital rights and obligations is essentially similar in the Polish, German, Austrian, and Swiss laws. The differences, however, relate to the manner in which individual marital rights and obligations are regulated and the legal structures used. It should be noted that the most extensive regulation in the indicated area is contained in the Swiss law.

The statutory models of matrimonial property systems are also different. And so, in the German and Swiss laws, property relations between spouses are based on the system of separated matrimonial property with compensation of gained property (community of accrued gains), in the Austrian law on a system of separated property, whereas in the Polish law on the system of a statutory joint property regime. Therefore, in the Polish law the position of the spouse in this respect is undoubtedly stronger than in the German, Austrian, and Swiss laws. Nevertheless, both models, i.e. the system of separated matrimonial property with compensating of gained property and the system of statutory joint property regime, include solutions confirming the privileged position of the spouse in relation to other relatives. In the system of statutory joint property regime these solutions are expressed in

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[76] Also, in 1939, Kazimierz Przybyłowski as the rapporteur of the Inheritance Law Sub-Committee of the Codification Commission presented to the Sub-Committee basic principles of the inheritance law project, in which the spouse, inheriting concurrently with the descendants of the testator inherited ½ of the estate – compare in this subject Walaszek, *supra* note 70, p. 426 in the light of Przybyłowski's account – Przybyłowski, *supra* note 70, pp. 268–269. Such proposal had been earlier contained in the projects of Henryk Konic, however, with the reservation that the spouse should inherit ¼ of the estate if the descendants were born in previous marriages (see L. Górnicki, *Prawo cywilne w pracach Komisji Kodyfikacyjnej Rzeczpospolitej Polskiej w latach 1919–1939*, Wrocław, 2000, p. 289) and Stanisław Wróblewski (compare *Ibid*., p. 305). Ernest Till was, furthermore, of the opinion that the spouse should receive the other half of the estate into life rent (Walaszek, *supra* note 70, p. 426).

(among others) the existence of joint marital property, as well as in the creation of substantially equal shares in this property upon the termination of that system. In turn, the privileging of the spouse in the system of separation of property with compensating of gained property is manifested by the occurring of the obligation to compensate the gained property upon termination of the property system in question. The position of the spouse does not differ from the situation of other relatives only in the Austrian system of separation of property without the compensating of gained property.

In turn, comparing the provisions on statutory inheritance leads to the conclusion that the Polish law, unlike the German, Austrian, and Swiss laws, generally provides a lower degree of protection of the property interests of the longer-living spouse. In all the indicated legislations, the share of the spouse inheriting with particular groups of heirs is generally higher. The exception in this regard is the Austrian law, in which the spouse, concurently with the testator's descendants, inherits a fixed share of 1/3 of the inheritance. In the German law, on the other hand, the size of the share of the inheritance depends on the property regime in which the spouses remained. Under the model solution adopted by the German legislator, the longer-living spouse inherits a larger share than under the Polish law.

The issue of the concurrence of the spouse's inheritance with other groups of heirs in the compared legislations has been treated essentially in the same way as in the Polish law, i.e. the spouse's inheriting is allowed concurently with descendants, parents, and descendants of parents. From the perspective of the longer-living spouse, less favourable solutions in this regard are contained in the German law, in which the spouse also inherits in concurrence with the testator's grandparents, while the spouse is in a stronger position in this regard in the Austrian law, which provides for inheritance of the entire estate by the spouse in the absence of the testator's descendants and parents. The Austrian law therefore excludes the spouse from inheriting concurently with the descendants of the testator's parents or siblings.

The legal-comparative analysis carried out shows, that compared to other human relations, marital relations both in the non-property and property sense are regulated in a particular manner. It is not the specificity only of the Polish family law, as the marital relations are shaped in

the similar spirit in the German, Swiss, and Austrian laws. At the same time the high position of the spouse in the indicated legislations is consequently included also in the provisions of the inheritance law relating to the order of statutory inheritance. Unfortunately such unambiguous translation is not shown by the Polish law, which argues for amendments in the provisions on the spouse's succession and strengthening his/her position. *De lege ferenda* the new regulation should be based on the following assumptions. Thus, the current regulation assuming no concurrence of inheritance of the spouse and grandparents of the testator should be maintained. In fact, the protection of the testator's grandparents based on Article 938 of the Civil Code is sufficient. From the Polish perspective, the regulation of the German law assuming the existence of such a concurence should be seen as a manifestation of excessive protection of the property interests of the testator's grandparents.

The concurrence of the inheritance of the spouse and siblings and descendants of the testator's siblings, which is in force in the Polish law, should be strongly criticized. The optimal solution should be based on the Austrian concept, in which the concurence of the spouse's inheritance and the testator's relatives ends with the testator's parents. In this approach, siblings (descendants of parents) come to the inheritance only in the absence of the testator's spouse. There are a number of arguments in favour of such a solution, not only of a comparative legal nature, but also of a systemic, moral, social, economic, historical, as well as statistical nature. In the light of these arguments, further maintenance of the regulation in question in the system of the Polish inheritance law should be considered unjustified.

The regulation of the spouse's inheritance concurrently with the testator's parents generally deserves a positive assessment. However, it is worth considering increasing (as in the Swiss and German laws) the share of the spouse to ¾ of the inheritance, which would be more in line with the sense of social justice. At the same time, acknowledging the close kinship and importance of the parents in the life of the testator, it would be appropriate to secure the property interest of the parents with an additional legal claim for maintenance following the regulation of Article 938 of the Civil Code. Thus, the parents would be entitled to pursue a claim for maintenance from the surviving spouse, as long as they were in a state of need.

The position of the spouse inheriting concurrently with the testator's descendants should also be strengthened. Indeed, his/her share should be fixed at ½ of the inheritance, as provided for in the German and Swiss laws. With such a change, the chances of the longer-living spouse making repayment to the testator's descendants (as part of the inheritance division) would be significantly increased. It is a well-known practice that descendants quite expansively pursue their exorbitant claims within the framework of the proceedings in question, disregarding the difficult property situation in which the widowed spouse finds himself/herself. At the same time, the interests of the descendants would still be fully protected, not only by the share in the inheritance awarded, but also by the provisions of the Family and Guardianship Code governing maintenance claims between relatives in a straight line and between affinities.