

## THE CONSENT OF SPOUSE FOR THE PERFORMANCE OF A CERTAIN ACT IN THE LAW BY THE OTHER SPOUSE – COMMENTS WITH REFERENCE TO ARTICLE 37 FAMILY AND GUARDIANSHIP CODE

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**Summary.** The aim of the research was to analyse selected interpretation problems that appear on the background of Art. 37 Family and Guardianship Code. This provision states the requirement for obtaining the consent of spouse for the performance of a certain act in the law, concerning the management of the joint property, which is made by the other spouse. The applied research method included the dogmatic and legal analysis of the provisions of the Polish Family and Guardianship Code and Polish Civil Code as well as the analysis of the Polish judicial decisions and opinions expressed in legal doctrine.

This article presents legal argumentation proving that the spouse's statement of consent for the performance of a certain act in the law by the other spouse cannot only be specified by type and cannot cover many arbitrary, non-specific acts in the law. The consent should cover only one, individual act in the law and should indicate the person with whom the action is to be made. The requirement for obtaining the consent of spouse aims to protect the interests of a spouse who does not make an act in the law, as well as it is to ensure the safety of trading and to protect interests of a third party who performs act in the law with one of the spouses.

**Key words:** consent, spouse, third party, act in the law

The requirement for obtaining the consent of spouse for the performance of a certain act in the law by the other spouse is contained in Art. 37 Family and Guardianship Code.<sup>1</sup>

There is a number of doubts regarding interpretation of the said regulation, some of which have been discussed in this paper. First of all, the issue of the level of detailedness of the consent has been discussed, i.e. whether the consent may cover many arbitrary, non-specific acts in the law (the so-called blanket consent), or whether the acts for the performance of which the

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<sup>1</sup> Act of 25 February 1964, the Family and Guardianship Code, Journal of Laws of 2019, item 2086 [henceforth cited as: FGC].

spouse grants their consent may only be specified by type or maybe the consent should cover only one, individual act in the law.

## 1. THE LEGAL NATURE OF THE CONSENT OF SPOUSE

The consent of spouse is a declaration of will which the provisions on the principles of making declarations of will and on defects in the declarations of will apply to [Nazar 2014, 361]. It constitutes the consent of a third party specified in Art. 63 of the Civil Code<sup>2</sup> [Machnikowski 2019].

The spouse's declaration of granting consent to the other spouse performing an act in the law is made to another person, pursuant to Art. 61, para. 1 CC.<sup>3</sup> The content of such declaration is acceptance of the act in the law the consent refers to. By expressing such will, the spouse does not become a party to the act in the law the consent refers to. The spouse retains the status of a third party [Radwański 2008, 297].

## 2. THE LEVEL OF DETAILEDNESS OF THE CONSENT

There are fundamental questions regarding the issue of how consent can be formulated. Consideration should be given to whether the consent may be expressed in the so-called blanket form, namely covering infinite number of non-specific acts in the law. For example, the content of the consent could cover performance of all acts in the law related to the business activity conducted by the spouse. A question arises, whether the consent formulated in such a manner will produce legal effects as the consent of spouse referred to in Art. 37 FGC.

The first point to consider should be the function of the consent of spouse for the performance of a certain act in the law by the other spouse and the question whose interests it is supposed to protect. The requirement for the consent specified in Art. 37 FGC refers to the spouses remaining in a joint marital property regime and includes specific actions concerning this property, such as disposal or encumbrance of real estate, specified by the legislator. In general, other activities related to the management of joint property are performed by the spouses on their own, pursuant to Art. 36, para. 2 FGC.<sup>4</sup>

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<sup>2</sup> Act of 23 April 1964, the Civil Code, Journal of Laws of 2019, item 1145 as amended [henceforth cited as: CC].

<sup>3</sup> This provision states that: "A declaration of intent which is to be made to another person is deemed made at the time it reaches that person in such a manner that he could have read its content. The withdrawal of a declaration of intent is effective if it arrives together with the declaration, or earlier."

<sup>4</sup> This provision states that: "Each spouse is free to manage the joint property unless the provi-

The function of the consent of spouse is, first and foremost, protection of the interests of the spouse not performing act in the law, who is considered a third party by the legislator [Radwański 2008, 299]. The aim of the consent is also to provide certainty and security of transactions, as well as protection of the interest of a person performing the act with one of the spouses [Mróz 2019].

In the case of the so-called blanket consent, the interest of a spouse not performing the act in the law would be jeopardized. The spouse expressing the consent for the performance of many non-specific acts in the law would not be able to be aware of all the acts to the performance of which they grant their consent. On the other hand, it is the spouse not performing the act in the law who takes the decision on granting their consent to certain act or category of acts. It should be put under consideration whether the possibility of granting a general, non-specific consent should remain within the scope of the autonomy of will of the spouse, if it is their intention to do so. However, adopting such perspective would lead to a conclusion that the requirement to obtain the consent of spouse is of illusory nature and does not serve any protective function with regard to the joint property of the spouses. It would pose a threat to the certainty and security of transactions. If the content of the spouse's consent is formulated in a very general manner (as in the given example of the consent covering all business activities of the spouse), a non-active spouse could question whether the consent which he or she gave included a specific act in the law. For instance, in the event of the purchase of real estate for consideration by a spouse conducting business activity who is a holder of such a generally expressed consent, it should be taken into consideration whether the purchase of real estate is associated with the conducted business activity; thus, whether it lies within the scope of the consent of the spouse. Therefore, a question arises who is supposed to verify that issue – the notary or maybe the seller, as the other party to the transaction? Another issue concerns a situation when the purchased property changes its purpose and is no longer used for conducting business activity – would that affect the validity and effectiveness of the performed act of purchasing the real estate to the joint property of the spouses? In such a case, the interests of the other party to the transaction performed by one of the spouses would be jeopardised; such party would remain uncertain whether the consent expressed by the spouse concerns the performed act.

It should also be taken into consideration whether the consent of the spouse may be specified by type, namely indicate the type of acts in the law the performance of which the spouse grants their consent to. Hence, it should be noted that inclusion of certain activities specified by type in the consent also leads to a situation where the spouse grants their consent to an infinite number

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sions below state otherwise. Management covers performing activities relating to items of joint property, including steps to help preserve the property.”

of acts in the law of a certain type, e.g. the conclusion of real estate purchase agreements. Such formulation of the content of the declaration of granting consent does not eliminate problems arising with regard to the so-called blanket consent. Indicating the type of act does not imply its individualisation and does not allow to specify the particular act in the law the performance of which the spouse has granted their consent to. For these reasons, it is not possible to share the view that granting the consent specified by type by the spouse lies within the scope of the autonomy of their will [Czech 2017]. The argument of the needs of the transaction and the necessity to provide efficient management of the joint property used for conducting business activity should be considered unconvincing [ibidem]. As indicated above, adopting the possibility of granting blanket consent or consent specified by type by a spouse – which may be convenient for the spouse performing acts in the law – threatens the security of transactions, as well as the interests of the persons performing acts in the law with one of the spouses. Neither it seems justified to put the interest of a spouse performing act in the law above the interest of their business partner and the safety of transactions.

Taking the above into consideration, the view must be supported that the consent of spouse for the performance of act in the law by the other spouse should refer to a certain act in the law of specified content, binding individually specified persons [Radwański 2008, 301]. In other words, the act which the consent applies to should be specified by framework definition of its significant provisions, allowing for its individualisation [Nazar 2014, 361; Jędrejek 2012, 114; Sychowicz 2019, 37; Lutkiewicz–Rucińska 2019; Słyk 2019; Swaczyna 2019]. It is also to be agreed that the content of the declaration of consent of spouse for the performance of a certain act in the law by the other spouse constitutes acceptance of such act. This means that such consent should include at least the elements significant for the act in the law, and, if it is the will of the parties, the other elements as well (*accidentalialia negotii*) [Mróz 2019].

At that point, it should be emphasized that the content of the consent of spouse should specify the person who such act in the law should be performed with. The choice of a business partner may be of considerable importance for the performance of the act and the performance of obligation by the debtor. For instance, the consent of one of the spouses to sell the real estate constituting part of joint property of the spouses should not only include the significant elements of a purchase agreement (e.g. the price), but also individualise the person who is planning to enter into agreement with a spouse. Taking into consideration the function of the consent, i.e. protection of the interest of a spouse not performing the act in the law as well as protection of the joint property of the spouses, the choice of a business partner should be considered a significant element. For instance, concluding the agreement with a person

who does not have the financial means to pay the price may jeopardise the joint property of the spouses.

At the same time, it immediately raises doubt as to whether such a regulation is not too restrictive and would not hinder the proper transactions by the spouses. In the event of one of the spouses planning, for example, a longer stay abroad and entrusting the other spouse with the task of finding the buyer of the real estate belonging to their joint property and selling the estate. It may be concluded that the requirement of granting consent for the performance of the act in the law with a specific person would significantly hinder the sale of the property by one spouse in the situation described hereinabove. It is beyond any doubt that a consent of spouse may be given upon the performance of the act in the law. It is derived directly from Art. 37, para. 3 FGC which states that the other party may give the spouse whose consent is required a deadline by which to confirm an agreement; the other party becomes free if the deadline passes without effect. However it should be noted that a party contracting with the spouse may not be interested in the performance of an act in the law involving risk that the other spouse will not give consent to this act. It should not be forgotten, however, that the mechanism of the consent of spouse functions concurrently with the mechanism of the power of attorney. There is no obstacle for the spouse who is a co-owner of the estate to grant another person (e.g. the other spouse) the power of attorney to perform act in the law on their behalf.<sup>5</sup> The consent of a third party should not be identified with the power of attorney.

The difference between the consent and power of attorney also constitutes an argument against the admissibility of a blanket consent or a consent specified by type. In no provision does the legislator distinguish between consent for a particular activity, consent specified by type or a general consent, as it has been distinguished with reference to the power of attorney in Art. 98 CC.<sup>6</sup> Neither the application of the consent of the spouse similarly to Art. 98 CC seems justified, as the consent referred to Art. 37 FGC constitutes legal authorization which is entirely separate from the power of attorney. The objectives of both authorizations also vary. A spouse performs the acts for which consent is necessary on their own, acting on their own behalf (does not act as an attorney to the other spouse). The consent comprises a declaration of will constituting an element of an act in the law, necessary for its effective per-

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<sup>5</sup> At this point, another doubt arises whether the spouse's authorization for the other spouse to sell the property that is part of the joint property also requires the consent of the spouse referred to in Art. 37 FGC.

<sup>6</sup> This provision states that "The general power of attorney shall confer authorization to perform acts of ordinary management. Acts which exceed the scope of ordinary management shall require a power of attorney specifying their kind unless statutory law requires a power of attorney for a particular act."

formance [Gutowski 2019].<sup>7</sup> In the case of agreement, lack of consent results in the suspended ineffectiveness (Art. 37, para. 2 FGC) of the agreement or invalidity in the case of unilateral act in the law (Art. 37, para. 4 FGC).

The legislator has provided for one type of consent expressed for the performance of a specific act in the law. However, it should be concluded with reference to the three types of the power of attorney specified by the legislator that the consent included in Art. 37 FGC always refers to “particular act” and not the consent “by type” or “general” consent. Lack of individualization of the act the spouse expresses their content to would result in the lack of certainty as of the validity of a legal act performed by the spouse who uses the consent.

The following arguments support the relevance of the above thesis that the consent of spouse referred to in Art. 37 FGC should include an individual legal act to be carried out by specific persons.

In Art. 37 FGC, the legislator uses the terms “consent” for “the performance of act in the law.” The expressions “consent” and “act in the law” are singular, which means it should be possible to identify a specific declaration of will constituting a consent to perform a certain act in the law. There are certainly no obstacles to a single document reflecting several or even more than a dozen or even hundreds of consents for performing an act in the law. However, it seems that the list of acts in the law which the spouse expresses their consent to should be closed. It should be considered inadmissible to state that the consent may relate to an infinite number of legal acts as it is contrary to the wording of the Art. 37, para. 1 FGC and, above all, to the purpose of that provision. Meanwhile, the acceptance of the idea that consent may include the acts in the law defined by type or blank consent has exactly such an outcome. The spouse, by expressing consent to perform acts in the law specified by type, would actually express consent to perform a non-specified, indefinite number of acts in the law.

It should be taken into account when formulating spouse’s declaration to grant consent to perform act in the law that its consent should be sufficiently unambiguous to make it comprehensible for each average person whether the spouse consents to a specific act. However, the need to establish by the third party intending to perform the act with the spouse the exact extent of the consent and conducting evidence proceedings in this area or complex procedures related to the interpretation of declarations of intent is undesirable from the point of view of the security of the transactions. It is also an argument against the possibility to grant blanket consent or consent specified by type. For example, there are doubts in the views of legal scholars regarding the semantic scope of the expression contained in Art. 37 FGC “act in the law leading to...”

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<sup>7</sup> Opposite opinion, that the consent of a third party in accordance with the Art. 63 CC is an unilateral act in the law [Sobolewski 2019].

(disposal, encumbrance of property) [Sylwestrzak 2019]. It remains unclear what specific acts are included in the concept of the “act leading to” the performance of the particular act in the law. Thus, it may not be considered admissible to specify the scope of the consent of spouse by specifying that the consent comprises all actions leading to, for example, disposal of property. A third party entering into a legal transaction with a spouse would be required to interpret the concepts contained in the declaration of consent by the spouse in order to determine whether the consent granted includes the transaction to be performed.

### 3. OTHER REMARKS

It should also be pointed out that the provisions of the Civil Code, as well as the Family and Guardianship Code, do not specify the date by which the act which the spouse has expressed consent to should be performed. Undoubtedly, the consent expires and loses its binding force when it is “consumed,” i.e. when the act specified therein, or other act the spouse expressed consent to, is performed. In the case of the consent including individual act in the law to be performed between particular persons, the issue of temporary range of the consent is especially significant. Doubts could arise if the consent were to be blank or generic and would cover an act performed many years later.

Thus, it must be concluded that the consent of spouse should have a reasonable time relationship with the activity to which it relates [Sobolewski 2019]. This allows to state that the spouse granting the consent was aware of the current status of the joint property and the results of the act they had given consent to regarding the said property. Obviously, the declaration of granting the consent may only refer to the acts whose performance is admissible under the provisions in force at the time of consent. Acceptance of the possibility of granting consent specified by type or blank consent could result that in the event of a change in the law, the consent would cover activities about which the spouse was not aware at the time of granting the consent. For instance, pursuant to Art. 95 Bank Law in the wording applicable until May 1, 2004<sup>8</sup> bank mortgage could only be established on real estate owned by the debtor of the bank. Following the amendment of this provision<sup>9</sup> bank mortgage may also be established on the property belonging to another person in order to secure the liabilities of the bank’s debtor. This means that the spouse granting e.g. in 2003 the consent for the other spouse to establish a bank mortgage on the property constituting part of joint marital property, could not be aware of

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<sup>8</sup> Act of 29 August 1997, the Bank Law, Journal of Laws of 2019, item 2357.

<sup>9</sup> Change of Art. 95 made by Art. 1, point 59 of the act of 1 April 2004 on amending the act Bank Law and on amending other acts, Journal of Laws No. 91, item 870.

the performance of the act not permissible at that time, i.e. establishing a bank mortgage to secure a debt for which the debtor is not a spouse but a completely different entity. Aforementioned remarks does not apply to a consent which is given upon the performance of the act in the law, according to Art. 37, para. 2–3 FGC. A consent, which is a confirmation of an agreement concluded by the one spouse, should be performed according to the provisions of law effective upon the execution of an agreement.

The legislator has not clearly specified the possibility to revoke the consent by a spouse after a declaration of consent arrived to its recipient<sup>10</sup> (such regulation is provided for in the provisions of the Civil Code regarding the revocation of the power of attorney in Art. 101, para. 1 CC<sup>11</sup>). The lack of regulations regarding the possibility to revoke the consent by a spouse in such situation supports the claim that it is one-time consent limited to one, particular act in the law, as the issue of the revocation of the consent is irrelevant in such case. However, the possibility and effectiveness of the spouse's revoking their consent may give rise to doubts, in particular in a case where a third party in a legal relationship with the spouse was not aware of the revocation. In respect to consent of a third party, in accordance with Art. 63 CC, was expressed an opinion that a consent cannot be revoked after a declaration of consent arrived to its recipient [Kozik 2007, 82].

On the other hand, adopting a stand that the consent may only refer to an infinite number of acts in the law specified by type or in blanket terms, would lead to a conclusion that such a consent would never be “consumed” and, in general, would be infinite, unless such consent is revoked by the spouse (provided that such action is admissible). However, taking into account the safety of transactions, such possibility should be opposed. The third party entering into an act in the law requiring the consent of spouse with another spouse not only would have to verify whether such consent has already been granted, but also – in the case of consent specified by type or general consent – it would be necessary to verify whether such a consent had not been revoked. This would actually mean the necessity for the spouse to grant consent for the performance of a particular act in the law each and every time, as a third party would have no other opportunity to verify whether the consent granted had not been revoked.

Moreover, adopting the view that the consent of spouse referred to in Art. 37, para. 1 FGC can specify – in blanket terms or by type – the acts to the performance of which the spouse gives consent to, may directly lead to

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<sup>10</sup> According to Art. 61, para. 1 second sentence CC, the revocation of a declaration of intent is effective if it arrives together with the declaration, or earlier.

<sup>11</sup> This provision states that: “The power of attorney may be revoked at any time unless the principal has renounced the revocation of the power of attorney for reasons justified by the contents of the legal relationship on which the power of attorney is based.”

circumvention of law, i.e. the actual exclusion of the application of Art. 37 FGC. The legal scholars might dispute whether the given act in the law would require consent, e.g. as the encumbrance of property. However, it is possible without the slightest difficulty to enumerate all acts in the law requiring consent specified in Art. 37, para. 1 FGC and obtain the consent of spouse to perform such act. It would be sufficient to replace the terms “dispose,” “encumber,” “acquire against payment” in the declaration of consent with a list of activities specified only by type, e.g. replace “dispose” with “sell, exchange, make a contribution in kind to a commercial company,” etc. and the scope of the term “dispose” would quickly be exhausted, as there is a closed catalogue of legal acts included in the meaning of “dispose,” “acquire,” “encumber.” Taking the view of admissibility of granting a consent specified by type, a spouse could grant a consent in which they would list all types of acts specified in Art. 37 FGC. However, this would essentially lead to circumvention of the law and complete distortion of the institution of consent of a third party referred to in Art. 37 FGC, as such consent is supposed to apply to a specific “act in the law,” and not to an unlimited, infinite set of legal acts specified by type or in blanket terms.

To sum up, it should also be concluded that on the grounds of other legal regulations formulating the requirement of a consent of a particular person or body, it is assumed that such consent may not be general or specified by type, but should indicate a specific individualised act to which the consent is granted. For example Art. 22, para. 1 of the act on Ownership of Premises<sup>12</sup> indicates that the acts of general management are performed by the management board on their own. The legislator in Art. 22, para. 2 of that act thereof specifies that in order for the management board to perform the acts exceeding the scope of general management, a resolution of the owners of premises is required, expressing their consent to the performance of such act and granting the management board the power of attorney to conclude agreements constituting the acts exceeding the scope of ordinary management in the form provided for by law. At the same time, the case law indicates that “a resolution granting consent to perform acts exceeding the scope of ordinary management, including e.g. an agreement, should specify the provisions of the agreement that are material in subjective and objective terms as well as the entity with whom the agreement is to be concluded. A general definition of the terms and conditions of the agreement without specifying the party with whom the agreement is to be concluded – as is in this case – should be deemed inadmissible, as in such a way, the co-owners assign to the management board the right to independently undertake activities exceeding the scope of ordinary management, which constitutes a circumvention of the law, in particular the

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<sup>12</sup> Act of 24 June 1994 on Ownership of Premises, Journal of Laws of 2019, item 737 as amended.

provision of Article 22 section of the Act on the Ownership of Premises. [...] The consent provided for in Article 22 section 2 of the Act on the Ownership of Premises should refer to a specific, strictly defined activity. By way of a resolution, it is not possible to transfer the power to independently undertake a specific type of activities exceeding the scope of ordinary management to the management board.”<sup>13</sup>

## CONCLUSION

The consent of spouse for the performance of a certain act in the law by the other spouse is of great practical significance. The persons remaining in matrimonial relationships with a joint matrimonial property regime are active participants to transactions and perform acts in the law involving the components of joint property. The absence of the consent of spouse or the consent being granted in an improper manner which does not produce legal effects may eventually lead to invalidity of the act in the law performed by one of the spouses. Transaction practice (including notarial practice) contains examples of declarations of spouses expressing their consent under Art. 37 FGC which constitute consent by type or even blanket consent. The jurisprudence of common courts in this matter is not uniform and the Supreme Court has not yet expressed its opinion in this regard.<sup>14</sup> From the point of view of security and certainty of transactions it seems desirable to unify the judicial practice of courts. The views of mentioned above legal scholars concerning the interpretation of Art. 37 FGC in the context of the required degree of detail of consent seem to be almost uniform and against the admissibility of blanket consent or consent specified by type. However, due to the doubts that arise in the course of transactions, it seems desirable for the Supreme Court to take a position on this issue or for the legislator to intervene.

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<sup>13</sup> The judgement of the Court of Appeal in Cracow of 17 March 2009, I ACa 149/09, LEX no. 1311963.

<sup>14</sup> Polish Supreme Court on May 29, 2018 adopted a cassation complaint to be examined, in which the important legal issue concerning the problem of consent of the spouse was discussed in the present study, see the judgement of the Supreme Court of 5 March 2019, II CSK 43/18, LEX no. 2629838.

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#### ZGODA MAŁŻONKA NA DOKONANIE CZYNNOŚCI PRAWNEJ PRZEZ DRUGIEGO MAŁŻONKA – UWAGI NA TLE ART. 37 KODEKSU RODZINNEGO I OPIEKUŃCZEGO

**Streszczenie.** Celem niniejszego artykułu była analiza wybranych problemów interpretacyjnych pojawiających się na tle regulacji zawartej w art. 37 Kodeksu rodzinnego i opiekuńczego. Przepis ten przewiduje wymóg uzyskania zgody małżonka na dokonanie przez drugiego małżonka określonych czynności prawnych dotyczących zarządu majątkiem wspólnym małżonków. Zastosowana metoda badań obejmuje analizę dogmatycznoprawną wybranych przepisów polskiego Kodeksu rodzinnego i opiekuńczego oraz Kodeksu cywilnego, a także analizę poglądów wyrażonych w orzecznictwie sądowym oraz w nauce prawa. Po przeprowadzeniu badań sformułowano tezę, że oświadczenie małżonka o wyrażeniu zgody na dokonanie czynności prawnej przez drugiego małżonka nie może mieć charakteru rodzajowego, ani blankietowego, natomiast musi obejmować elementy przedmiotowo istotne czynności prawnej oraz osobę, z którą czynność ma zostać dokonana. Wymóg uzyskania zgody małżonka ma na celu zarówno ochronę interesów małżonka niedokonującego czynności prawnej, jak również służyć ma zapewnieniu bezpieczeństwa obrotu oraz chronić interesy osoby trzeciej, dokonującej czynności prawnej z jednym z małżonków.

**Słowa kluczowe:** zgoda, małżonek, osoba trzecia, czynność prawna

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