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Valuation of Mortgaged Real Estate in the Proceedings for the Division of Community Property of Spouses – Remarks De Lege Lata

Ustalenie wartości nieruchomości obciążonej hipoteką w postępowaniu o podział majątku wspólnego małżonków – uwagi de lege lata

ABSTRACT

The problem of determining the value of mortgaged real estate in proceedings for the division of community property of spouses has repeatedly been the subject of analysis by civil law scholars. Over the years, two opposing views have formed in the case law of the Supreme Court as to how to determine the value of mortgaged real estate. The first to emerge and consolidate was the view that encumbrances on real estate, including mortgages securing loans granted to the spouses during the time of holding their community property, are assumed to reduce the value of the real estate. The court, therefore, in determining the value of this item within the community property, takes into account the amount of the debt unpaid (by the date of the decision on property division) by the spouses and, in awarding the property to one of them, reduces the additional payment or repayment to the other accordingly. According to the second view, currently dominant, the court, when establishing the value of real estate constituting a community property of spouses, encumbered with a mortgage securing a loan granted to the spouses, takes into account only its market value, disregarding the encumbrance. It appears, however, that each of the presented methods of determining the value of the mortgaged real estate in the proceedings for the division of community property of the spouses

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may entail the risk of harming interests of one of the spouses. Thus, in spite of abundant case law and numerous contributions from scholars in the field, this problem is still relevant under the current legislation and requires consideration of legislative change in this area.

Keywords: marriage; division of community property; division of real estate; joint and several liability of spouses; mortgage-backed loan

INTRODUCTION

The problem of valuation of mortgaged real estate in proceedings for the division of community property of spouses has often been analysed by civil law scholars.[1] Over the years, two opposing views have emerged in the Supreme Court's case law as to how to value mortgaged real estate. The first to emerge and consolidate was the view that encumbrances on real estate, including mortgages securing loans granted to the spouses during the time of their community, are assumed to reduce the value of the real estate. Thus, when determining the value of this component of community property, the court takes into account the amount of the debt not repaid (by the date of issuing the ruling on the division of property) by the spouses and, when granting the real property to one of them, it reduces correspondingly the contribution payment or repayment for the other.[2] According to the second view,

[1] For example, see K. Skiepko, [in:] *Komentarz do spraw o podział majątku wspólnego małżonków*, ed. J. Ignaczewski, Warszawa 2021, p. 269 ff.; H. Ciepła, M. Pytlewska, *Podział majątku wspólnego z rozliczeniem praw spółkowych i kredytów frankowych. Regulacje dotyczące małżonków, konkubentów i partnerów związków jednopłciowych*, Warszawa 2022, p. 149 ff.; G. Jędrejek, *Postępowanie o podział majątku wspólnego, w skład którego wchodzi nieruchomość obciążona hipoteką*, "Monitor Prawniczy" 2010, no. 9, p. 532 ff.; M. Knotz, *Podział majątku wspólnego obciążonego hipoteką w orzecznictwie SN*, "Iustitia" 2011, no. 3, p. 126 ff.; A. Grajewski, *Podział majątku wspólnego a zwolnienie byłego małżonka z długu*, "Palestra" 2016, no. 11, p. 16 ff.; J. Kolenda, *Obciążenie hipoteczne nieruchomości a podział majątku wspólnego. Rozważania w oczekiwaniu na uchwałę Sądu Najwyższego*, "Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury" 2018, no. 4, p. 71 ff.; A. Stempniak, *Ocena kształtującej się linii orzecznictwa Sądu Najwyższego w zakresie ustalania w sprawach działowych wartości nieruchomości obciążonej hipoteką*, "Monitor Prawniczy" 2020, no. 12, p. 625 ff.; A. Partyk, T. Partyk, *Wartość nieruchomości obciążonej hipoteką. Glosa do postanowienia SN z dnia 26 stycznia 2017 r., I CSK 54/16*, LEX/el. 2018; J. Górecki, D. Wybrańczyk, *Uwzględnienie obciążenia hipoteką przy ustalaniu wartości nieruchomości należącej do majątku wspólnego małżonków w postępowaniu o podział tego majątku. Glosa do uchwały SN z dnia 27 lutego 2019 r., III CZP 30/18*, "Gdańskie Studia Prawnicze" 2019, no. 4, p. 57 ff.; J. Szachta, *Określenie wartości nieruchomości należącej do majątku wspólnego małżonków podlegającego podziałowi. Glosa do uchwały SN z dnia 25 lipca 2019 r., III CZP 14/19*, "Orzecznictwo Sądów Polskich" 2021, no. 2, p. 8 ff.

[2] For example, see resolution of the Supreme Court of 25 June 2008, III CZP 58/08, Legalis no. 100976; decision of the Supreme Court of 5 October 2000, II CKN 611/99, Legalis no. 48502; decision of the Supreme Court of 29 September 2004, II CK 538/03, Legalis no. 277052; decision of the Supreme Court of 26 November 2009, III CZP 103/09, Legalis no. 177443; decision of the Supreme Court of 21 January 2010, I CSK 205/09, Legalis no. 338379; decision of the Supreme Court

currently dominant, when determining the value of a real property belonging to the community property of the spouses, which is mortgaged as collateral for a loan granted to the spouses, the court takes into account only its market value, disregarding that encumbrance.[3]

The paper seeks to analyse and evaluate the methods adopted in the case law of the Supreme Court to determine the value of mortgaged real estate in proceedings for the division of the community property of spouses, taking into account the views presented by scholars in the field.

RESEARCH PART

Due to the resulting heterogeneity in the case law of the Supreme Court in determining the value of mortgaged real estate in proceedings for the division of the community property of spouses, the First President of the Supreme Court requested that the resulting interpretive differences be decided by a resolution of the panel of seven judges of the Supreme Court. The application also concerned the issue of determining whether Article 618 § 3 of the Civil Procedure Code[4] excludes the pursuit of a claim between former spouses for repayment of the amount of a mortgage debt repaid by one of the spouses after termination of the community and division of the community property. The Supreme Court, having resolved the legal issues presented, ruled on 27 February 2019 that Article 618 § 3 CPC did not preclude the former spouses to seek a claim for repayment of the amount of a debt secured by a mortgage, repaid by one of them after the decision on the division of community property has become final, and as regards determining the method of valuation of the mortgaged real estate forming part of the property to be divided, it refused to adopt a resolution, pointing out that the various factual circumstances of the cases in question make it impossible and unjustified to adopt a resolution of an abstract and universal nature.[5]

It is worth noting that the view that due to the content of Article 618 § 3 CPC in conjunction with Article 567 §§ 1 and 3 CPC it is precluded to seek a recourse

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of 20 April 2011, I CSK 661/10, Legalis no. 385418; decision of the Supreme Court of 26 September 2013, II CSK 650/12, Legalis no. 950242.

[3] For example, see resolution of the Supreme Court of 28 March 2019, III CZP 21/18, Legalis no. 1886371; resolution of the Supreme Court of 25 July 2019, CZP 14/19, Legalis no. 1977203; decision of the Supreme Court of 26 January 2017, I CSK 54/16, Legalis no. 1591680; decision of the Supreme Court of 14 March 2017, II CZ 161/16, Legalis no. 1668518; decision of the Supreme Court of 12 July 2019, I CSK 713/17, Legalis no. 2201742; decision of the Supreme Court of 15 May 2020, IV CSK 474/19, Legalis no. 2399386.

[4] Act of 17 November 1964 – Civil Procedure Code (consolidated text, Journal of Laws 2024, item 1568, as amended), hereinafter: CPC.

[5] See resolution of the panel of seven judges of the Supreme Court of 27 February 2019, III CZP 30/18, Legalis no. 1879403. See also J. Górecki, D. Wybrańczyk, *op. cit.*, p. 57 ff.

claim against the former spouse by the spouse who repaid the mortgage debt after the division of the community property was one of the basic arguments raised by supporters of the concept of reducing the market value of the shared property by the amount of the unpaid loan.[6] It was considered that failure to take into account a mortgaged immovable property when determining the amount of the repayment or contribution payment due to the spouse to whom the immovable property was not granted could lead to a situation where the spouse who received the immovable property, being a mortgage debtor, repays all the remaining debt himself/herself but may not seek recourse claims against the former spouse in the event that he/she received the repayment (contribution payment), the amount of which was determined without taking into account the mortgage encumbrance.[7] However, this view had been criticized by scholars in the field even before the Supreme Court, in its resolution of 27 February 2019, pointed out that the position presented in the case law "wrongly relied on the statute of repose resulting from Article 618 § 3 CPC, governing relations between co-owners and omitted the provisions of the Civil Code regarding the rights and obligations of jointly-and-severally obliged debtors".[8] Pursuant to Article 567 CPC, in proceedings for the division of community property, after the cessation of community property between the spouses, the court also decides what expenses, costs and other performances from the community property for personal property or vice versa are to be repaid. Thus, it is rightly stressed by scholars in the field that only the joint debts of spouses which were repaid from the personal property of one of them before the division of community property are to be settled in proceedings for the division of community property (Article 686 CPC in conjunction with Article 567 § 3 CPC).[9] In the decision of 9 September 1976, the Supreme Court indicated that, by applying mutatis mutandis Article 686 CPC to the proceedings for the division of community property, the court decides in this order – and this with the effects resulting from Article 618 § 3 CPC in conjunction with Article 688 and Article 567 § 3 CPC – only about the debts relating to the community property and which, during the period of the joint property, were owed by both spouses as members of the marital community, which were repaid by one

[6] For example, see G. Jędrejek, *op. cit.*, p. 536.

[7] For example, see decision of the Supreme Court of 5 October 2000, II CKN 611/99, Legalis no. 48502; decision of the Supreme Court of 29 September 2004, II CK 538/03, Legalis no. 277052; decision of the Supreme Court of 26 November 2009, III CZP 103/09, Legalis no. 177443; decision of the Supreme Court of 20 April 2011, I CSK 661/10, Legalis no. 385418. Cf. K. Skiepko, *op. cit.*, p. 271 ff.; H. Ciepła, M. Pytlewska, *op. cit.*, p. 149 ff.

[8] See resolution of the panel of seven judges of the Supreme Court of 27 February 2019, III CZP 30/18, Legalis no. 1879403. Cf. decision of the Supreme Court of 26 September 2013, II CSK 650/12, Legalis no. 950242.

[9] For example, see M. Knotz, *op. cit.*, p. 129; J. Kolenda, *op. cit.*, p. 79 ff.; A. Stempniak, *op. cit.*, p. 633 ff.

of the spouses from spouses – own resources after the cessation of the community and before the division of the community property.[10] The provision of § 3 of Article 618 CPC therefore only precludes, after the final conclusion of the proceedings for the division of community property, the possibility of pursuing claims for the debts repaid before the division of community property. On the other hand, the joint debt repaid after the division of the community property by one of the former spouses is settled in accordance with Article 376 § 1 of the Civil Code,[11] as a recourse claim between joint-and-several debtors.[12] The provision of Article 618 § 3 CPC does not exclude in such a case a recourse action and the spouse who repaid the mortgage loan after the division of the community property may effectively claim from the former spouse the reimbursement of the relevant part of the repayment.[13]

One should agree with the view that the division of community property does not affect the status of the former spouses who are still encumbered with debts from the period of marital community. After the division of community property and the granting of a mortgaged property to one of the spouses, both spouses, remaining parties to the loan contract, are joint-and-several personal debtors of the mortgage creditor, who can seek repayment of the loan from each of them. The obligation to repay the debt by the spouse who received the property is therefore no broader than the joint-and-several obligation of the other spouse. The tangible collateral does not change the scope of the co-debtors' loan obligation and does not transfer to the spouse who received the mortgaged real property the obligation to independently repay the debt due to the risk of foreclosure.[14] The mortgage creditor, the bank, retains the freedom to choose the debtor from whom it will demand payment and is not obliged to satisfy the claim from the mortgaged property. It operates fully

[10] See decision of the Supreme Court of 9 September 1976, III CRN 83/76, Legalis no. 19603.

[11] Act of 23 April 1964 – Civil Code (consolidated text, Journal of Laws 2024, item 1061, as amended).

[12] For more detail on the recourse claim, see K. Zawada, *Komentarz do art. 376*, [in:] *Kodeks cywilny*, vol. 1: *Komentarz. Art. 1–449[10]*, ed. K. Pietrzykowski, Legalis 2020, marginal no. 1 ff.; W. Dubis, *Komentarz do art. 376*, [in:] *Kodeks cywilny. Komentarz*, eds. E. Gniewek, P. Machnikowski, Legalis 2021, marginal no. 1 ff.; B. Lackoroński, *Komentarz do art. 376*, [in:] *Kodeks cywilny. Komentarz*, eds. K. Osajda, W. Borysiak, Legalis 2022, point A ff.; A. Raczyński, *Komentarz do art. 376*, [in:] *Kodeks cywilny*, vol. 2: *Komentarz. Art. 353–626*, ed. M. Gutowski, Legalis 2022, marginal no. 1 ff.

[13] For more detail, see M. Knotz, *op. cit.*, p. 129; J. Kolenda, *op. cit.*, p. 79 ff.; A. Stempniak, *op. cit.*, p. 633 ff.

[14] For another view, see e.g. decision of the Supreme Court of 26 October 2011 (I CSK 41/11, Legalis no. 453499), wherein the Supreme Court argued that "If, due to the existence of liability in rem, the debt burdens the property and reduces its value, its repayment by the spouse who, as a result of the division of assets, received the encumbered property, assessed taking into account this debt, constitutes the implementation of the principle that the person obligated to repay is the one to whom the real estate was awarded, because by repaying the debt the person prevents the creditor from directing claims against that property". Cf. decision of the Supreme Court of 2 April 2009, IV CSK 566/08, Legalis no. 13865; G. Jędrejek, *op. cit.*, p. 533 ff.; A. Partyk, T. Partyk, *op. cit*.

autonomously, and its decisions are in no way dependent on the manner of division of community property between the spouses. The loss of the position of the mortgage debtor by the spouse who did not receive the previously community property does not cause the loss of their status as a personal joint-and-several debtor in the obligation that is secured by a mortgage.[15]

It is a well-established view in the literature on the topic and the relevant case law that the division of the spouses' community property regards only assets. Therefore, the division procedure does not include debts and thus the court does not determine their existence and amount, nor does it rule on their repayment.[16] The Supreme Court, in its decision of 5 December 1978, ruled that debts incurred by both spouses cannot be settled during the division of community property, as the

[15] For example, see K. Skiepko, *op. cit.*, p. 278 ff.; H. Ciepła, M. Pytlewska, *op. cit.*, p. 152 ff.; J. Kolenda, *op. cit.*, p. 78 ff. Cf. M. Knotz, *op. cit.*, p. 128. See also resolution of the panel of seven judges of the Supreme Court of 27 February 2019, III CZP 30/18, Legalis no. 1879403; resolution of the Supreme Court of 28 March 2019, III CZP 21/18, Legalis no. 1886371; resolution of the Supreme Court of 25 July 2019, CZP 14/19, Legalis no. 1977203; decision of the Supreme Court of 12 July 2019, I CSK 713/17, Legalis no. 2201742; decision of the Supreme Court of 13 March 2020, III CZP 64/19, Legalis no. 2292786.

[16] For example, see K. Skiepko, *op. cit.*, p. 270; H. Ciepła, M. Pytlewska, *op. cit.*, p. 149; M. Knotz, *op. cit.*, p. 129; J. Kolenda, *op. cit.*, p. 73 ff. Cf. T. Smyczyński, [in:] *System Prawa Prywatnego*, vol. 11: *Prawo rodzinne i opiekuńcze*, ed. T. Smyczyński, Warszawa 2009, p. 513 ff.; K. Pietrzykowski, *Komentarz do art. 46*, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. K. Pietrzykowski, Legalis 2023, marginal no. 36; J. Słyk, *Komentarz do art. 46*, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, eds. K. Osajda, M. Domański, J. Słyk, Legalis 2023, point 43; B. Kubica, *Komentarz do art. 46*, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, eds. M. Fras, M. Habdas, LEX/el. 2021, marginal no. 50; E. Skowrońska-Bocian, *Komentarz do art. 46*, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. J. Wierciński, LEX/el. 2014, marginal no. 66; idem, *Rozliczenia majątkowe małżonków w stosunkach wzajemnych i wobec osób trzecich*, Warszawa 2013, p. 226 ff.; M. Sychowicz, *Komentarz do art. 46*, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. K. Piasecki, LEX/el. 2011, marginal no. 67; J. Ignaczewski, O.M. Piaskowska, [in:] *Małżeńskie prawo majątkowe*, ed. J. Ignaczewski, Warszawa 2014, p. 150 ff.; M. Kuchnio, *Komentarz do art. 567*, [in:] *Kodeks postępowania cywilnego. Postępowanie nieprocesowe. Postępowanie w razie zaginięcia lub zniszczenia akt. Postępowanie zabezpieczające. Komentarz aktualizowany*, ed. O.M. Piaskowska, LEX/el. 2023, marginal no. 9; A. Zieliński, K. Flaga-Gieruszyńska, *Kodeks postępowania cywilnego. Komentarz*, Legalis 2022, commentary on Article 567, marginal no. 8; P. Pruś, *Komentarz do art. 567*, [in:] *Kodeks postępowania cywilnego. Komentarz aktualizowany*, vol. 2: *Art. 478–1217*, ed. M. Manowska, LEX/el. 2022, marginal no. 10; D. Dończyk, I. Koper, *Komentarz do art. 567*, [in:] *Kodeks postępowania cywilnego. Komentarz*, vol. 3: *Art. 506–729*, ed. T. Wiśniewski, LEX/el. 2021, marginal no. 40; J. Bodio, *Komentarz do art. 657*, [in:] *Kodeks postępowania cywilnego. Komentarz aktualizowany*, vol. 1: *Art. 1–729*, ed. A. Jakubecki, LEX/el. 2019, marginal no. 3. See, i.a., decision of the panel of seven judges of the Supreme Court of 5 December 1978, III CRN 194/78, Legalis no. 21212; decision of the Supreme Court of 21 January 2010, I CSK 205/09, Legalis no. 338379; resolution of the Supreme Court of 28 March 2019, III CZP 21/18, Legalis no. 1886371. Cf. decision of the Supreme Court of 26 January 1972, III CRN 477/71, Legalis no. 15990; decision of the Supreme Court of 12 January 1978, III CRN 333/77, Legalis no. 20622; decision of the Supreme Court of 20 September 2000, I CKN 295/00, Legalis no. 48446.

debt continues despite such a division, and transferring the debt to only one of the spouses would be detrimental to the rights of creditors.[17] The literature also holds that the inclusion of the division of the community property as a division of assets is supported by the content of the provisions of Article 45 § 3 of the Family and Guardianship Code[18] and Article 686 CPC in fine in conjunction with Article 567 §§ 1 and 3 CPC. Both legal grounds indicate that only repaid debts may be decided about in proceedings for the division of community property of spouses.[19] Instead, the court, when dividing the community property, should determine the composition of the community property and the value of the individual components of this property (Article 684 CPC in conjunction with Article 567 § 3 CPC).[20] Such generally formulated requirement for the court to determine the value of the property items subject to division, taken in abstracto, does not raise any objections. However, the valuation of the items forming part of the community property subject to division becomes problematic when they are encumbered as a tangible collateral.[21]

It is uniformly accepted that the value of the property being divided is determined according to the prices applicable at the time of ruling about the division, and when determining the value of items that are themselves subject to division, especially real estate, their real market value should be considered.[22] It is also pointed out that in proceedings for the division of community property, the determination of the market value of real estate is carried out under the provisions of the Act of 21 August 1997 on real estate management[23] (Article 149). According to Article 151 (1) of this Act, the market value of real estate is the estimated amount that can be obtained for the property as of the day of valuation in a sales transaction concluded under market conditions between a buyer and a seller who have a firm intention to conclude a contract, act with discernment and proceed prudently, and are not in a situation of necessity. The determination of the market value of real estate is the responsibility of a property appraiser, who – according to Article 154 (1) of this Act – considers in particular the purpose of the valuation, the type and location of the property, intended purpose of the property in the zoning plan, the condition of the property, and available data on prices, incomes, and characteristics of similar properties. Furthermore, based on § 38 (1) of the Ordinance of the Council of

[17] See decision of the panel of seven judges of the Supreme Court of 5 December 1978, III CRN 194/78, Legalis no. 21212. Cf. decision of the Supreme Court of 21 January 2010, I CSK 205/09, Legalis no. 338379.

[18] Act of 25 February 1964 – Family and Guardianship Code (consolidated text, Journal of Laws 2023, item 2809, as amended).

[19] For example, see A. Stempniak, *op. cit.*, p. 628 ff.

[20] For more detail, see K. Skiepko, *op. cit.*, p. 268 ff.; H. Ciepła, M. Pytlewska, *op. cit.*, p. 148 ff.

[21] A. Stempniak, *op. cit.*, p. 627.

[22] For example, see K. Skiepko, *op. cit.*, p. 270 ff.; H. Ciepła, M. Pytlewska, *op. cit.*, p. 148 ff.

[23] Consolidated text, Journal of Laws 2024, item 1145, as amended.

Ministers of 21 September 2004 on the valuation of real estate and preparation of an appraisal report,[24] encumbrances on the property with limited property rights are considered if they affect the change in this value.[25]

Supporters of the view that the value of a property should be reduced by a mortgage encumbrance seem to assume that such an encumbrance actually reduces the market value of the property. Opponents of this view, on the other hand, point out that the market value of the property is determined by the physical characteristics of the property and the purpose of the assessment.[26] Consequently, they assume that the mortgage encumbrance does not affect the market value of the property, but only the method of settling the purchase price of the property between the parties to the contract (transferring the ownership of the encumbered property). In the practice of real estate transactions, the buyer, with the consent of the seller, transfers a certain part of the purchase price directly to the mortgage creditor (bank) as a repayment of the (loan) claim secured by the mortgage, which results in the cessation of the mortgage and its deletion from the land and mortgage register with the consent of the creditor. According to the view presented, the mere fact of being mortgaged does not therefore reduce the market value of the property being sold. In the case where a contract is concluded for the sale of a mortgaged real property without the seller's obligation to repay the debt secured on the real estate, the buyer of the real estate will bear the risk of liability for another person's debt, with a possible option of recovering the debt repaid to the creditor by way of a recourse claim (Article 618 CPC).[27] In such a case, the price of the real estate may, of course, be reduced, but only, as M. Knotz points out, by the value, resulting from financial analysis, of the risk of incurring liability for the debt and the possibility of recovering it.[28] This view was also accepted by the Supreme Court in its resolution of 27 February 2019, indicating that the importance of the purpose of the assessment is visible, in particular, when the assessment is made for the purposes of real estate transactions. When selling a real property, the market value of the property reflects the price equal to that value, and the mortgage encumbrance only affects the way in which that price is disposed of, usually by paying debt in order to bring about the

[24] Consolidated text, Journal of Laws 2021, item 555, as amended.

[25] For example, see K. Skiepko, *op. cit.*, p. 271 ff.; H. Ciepła, M. Pytlewska, *op. cit.*, p. 151; M. Knotz, *op. cit.*, p. 126 ff.; J. Kolenda, *op. cit.*, p. 76; resolution of the panel of seven judges of the Supreme Court of 27 February 2019, III CZP 30/18, Legalis no. 1879403; judgment of the Supreme Court of 7 October 2005, IV CK 106/05, Legalis no. 71722; decision of the Supreme Court of 8 December 2010, V CSK 171/10, Legalis no. 1870982; decision of the Supreme Court of 20 October 2011, IV CSK 12/11, Legalis no. 465608. Cf. A. Partyk, T. Partyk, *op. cit.*; J. Szachta, *op. cit.*, p. 8.

[26] See J. Kolenda, *op. cit.*, p. 76. As proposed by, i.a., A. Stempniak (*op. cit.*, p. 632 ff.).

[27] For example, see K. Skiepko, *op. cit.*, p. 277; H. Ciepła, M. Pytlewska, *op. cit.*, p. 151 ff.; M. Knotz, *op. cit.*, p. 126 ff.; J. Kolenda, *op. cit.*, p. 76 ff.

[28] For example, see M. Knotz, *op. cit.*, p. 126 ff.

cessation of the mortgage. If the parties to the contract do not agree on the way the price is paid by allocating it in whole or in part to satisfy the mortgage creditor and do not lead to the cessation of the mortgage, the buyer of the mortgaged real estate replaces the morgage debtor and therefore bears the risk of liability for another party's debt in the form of the risk of enforcement. This risk may then decrease the price of the property, because it has a financial dimension, but this does not mean reducing the value of the property by the amount of outstanding debt.[29] The Supreme Court also concluded that "the value of the property is not affected by the very right encumbering it, but by the debt connected with that right, which, in relation to the mortgage, means a link with liability for that debt. If there is no change in the persons liable for the debt, there are insufficient grounds to assume that the encumbrance affects the value of the property. From the perspective of the purpose of the valuation of real property carried out in the process of division of the community property and the effects of that procedure, the fact of the property being mortgaged to secure the claim in which the two spouses are personal debtors does not affect the value of the property in those relationships".[30]

Certain scholars in the field also argue that the analogy to other rights in rem, such as easements or usufruct, pointed out by proponents of reducing the value of the property by a mortgage encumbrance, is wrong. These rights in rem are in fact of a different nature than mortgage. Mortgage is an accessory right which ceases to exist upon expiry of the receivable it secures (Article 65 ff. of the Land Registers and Mortgage Act[31]).[32] As K. Skiepko emphasizes, mortgage is accessory in nature, as it secures a receivable and "it may exist in this function separately from a personal obligation to repay the receivable also from other obligor's property items than the mortgaged real estate. The sale of the mortgaged real estate is not relevant for the personal liability for the debt. It only causes another person, the

[29] See resolution of the panel of seven judges of the Supreme Court of 27 February 2019, III CZP 30/18, Legalis no. 1879403; decision of the Supreme Court of 26 January 2017, I CSK 54/16, Legalis no. 1591680. Cf. judgment of the Supreme Court of 21 March 2013, II CSK 414/12, Legalis no. 726330.

[30] See resolution of the panel of seven judges of the Supreme Court of 27 February 2019, III CZP 30/18, Legalis no. 1879403.

[31] Act of 6 July 1982 on land registers and mortgage (consolidated text, Journal of Laws 2023, item 1984, as amended).

[32] For example, see K. Skiepko, *op. cit.*, p. 277; J. Kolenda, *op. cit.*, p. 77; M. Knotz, *op. cit.*, p. 127 ff.; resolution of the panel of seven judges of the Supreme Court of 27 February 2019, III CZP 30/18, Legalis no. 1879403. Differently, A. Stempniak (*op. cit.*, p. 633), who believes that the differentiation of the nature of individual debts cannot be sufficiently justified. The author emphasizes that according to the rule *lege non distinguente nec rostrum est distinguere* (when the law does not distinguish, it is not our role to distinguish), debts cannot be differentiated and separate legal embodiments cannot be constructed for them, and thus it cannot be argued that certain debts (e.g. easements) reduce the value of the property, while others (e.g. mortgage) do not have such an effect.

purchaser of the real estate, to appear in the role of the debtor liable for the debt, restricted to the mortgaged property".[33]

Undoubtedly one cannot agree with the view, expressed by the supporters of taking into account the mortgage encumbrance in the valuation of a real property, that if one of the spouses is granted a mortgaged property, only that spouse is obliged to repay the debt.[34] The principle pointed to by the Supreme Court, e.g. in the decision of 26 October 2011, "that the person to whom a real property has been granted is obliged to repay the property, because by repaying the debt prevents the creditor from making claims related to this thing", has no legal justification.[35] It should be noted that, after the division of the community property and the granting of immovable property to one of the spouses, both former spouses continue to be personal debtors and are jointly and severally liable to the creditor. Each of them may fulfil the performance, and the creditor may, in accordance with the provision of Article 366 of the Civil Code, demand all or part of the performance from both former spouses together, or from each one separately, i.e. also from the spouse who has not been granted the real estate.[36] In its resolution of 27 February 2019, the Supreme Court emphasized that the practice of anticipating, in proceedings for the division of community property, by the court whether, when, and in relation to whom an enforced satisfaction of the creditor from the property of its debtors will take place would violate the CPC rules for finding the facts underlying the decision.[37]

It should be noted that currently the Supreme Court (both in the justification for the resolution of 27 February 2019[38] and in subsequent resolutions[39], which are ap-

[33] See K. Skiepko, *op. cit.*, p. 277.

[34] For example, see G. Jędrejek, *op. cit.*, p. 533 ff.; A. Partyk, T. Partyk, *op. cit.*; decision of the Supreme Court of 26 October 2011, I CSK 41/11, Legalis no. 453499; decision of the Supreme Court of 2 April 2009, IV CSK 566/08, Legalis no. 13865.

[35] See decision of the Supreme Court of 26 October 2011, I CSK 41/11, Legalis no. 453499. Cf. judgment of the Supreme Court of 2 April 2009, IV CSK 566/08, Legalis no. 1874861.

[36] For example, see K. Skiepko, *op. cit.*, p. 278 ff.; H. Ciepła, M. Pytlewska, *op. cit.*, p. 152 ff.; J. Kolenda, *op. cit.*, p. 78 ff.; resolution of the panel of seven judges of the Supreme Court of 27 February 2019, III CZP 30/18, Legalis no. 1879403. Similarly, e.g., resolution of the Supreme Court of 28 March 2019, III CZP 21/18, Legalis no. 1886371; resolution of the Supreme Court of 28 March 2019, III CZP 41/18, Legalis no. 1886370; resolution of the Supreme Court of 25 July 2019, CZP 14/19, Legalis no. 1977203; decision of the Supreme Court of 13 March 2020, III CZP 64/19, Legalis no. 2292786.

[37] See resolution of the panel of seven judges of the Supreme Court of 27 February 2019, III CZP 30/18, Legalis no. 1879403.

[38] See *ibidem*.

[39] See resolution of the Supreme Court of 28 March 2019, III CZP 21/18, Legalis no. 1886371; resolution of the Supreme Court of 28 March 2019, III CZP 41/18, Legalis no. 1886370; resolution of the Supreme Court of 25 July 2019, CZP 14/19, Legalis no. 1977203. Cf. decision of the Supreme Court of 11 December 2020, V CSK 41/19, Legalis no. 2506294.

proved by some authors[40]) assumes that a mortgage encumbrance generally does not affect the value of a real property that was originally co-owned and then allocated to one of the spouses as a result of the division. However, it also acknowledges that circumstances may occur that cause the typical solution not to fulfil its role because it does not lead to the intended goal of the division proceedings, i.e. the removal of the state of joint ownership of the property or joint rights in a fair manner, balancing the interests of the co-holders. As noted, the reasons behind deviation from the solution that ignores the mortgage encumbrance may be of a subjective nature (particular personal or financial situation of the former spouses) or of an objective nature (proportions of the value of the encumbrance and property value), and the burden of proving their existence and importance for the decision rests on the parties. Consequently, it allows for the possibility of offsetting the encumbrance by deducting the nominal value of the mortgage or applying appropriate market criteria to adjust the value of the property subject to division. It emphasizes that determining the type and value of the object of the division proceedings, namely the real estate in the case in question, is an evidentiary issue. Therefore, the court should be allowed the discretion to adjust the method of estimating the value of the property and making settlements between former spouses dissolving joint ownership (community property) in a flexible manner, considering economic criteria when the circumstances of the factual state of the case require it.

CONCLUSIONS

To sum up, it should be noted that under the regulations currently in force, the prevailing view in the literature and case law is that in proceedings for the division of community property of spouses, the court, when determining the value of the real estate, should not take into account the outstanding mortgage loan to be repaid. At the same time, it should be emphasized that this solution is not compulsory, and the court, in the circumstances of a particular case, may apply a different solution, reducing the value of the real estate by the value of the loan so far unpaid by the spouses.[41] Nevertheless, it appears that each of the presented methods of valuation of mortgaged

[40] For example, see K. Skiepko, *op. cit.*, p. 279; M. Knotz, *op. cit.*, p. 129 ff.; J. Kolenda, *op. cit.*, p. 82 ff. A different opinion is expressed by, i.a., A. Stempniak (*op. cit.*, p. 632), who indicates that if a designated asset is encumbered by some debt, then the value of that asset should be reduced by the amount of that debt. This procedure, according to the author, is necessary because only then can we assume that the value thus determined constitutes a component of the assets that are subject to division and appropriate settlements undertaken during the division process. A. Stempniak also emphasizes that this solution is universal and consistent with the accepted axiom that the division covers only the assets belonging to the joint property. Cf. J. Górecki, D. Wybrańczyk, *op. cit.*, p. 62 ff.

[41] Cf. K. Skiepko, *op. cit.*, p. 279 ff.; M. Knotz, *op. cit.*, p. 129 ff.; J. Kolenda, *op. cit.*, p. 82 ff.

real estate in the proceedings for division of community property of spouses may entail a risk of harming one of the spouses.[42] The issue would therefore need to be resolved in a definitive manner that is fair to the spouses, while taking into account the creditor's interest. However, it seems that this is not possible without decisive intervention by the legislature. The presentation of proposals de lege ferenda related to legislative amendments in this area requires the preparation of a separate publication.

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ABSTRAKT

Problem ustalenia wartości nieruchomości obciążonej hipoteką w postępowaniu o podział majątku wspólnego małżonków niejednokrotnie był przedmiotem analizy przedstawicieli nauki prawa cywilnego. Na przestrzeni lat w orzecznictwie Sądu Najwyższego ukształtowały się dwa przeciwstawne poglądy w zakresie sposobu ustalania wartości nieruchomości obciążonej hipoteką. Jako pierwszy wykształcił się i utrwalił pogląd, zgodnie z którym przyjmuje się, że obciążenia nieruchomości, w tym również hipoteki zabezpieczające kredyty udzielone małżonkom w czasie trwania wspólności majątkowej, powodują zmniejszenie wartości nieruchomości. Sąd, ustalając wartość tego składnika majątku wspólnego, uwzględnia więc kwotę niespłaconego (do daty wydania orzeczenia o podziale majątku) przez małżonków długu, a przyznając nieruchomość jednemu z nich, pomniejsza odpowiednio dopłatę lub spłatę na rzecz drugiego Zgodnie z drugim poglądem, obecnie dominującym, ustalając wartość wchodzącej w skład majątku wspólnego małżonków nieruchomości obciążonej hipoteką zabezpieczającą udzielony małżonkom kredyt, sąd uwzględnia jedynie jej wartość rynkową, z pominięciem tego obciążenia. Wydaje się jednak, że każda z prezentowanych metod ustalania wartości nieruchomości obciążonej hipoteką w postępowaniu o podział majątku wspólnego małżonków może nieść za sobą ryzyko pokrzywdzenia jednego z małżonków. Pomimo bogatego orzecznictwa i licznych wypowiedzi przedstawicieli nauki na gruncie obowiązujących przepisów, problem ten jest ciągle aktualny i wymaga rozważenia wprowadzenia zmian legislacyjnych w tym zakresie.

Słowa kluczowe: małżeństwo; podział majątku wspólnego; podział nieruchomości; odpowiedzialność solidarna małżonków; kredyt zabezpieczony hipotecznie

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