A. GLOSY
GLOSSES

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Gloss to the decision of the Supreme Court of November 29, 2017, ref. act II CSK 88/17

Glosa do postanowienia Sądu Najwyższego z dn. 29 listopada 2017 r., sygn. akt II CSK 88/17

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The thesis of the voted provision reads as follows:

"In the proceedings for declaring the acquisition of inheritance, the court of inheritance acts actively regardless of the claims, conclusions and arguments of the interested parties." [2]

The thesis of the chosen resolution, due to the degree of its categoricality, can be treated as the culmination of a series of decisions of the Supreme Court regarding the activity of a court ex officio in proceedings for declaring the acquisition of inheritance.

In the process mode, in accordance with the principles of availability and adversariality, the principal factors determining the scope of action and adjudication of the court is the claim of the plaintiff together with the factual basis justifying it and the evidence requests of the parties. The procedural act only modifies these principles in exceptional cases (Articles 477 (1), 232, item 2, Code of Civil Procedure (CCP)). As a consequence, the plaintiff's failure to make the relevant claims and to prove the facts that constitute his right end, as a rule, dismiss the action.

However, in non-litigious proceedings, the limitations of the above-mentioned rules are much more serious and have a different character. Often, the limits of legal protection granted are independent of the will of the participants of the proceedings, as they are outlined by the act itself. This is particularly visible in proceedings that may be instituted ex officio, e.g. in proceedings before a guardianship court (Article 570, CCP). However, despite these serious limitations, it can be concluded that the principles of availability and adversariality generally apply also in non-litigious

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[2] The decision was published in the LEX program under No. 2420322.

proceedings. This is manifested, in particular, in maintaining the rule of initiating the proceedings upon request (Article 506, CCP), the content of the application usually also defining the scope of legal protection sought[3]. In addition, as is correctly assumed in jurisdiction, even the duty of court action ex officio does not overrule the obligation of the parties to submit evidence to the court[4].

The proceedings for declaring the acquisition of inheritance may be instituted by the court only upon application (Article 1025 of the Civil Code (CC)), but in the light of the provisions of art. 670 and 677 § 1 of the Code of Civil Procedure the court examines ex officio who is the heir and determines the acquisition of inheritance by the heirs, even if they were other people than those indicated by the participants. In connection with such legal regulation, the question has arisen what is the impact of the application on the scope of action and adjudication of the court in this proceeding. In the opinion of J. Krajewski, the application of the authorized person is a necessary impulse here, in the sense that without the application the proceedings could not take place at all, but if an application is submitted, further proceedings are pending ex officio[5]. Similarly, B. Dobrzański, who noticed that, apart from submitting the application, the entire proceedings are pending ex officio[6].

The above theses generally accurately reflect the essence of the legal construction used by the legislator, but they constitute a certain simplification. They do not take into account the role of the application in determining the general scope of the subject of adjudication (the court cannot decide on anything other than declaring the inheritance of a specific person) or the possibility of annihilating the whole proceeding by withdrawing the application (assuming that there are no obstacles from Article 203 § 4 in connection with Article 13 § 2 CCP and that the application was not upheld by another participant). Moreover, the elements of the application's content which are not binding for the court (such as the identification of heirs, their shares or titles of appointment to inheritance) are not devoid of meaning because they direct the court's activity and force it to express its position in relation to them[7].

On the other hand, in the course of the proceedings, the activity of participants for presenting the evidence is important, which may also be caused by appropriate court orders[8]. Here, however, we come to the difficult problem of balancing the right proportions between the principle proclaimed in art. 6 § 2 and art. 232 sent. 1 in relation to art. 13 § 2 CCP which imposes the burden of citing factual circumstances and evidence on the parties, and the court's activity ex officio. In practice, there have

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[3] Compare Sielecki, *Zasady orzekania w postępowaniu cywilnym* [Rules for adjudication in civil proceedings], "Nowe Prawo" 1965, No 6, p. 589, 590.

[4] For example, the decision of the Supreme Court of 23/02/2017, I CSK 126/16, LEX No. 2276660, order of the Supreme Court of 21/04/2004, III CK 420/02, LEX No. 399729.

[5] J. Krajewski, *Postępowanie nieprocesowe* [Non-litigious proceedings], Toruń 1973, p. 123.

[6] B. Dobrzański, *Glosa do orzeczenia SN z dn. 16.04.1971 r.,* III CRN 61/71 [Gloss to the ruling of the Supreme Court dated April 16, 1971, III CRN 61/71], "Nowe Prawo" 1973, No 3, p. 450.

[7] See more T. Felski, *Zakres orzekania sądu pierwszej instancji w postępowaniu o stwierdzenie nabycia spadku*, "Acta Universitatis Nicolai Copernici, Prawo" XXVII [The scope of adjudication of the court of first instance in the proceedings for confirmation of the acquisition of inheritance, Acts Universitatis Nicolai Copernici, Law XXVII], notebook 196 from 1989, p. 19-22.

[8] See footnote 3.

been cases where the courts passed the burden of supporting the proceedings fully on the applicants, in the form of, for example, treating the non-attachment of all the civil status records as formal defects of the application, or suspending the proceedings if the applicant was unable to provide the court with an appropriate document, or in the form of referring, in a manner similar to the preliminary proceedings, to the distribution of the burden of proof. Such practices have generally not been accepted by the Supreme Court's jurisdiction, as well as in the jurisdiction of some second instance courts. For example, in the justification of the decision of July 10, 1998[9], the Supreme Court accepted that the court should ex officio examine the authenticity of the school leaving certificate in a situation where one of the participants denied the authenticity of this document and the material already collected confirmed doubts in this matter. In the conclusion of its considerations, the Supreme Court formulated the general thesis that the obligation of evidence imposed in art. 252 CCP to the procedural party can not apply in the proceedings for declaring the acquisition of inheritance to the same extent as in the case of obligation of action ex officio imposed on the court by the special provisions - art. 670 § 1 and 2 CCP.

On the other hand, in the actual state covered by the decision of the Supreme Court dated November 16, 2016[10], the chairman of the court of first instance summoned the applicant's attorney to include a number of copies of death certificates of prospective heirs of group I and II in the case file, and when the attorney was not able to fully perform the order, the court suspended the proceedings and then discontinued them. This solution was approved by the court of second instance. The Supreme Court, by repealing the challenged decision and the preceding decision of the District Court, stated that the requested extracts from civil status acts do not constitute a formal lack of application for declaring the acquisition of an inheritance. These are documentary evidence, which means that failure of their submission can not constitute grounds for suspending proceedings within the meaning of Article 177 § 1 point 6 CCP. Thus, it is not a cause to deprive the case of further course. Moreover, the Supreme Court formulated a firm thesis that the previous passivity of the applicant in presenting evidence confirming the right of inheritance of the heirs from the act of the first order, in presenting the circumstances relevant to the determination of the competent civil registry office, in which the civil registry files of these persons are located, does not release the court of inheritance from the initiative of evidence ex officio.

In the case with reference number VIII Cz. 416/09 of the District Court in Toruń[11], the Court requested the applicant to submit death certificates of the siblings or to indicate the civil registry offices competent to issue these acts, otherwise the application would be refused, and in the face of failure to comply with this order, this rigor was actually applied. The District Court, by repealing the appealed order on the rejection of the application, stated that failure to file death certificates of the testator's siblings and not to indicate the civil registry office competent to issue these acts, as well as not specifying the testator's children and addresses, does not constitute

[9] I CKU 47/98, LEX No 34569.
[10] I CSK 807/15, LEX No 2174065.
[11] Resolution of November 6, 2009, LEX No. 1714409.

a formal defect of the application for inheritance recognition, which would justify the request for applicant to present the lacking documents under pain of refusing the application. The District Court added that art. 670 CCP imposes on the court an obligation to establish ex officio circle of heirs, and this burden cannot be passed on to the applicant. In addition, the court is obliged ex officio to ensure participation in the proceedings of all interested parties (Article 510 § 2 CCP), which is why it has been equipped with appropriate permissions for obtaining relevant data ex officio.

The above-outlined tendency to emphasize the role of court action ex officio finds the fullest expression in the content of the voted ruling. The facts of this case were relatively simple - Mr and Mrs M. had two daughters: E.M. and W.M. Both left the notarized wills drawn up in their home. B.M. declared in his testament that he would appoint his wife J.M. to receive the whole inheritance, and if she did not want to or could not inherit, he would appoint daughter E.M. to inherit the whole estate. He declared that he disinherits the daughter W.M. because of her persistently inappropriate conduct, which is against the will of the testator, is contrary to the principles of social coexistence, and does not meet family obligations according to the testator, does not visit him, is not interested in his health, does not help or nurtures him in his old age and illness and did not visit the testator during his stay in the hospital. Analogous statements were contained in the testament of J.M.

In the course of the proceedings in the first instance, the participant W.M. in her pleading has made a complain that the parents, due to their advanced age, were unable to make independent and rational decisions. In connection with this, she requested proof from the medical records of the testator and the expert doctor's opinion on the lack of the ability to consciously express the will in testaments dated December 22, 2007. At the hearing, however, after the break ordered by the Court at the request of the applicant and participant "in order to reach an agreement", she withdrew the allegation and the application, explaining that she acted under the influence of emotions. Therefore, the first-instance court stated the acquisition of inheritance on the basis of the presented wills: after the testator B.M. by his wife J.M., and after the deceased J.M. by daughter E.M.

In the appeal, the participant in the proceedings W.M. returned to the previous plea and requested to take evidence from the medical records in order to establish the health of the testators at the time the will was made in the presence of the notary. However, the District Court found this application to be late (probably on the basis of Article 381 in conjunction with Article 13 § 2 CCP) and dismissed the appeal.

In the cassation complaint, the participant raised the allegation of violation of art. 670 CCP by not turning to the medical facilities indicated by her for submitting medical records of the testators and for not having ex officio evidence of the expert doctor's opinion.

The Supreme Court, acknowledging the cassation appeal as justified, stressed that in the proceedings for confirmation of acquisition of inheritance, the court is charged with examining ex officio, depending on the content of the collected evidence, who is the heir. This includes, in particular, the obligation to examine the validity of the will, in particular when the participant in the proceedings raises objections in this

regard, referring to facts and raising evidence to remove doubts. The Supreme Court correctly stated *in casu* that the subsequent withdrawal of reservations as a result of a specific "agreement" with her sister not only did not bind the court, but even forced it to act ex officio, since the doubts from an objective point of view were not removed. This also applies to the court of second instance, which cannot hide behind the regulation of art. 381 in conjunction with art. 13 § 2 CCP and recognize that raising the appeals relevant to the resolution of the case and submitting evidence is late.

As one can see, the purpose of the proceedings for declaring the acquisition of inheritance, i.e. determining ex officio who is actually the heir, regardless of the applications and declarations of the participants in this respect, also determines the measures to be used to achieve this goal. If the evidence initiative of the participants in the proceedings turns out to be insufficient, the court is forced to carry out appropriate argumentation ex officio. It is not allowed to use in this situation the consequences of party passivity or the rules of non-performance of court decisions, such as returning the application, suspending the proceedings[12], omitting "belated" evidence and finally rejecting the application for declaring the inheritance due to the "failure to prove" rights to inheritance. Of course, the court's ex officio activity applies only to the situation when undertaking ex officio activities is necessary to establish a correct circle of heirs, as in the present case, in which there were objectively justified doubts as to the validity of the will.

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[12] An exception may be granted in the event of the need to correct a civil status certificate, which requires the application of the person concerned in the administrative proceedings. See the decision of the Supreme Court dated October 24, 2001, III CZP 64/01, LEX No. 49109.