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The Austrian matrimonial property law as applied in the practice of Cracow notary public offices (1918–1939)

Abstract

The article presents the process of applying the Austrian matrimonial property law in Poland based on the example of the interwar notary practice in Kraków. The subject of the analysis are the marital property agreements, which, in accordance with the legal provisions of the time, were mandatory and took the form of a notary deed. Based on the content of those contracts, an attempt is made to answer the question of whether and to what extent the marital property law included in ABGB affected the shape of the matrimonial property relations of the spouses. The analysis focuses in particular on the legal functioning of such notions as dowry, hope chest, bride price, dower or contract of inheritance.

Key words: Austrian law, matrimonial property law, marriage contracts, notary practice

Slowa klucze: prawo austriackie, małżeńskie prawo majątkowe, kontrakty małżeńskie, praktyka notarialna

The *Allgemeines bürgerliches Gesetzbuch* (ABGB), the civil code of Austria enacted in 1811, remained in force when Poland gained independence and covered matrimonial property law in the second part, chapter XXVIII, titled *Von den Ehepakten* (On Marriage Contracts). The articles referred mainly to the institution of matrimonial property contracts.¹ As a result, there was no distinction between statutory and contractual law. In practice the latter was devoted much more attention.

¹ Especially recommended Austrian literature on the subject L. v. Kirchstetter, *Commentar zum Oesterreichischen Allgemeinen bürgerlichen Gesetzbuche mit vorzüglicher Berücksichtigung des gemeinen deutschen Privatrechts*, Leipzig–Wien 1868, p. 534–535; J. v. Anders, *Das Familienrecht*, Berlin 1887, p. 110; J. Krainz, *System des österreichischen allgemeinen Privatrechts (Grundriss und Ausführungen)*, vol. 2, *Das Obligationen-, Familien- und Erbrecht*, 2nd ed., Wien 1894, p. 375–376; M. v. Stubenrauch, *Commentar zum österreichischen Allgemeinen bürgerlichen Gesetzbuche*, vol. 2, 8th ed., Wien 1903, p. 513 and following; A. Ehrenzweig, *System des österreichischen allgemeinen Privatrechts*, vol. 2, pt. 2, *Familien- und Erbrecht*, Wien 1924, p. 118 and following.

The separation of property (*Gütertrennung*)² was the statutory regime of the civil code of Austria, which was also described as “detachment” or “separation” of estate.³ According to paragraphs 1233 and 1237 of the code, matrimony did not influence the property relations of the spouses as a rule. Consequently, they maintained their former right or property as applying before entering into matrimony unless they had signed a marriage contract. In other words, the estates of the spouses remained their exclusive property, including the acquisitions during the marriage. The law did not provide for any exceptions, thus each of the spouses could enlarge or reduce their estate.⁴ To avoid any ambiguity of the ownership of each object acquired during the marriage, the code introduced a rebuttable legal presumption stating that the property is due to the husband (§ 1237 of ABGB *in fine*). The presumption is similar to the Roman *praesumptio Muciana* and was rebutted once the contrary had been proven.

In the Austrian system of property separation there was no full independence of the property administration by the spouses. A different solution was introduced – a presumed administration by the husband (*Verwaltungs- und Vertretungsrecht des Mannes*). According to § 1238 of ABGB, unless the wife objected, the husband was her legal representative with third parties. Which means he was authorised to take any actions on her behalf to properly manage the estate. The presumed power of administration was justified by the community of conjugal life and the relationship of particular trust between the spouses.

The property separation as a statutory system had also fundamental influence on the principles of the wife’s participation in lightening the expenses connected with the matrimonial union (*ehelicher Aufwand*) within ABGB. It included expenses connected with conjugal life, such as: household and living expenses, child support and education, medical expenses, etc. The act held the husband responsible for the expenses as a natural consequence of the fact that he was established the head of the family in § 91 of ABGB (*Haupt der Familie*), while the wife only assisted him in the housekeeping.

The Austrian act introduced some exceptions to the rule expressed in §§1233 and 1237 of ABGB that matrimony does not influence property relations. According to § 91 of ABGB not only was the husband responsible for supporting the family, but he was also responsible to procure a respectable maintenance (*anständiger Unterhalt*) according to his means (“*nach seinem Vermögen*”). Further exceptions dealt with inheritance, more specifically the legal succession (§§ 757–759 of ABGB), the possibility of making joint wills (§ 1248 of ABGB), inheritance contracts (§ 1249 of ABGB), the rights connected with the maintenance of the surviving spouse (§ 796 of ABGB), etc.

The core of the matrimonial property law of ABGB applied to marriage contracts (*Ehepakte*, § 1217),⁵ which were concluded “in regard to the property, and their object is especially: the dowry; the jointure; the gift on the morning after the nuptial day;

² See E.-H. Kaden, *Eheliches Güterrecht* [in:] *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes*, vol. 2, Berlin 1929, p. 709 and *idem*, *Gütertrennung* [in:] *ibidem*, vol. 4, Berlin 1933, p. 17 and following.

³ W. Jaworski, *Prawo cywilne na ziemiach polskich. vol 1. Źródła. Prawo małżeńskie osobowe i majątkowe*, Warszawa – Kraków no date, p. 356.

⁴ F. Zoll, *Małżeńskie prawo majątkowe. Województwa południowe* [in:] *Encyklopedia podręczna prawa prywatnego założona przez Henryka Konica*, eds. F. Zoll, J. Wasilkowski, vol. 2, Warszawa no date, p. 830.

⁵ In such a way the contracts were differentiated from the marriage itself *Ehevertrag* (§ 44 of ABGB).

the community of goods; the administration and usufruct of the property; the hereditary succession or life-long usufruct of the property intended for a case of death and the widow's settlement". It was concerned with agreements intended to regulate spouses' estate in connection with prospective or factual matrimony (§ 1217 of ABGB). Apart from this laconic but wide definition, the Austrian code enumerated agreements, which, according to the law, were marriage contracts: the dowry, the jointure, the community of goods, the administration of the property, the hereditary succession or life-long usufruct of the property intended for a case of death and widow's settlement. However, the list was not a closed one.⁶ There was a widely accepted, in the doctrine and judicature, rule of freedom of contract, which also applied to marriage contracts. The spouses could adopt one of the statutory models, its modification or create a solution not provided for by the code. The act allowed for concluding a contract both before and after the wedding.

Because of their importance to the relations of the spouses and their relations with third parties, marriage contracts were required to be drawn in the form of a notarial act, both by the Austrian law and other systems in force in Poland after 1918. The requirement was not stipulated in the civil code, but in the act of 25th July 1871 on the necessity of drawing notarial acts in certain legal actions.⁷ The new Notaries Law of 1933 kept the regulations in force in the southern part of Poland after 1st January 1934 (art. 137).⁸

The analysis of the notary practice in the city of Kraków, which was the main urban centre in Małopolska, allows to assess the application process of the Austrian matrimonial property law in the last years when it was in force. The research was conducted within the State Archive in Kraków.⁹ The number of public notaries in Kraków was relatively small taking into account the city's growth and expansion at the beginning of the 20th century.¹⁰ In the interwar period the city was the fourth biggest in the country after Warsaw, Poznań and Łódź (48,33 km² in 1931) and the fifth most populous (259 thousand in 1938). In the 1920s there were 7 practising notaries public in the city and until 1939 their number grew to 10, which means there was one notary office per about 26 thousand inhabitants.

In the interwar period there were nearly 1600 marital contracts notarised in the city. Having analysed their legal character and their aims, the contracts can be divided into four categories: marriage contracts for the duration of the marriage; premarital deeds of gift; prenuptial agreements in case of separation, divorce or marriage annulment and inheritance contracts. The importance of the city as a cultural and commercial centre contributed to the great amount of people passing through the city. As a result, the contracting parties were not a uniform group when it comes to their social status or origin. The sociological analysis of the notarised documents provides important information on the popularity of certain marriage contracts within different social strata. In case

⁶ S. Wróblewski, *Powszechny Austriacki kodeks cywilny z uzupełniającymi ustawami i rozporządzeniami objaśniony orzeczeniami Sądu Najwyższego*, vol. 2, Kraków 1928, p. 1027.

⁷ Reichsgesetzblatt für die im Reichsrath vertretenen Königreiche und Länder, z. XXXII, no. 76.

⁸ Dz.U. Nr 84, poz. 609.

⁹ Notary archives from 1918–1939 are found in Department II of the National State Archive at Grodzka Street 52, Kraków.

¹⁰ To find out more on the notary system in Poland in the inter-war period see D. Malec, *Notariat Drugiej Rzeczypospolitej*, Kraków 2002.

of marriage contracts aimed to regulate the property relations of the (future) spouses for the duration of the marriage there are certain regularities. The bourgeoisie, no matter how wealthy they were, entered into contracts according to the provisions of the Austrian code or other civil acts in force in Poland at the time. Premarital deeds of gift were notarised nearly solely by the peasants or inhabitants of the villages that were incorporated into the city limits at the beginning of the 20th century. They did not enter into the other two types of contracts: prenuptial agreements in case of separation, divorce or marriage annulment and inheritance contracts.

The basic type of marriage contract within the Austrian code were the marriage contracts aimed to regulate the property relations of the spouses for the duration of the marriage. In practice, they were mostly entered into before the wedding (around 60%), which proves that people, especially in the countryside, were attached to settling property agreements before the wedding ceremony. It is also clear that the marriage contract served as a kind of property constitution – not only did it regulate the property relations of the spouses for the duration of the marriage, but also stipulated, often very precisely, the consequences of separation or dissolution of the marriage in the future.

The fundamental function of the marriage contract of this kind was regulating the property relations of the (future) spouses, including the marriage regime serving as the basis for the relations for the time of the marriage. The spouses chose community of goods relatively rarely – only one in every five contracts. In most cases the community of goods was limited, usually to the accrual, only occasionally universal. Relatively low percentage of contracts introducing the community of goods meant that, in consequence, over 80% of contracting parties decided to maintain property separation. It may be concluded that such a regime was suitable for the material situation and needs of an average married couple.

It has to be stressed that the community of goods regime described in § 1233 of ABGB did not appear in contracts concluded by the contracting parties from the countryside. It is very interesting as, according to sociological research on the customs of the peasants of Małopolska conducted in the inter-war period, the community of goods was a common practice, especially when the marriage was harmonious.¹¹ The spouses managed the household finances together. It included the accrual, especially the real property. The property separation was manifested outside, towards the third parties or in case of execution against property.

The contracting parties accepting limited community of goods chose the community of accrual. It meant that the spouses maintained the separation of the property to date, while the community was subject to the goods acquired in the future during the course of the marriage. It is worth reminding that after 1918 in Poland only the German code, *Bürgerliches Gesetzbuch* (BGB), described explicitly such type of community of goods (§ 1519 of BGB). The Austrian code did not exclude limiting the community of goods to accrual, though it did not explicitly referred to the accrual. In notarial practice the accrual was usually described as property acquired “in the course of the marriage through

¹¹ K. Kowalski, *Prawne zwyczaje w zakresie wyposażenia dzieci i dziedziczenia oraz sprawa podzielnosci małych gospodarstw wiejskich w byłym zaborze austriackim* [in:] *Zwyczaje spadkowe włościan w Polsce*, pt. 1, *Zwyczaje spadkowe włościan w województwach południowych*, eds. K. Kowalski, S. and K. Grzybowski, K. Karpiniec, Warszawa 1928, pp. 9–10.

the foresight and thriftiness of both spouses or one of them regardless of the involvement of the other”.¹² The parties maintained the separation of property, in particular brought into the marriage acquired during the course of marriage through a deed of gift, inheritance or “an unpredicted event”.¹³ Rarely was the scope of the accrual broader and included “every acquisition to the property”.¹⁴ Some contracts stipulated indivisibility of the accrual until the divorce or separation, and the shares each party would receive in such a case.

The spouses rarely decided to have a universal community of goods (*allgemeines Gütergemeinschaft*), which means it had little practical importance. The community nearly always was established in case of death (§§ 1233–1235 of ABGB).

The typical marriage contract concluded for the course of the marriage of the time was usually a dowry agreement. The clauses concerning dowry were present in nearly all of the contracts of such kind. Some of the agreements were entered into only in order to establish the dowry or confirm it had been received. The practice of public notaries of Kraków confirms that the institution of dowry had certain importance in the interwar period. According to § 1218 of ABGB, the dowry was the property which is delivered to the husband by the wife or by a third person for her, in order to lighten the expenses connected with the matrimonial union. However, the woman was not obliged to set the dowry. The act stipulated that if a woman possessed property and was of age “it depends on her and the bridegroom, how they agree with one another in regard to the dowry and other mutual gifts” (§ 1219 of ABGB). The analysis of the solutions connected with dowry, its settlement and the aims it was to serve during the course of the marriage proves that the institution of the dowry of the contracts concluded by the contracting parties from the urban area corresponded with the clauses of the Austrian act. The dowry was usually settled by the bride rather than her parents. There were no cases of settling the dowry by third parties. Due to the fact that the contracts were concluded before the wedding, it seems it was customary to settle the dowry during the betrothal. However, the contracting parties from the countryside understood the dowry differently from the code. It had a broader meaning than provided by the legislator within § 1218 of ABGB and was considered to be the goods the spouses received from the parents on account of marriage.

Within the city the dowry constituted mainly certain amount of hard cash, which depended on the property of the wife and her parents. The movable goods were rarely part of the dowry, while real property hardly ever. In the countryside the dowry was ready money as well as household or farm equipment. No matter what its form was, the dowry always had two aims. On one hand it was used *ad onera matrimonii sustinenda* and as such was administered and exploited by the husband during the course of the marriage (§§ 1227–1228 of ABGB). On the other hand the dowry property was to provide the wife support if the husband were to die. It is worth mentioning the dowry was also the equivalent of the parents’ estate the woman would inherit in case of their death. To confirm the rule, some contracts stipulated that the dowry was the estate to be inherited. Due to the importance of the dowry, it was necessary to determine conditions of its return. The contracts discussed two aspects: (1) what happened to the dowry in case of earlier death of one of the spouses; (2) and the terms of its return in case of separation

¹² Notarial act from 1930 drawn by the notary public Jan Myciński, notary’s register no. 48656.

¹³ Notarial act from 1928 drawn by the notary public Tadeusz Starzewski, notary’s register no. 38304..

¹⁴ Notarial act from 1921 drawn by the notary public Stanisław Wisłocki, notary’s register no. 2569.

or dissolution of the marriage or other events. According to § 1229 of ABGB the dowry became the wife's property after the death of the husband or her heirs' had she died. The articles of the Austrian code corresponded with the practical needs – most contracts confirmed the rules of the code. The marriage contracts also stipulated other cases when the dowry was to be returned. They included, above all, separation or marriage dissolution, and aggravation of the husband's financial situation, which could result in the diminishing or loss of the dowry. What happened to the dowry in case of separation or divorced was described in §§ 1263–1266 of ABGB. They stipulated the return of the dowry if the marriage contracts lost their legal force. It was characteristic of marital agreements to stipulate the rules of settling the dowry when it was established, which usually meant before the wedding. The contracts either confirmed the rules of the code or modified them to enhance the protection of the wife's property interests, who, on the basis of the contract, gained the right to demand security or return of the dowry earlier than stipulated by the act. The contracts differed greatly from the statutory regulations when it comes to the return of the dowry in the case of the husband's bankruptcy. According to § 1260 of ABGB the wife could claim only security, but not the return of the dowry. To strengthen her position, the contracts stipulated as a rule that merely announcement of bankruptcy will result in the obligation of the dowry return. Many contracts also prescribed that the claim to return the dowry would be due in other cases signifying husband's financial problems.

The Austrian code also regulated yet another institution of the marital law, though far less popular than dowry – jointure. It was “whatever the bridegroom or a third party constitutes in favour of the bride” (§ 1230 of ABGB). The jointure is stipulated only in one every ten contracts which included clauses relating to the dowry. It may be concluded that in the interwar period it had hardly any practical importance. It had limited practical use, as it was an instrument intended for the affluent. As such it appeared only in the contracts concluded by the bourgeoisie. It is interesting that in the notarial practice the rules of the code were not always observed. According to ABGB settling the jointure was directly connected with the dowry, thus setting up the former was not allowed without the latter. In practice there were cases where the contract only regulated the jointure without the promise of the dowry. The object of the jointure was usually the same as of the dowry. In the city of Kraków the jointure was usually established as amount of hard cash. Its value obviously depended on the affluence of the contracting party and typically amounted to the half of the agreed dowry. The contract usually stipulated, as in case of the dowry, when the jointure would belong to the wife or when she would lose her right to it. According to the rule accepted by the legislator, the agreed jointure would belong to the wife should she survive her husband, no matter who should receive the dowry (§ 1230 of ABGB). In case of separation and divorce § 1263 and the following of ABGB applied. The spouses sometimes altered the aforementioned articles.

It was a common practice for the contracting parties of the urban descent to establish an outfit. The agreements between people coming from the countryside did not stipulate any outfit at all. The practice proves that everyday life gave it a different meaning than the one stipulated by the Austrian code. It has to be reminded that according to § 1231 of ABGB the outfit was the property given to the son by the parents within the statutory obligation to maintain and provide for the children. However, within the marriage

contracts the outfit was understood as everyday personal objects, clothes and household goods, which were brought in by the wife and were reserved as her own property. One of the inventories of 1934 included:

[...] all the household goods [...], which constituted two oak beds with mattresses and beddings, two bedside tables, two oak wardrobes, one couched covered with tapestry, one mirror, one wall clock, one oak table, six chairs, one dresser, one washbasin, moreover all kitchen goods including two white kitchen dressers, finally three pairs of net curtains, three green plush bedcovers, one silver candelabrum, six silver mugs, one service for twelve people, silver place setting for twelve people, six silver teaspoons, one Persian lamb coat, one lady's coat with a fur collar, one gent's sealskin coat, all the summer and winter clothes, two gent's suits, moreover all the underwear and clothes in above-mentioned flat and [...] four gold lady's rings, including two with diamonds, one gold lady's watch, one gold gent's watch with a chain, one string of pearls, lady's bracelet with a ruby.¹⁵

The notarial practice proves diminishing significance of many traditional institutions of the Austrian marital property law such as the gift on the morning after the nuptial day, widow's settlement or the life-long usufruct of the property. In the interwar period they were not applied at all.

The second, and the most popular type of contracts were prenuptial deeds of gift. Their legal character was complex. According to ABGB prenuptial deeds of gift were not classified as marriage contracts. Their immense popularity in the practice of the notaries of the city of Kraków proves that the marriages were regulated by means not provided by the code. The deeds signed above all by the peasants replaced standard marriage contracts. Their significance was greater than just regulating matrimonial relations and affected the material status of the whole family. The deeds were a kind of "family agreements". They involved not only the transfer of property, but also other connected agreements and actions, which covered further life of the donor (life-long usufruct) and the recipient's siblings. These contracts replaced, at least to some extent, *mortis causa* acts. On their basis the parents assigned the property to the child entering matrimony and other offspring. Along with the deeds of gift other agreements were concluded such as sales, exchange agreements, loans, etc. The need to draw such contracts resulted from a specific character of the rural property relations.

Another group of the marriage contracts were the contracts concluded in case of separation, divorce or marriage annulment. It was one of the possible ways of settling property relations between the spouses in case of a marriage breakdown and intention to regulate it legally, though not a dominating one taking into account its number against suits in such cases.¹⁶ There were many reasons for a conventional way of settling such cases – usually the economy of proceedings or willingness to settle the dispute quickly. The contracts were concluded usually in case of a planned separation (59% cases). Only one in three contracts were concluded with a divorce in foresight. ABGB was strict and did not allow the divorce for the Catholic and the legislation in other parts of the country stipulated various conditions for the marriage dissolution. As a result the spouses, especially Catholic, formed the contracts in such a way to make it easier to get a di-

¹⁵ Notarial act from 1934 drawn by the notary public Tadeusz Rotter, notary's register no. 2487/34.

¹⁶ The results of the research on the divorce suits amount in Kraków in the interwar period were presented by Z. Zarzycki in *Rozwód w świetle akt Sądu Okręgowego w Krakowie w latach 1918–1945. Studium historyczno-prawne*, Kraków 2010.

force omitting prohibiting clauses of the Austrian code. The contracts were occasionally concluded because of the planned marriage dissolution. The subject of the contracts concluded in case of separation, divorce or marriage dissolution were mainly alimony and property settlements between the spouses (e.g. the return of the dowry).

The articles of ABGB had little importance when it comes to hereditary contracts (*Erbverträge*). As it has been mentioned, a hereditary contract was a special type of marriage contract within the Austrian law (§ 1217 of ABGB), which was a separate legal title of succession along with the statutory act and last will (§ 799 of ABGB). *Erbvertrag* was not only a marriage contract, but above all, a *mortis causa* order with all its legal effects. However, due to irrevocability to the prejudice of the other spouse (§ 1254 of ABGB), it was not a last will order.¹⁷ The doctrine emphasised that the legal character of the contract was determined by two elements: the dispositions having qualities of the last disposition (§ 1250 of ABGB) and the waiver to the right to revoke them, which resulted in irrevocability of the contract (§ 1254 of ABGB).¹⁸

In the practice of the city of Kraków hereditary contracts were rare. In the interwar period there was one such contract concluded a year on average. The content of the contracts usually followed § 1249 of ABGB, which meant that two elements appeared: the promise to the spouse of future inheritance or its share and acceptance of such promise. As a rule the spouses awarded each other the whole share (3/4) of the inheritance, which could be stipulated in an inheritance contract. Due to the limitations resulting from § 1253 of ABGB, the spouses instituted each other mutually as heirs in an accompanying last will (*Wechselseitige Testamente*), which was analogous to the contract, but applied to the 1/4 of inheritance, which the legislator left at free disposal of the decedent.

In conclusion, one can state that the Austrian law remaining in force in the interwar period in southern Poland had indubitable influence on shaping marital property relations. However, some traditional institutions of the law ceased to be used as they seem to have been unfit for the financial and economic needs of the spouses at the time. Unfortunately, there is currently not enough knowledge on the practice in marital property cases in Poland to allow for the explicit description of the course and nature of the process. As hardly any comparative studies exist, both covering other parts of the country and covering the Małopolska region in earlier and later times, it is impossible to evaluate the long-term evolution of the practice in marital property cases.

The interwar times were the declining years of the Austrian code in the Małopolska region. The process of unification and codification of the law in Poland, which was started at the time, but stopped for a few years by the WWII outbreak, led to a separate decree on marital property law issued in 1946.¹⁹ It was replaced by the appropriate regulations of the family code in 1950.²⁰ Following the Soviet model, the new legislation was based on a disparate view of the property relations within marriage, and particularly refused to acknowledge greater significance of the marital property contracts as they were an unnecessary and socially harmful institution.²¹

¹⁷ S. Wróblewski, *Powszechny Austriacki kodeks...*, vol. 2, p. 1055.

¹⁸ *Ibidem*. Cf. E. Till, *Wykład austriackiego prawa spadkowego*, Lwów 1904, p. 198.

¹⁹ Dz.U., 1946, Nr 31, poz. 196.

²⁰ Dz.U., 1950, Nr 34, poz. 309.

²¹ See the remarks on the topic in S. Szer, *Prawo rodzinne*, 2nd ed., Warszawa 1954, p. 96.