WAIVER OF SUCCESSION WITH EFFECT ON A MINOR: COMMENTS *DE LEGE FERENDA*

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1. INTRODUCTION

Inheritance law is one of those fields of law that affects everyone in life practice. Many take legal actions that allow them to settle – to the extent permitted by law – the inheriting issue so that the final manner of transfer of ownership title after death in the existing circumstances corresponds to the actual human relations, and family relations in particular.

One of the legal actions envisaged by the legislature that may lead to modifying the intestate inheritance rules is a waiver of succession contract. Such a contract allows potential heirs to settle the issue of excluding them from inheriting with the future testator. Signing such a contract by relatives may turn out reasonable in a given case, considering the desire to counteract the emergence of disputes among the family after the death of one of its members. The motive for signing such a contract in practice is as a rule the intention to divide the estate in a fair manner by one of the relatives who desires that certain members of his/her family do not inherit from him/her. The law also allows such a contract to have consequences not only for the person waiving succession but also for his/her descendants.

In this paper I would like to focus on a selected area of waiver of succession, namely the issue of waiving succession which has consequences for minor children of the person waiving succession in the context of the need to obtain a relevant permission from the family court. Although this is not a frequently recurring issue in legal practice, in my opinion, it needs to be discussed in more detail. This is because in those cases where a descendant of the person waiving succession is a minor,

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unless the minor is excluded from the consequences of the waiver of succession, the minor's potential financial interests may be substantially violated.

This issue is not regulated directly under the currently applicable law, and opinions of representatives of the legal doctrine and judicial practice suggest that waiver of succession contracts are concluded without prior consent from a guardianship court also in those cases when they have (indirect) consequences for minor children of the person waiving succession. The legal regulations currently in force do not provide clear grounds for a different practice. However, it is worth suggesting that the legislator should consider amending the law to this effect so that the principle of protecting the child's best interests can be respected also in this area of inheritance law.

2. WAIVER OF SUCCESSION

Pursuant to sentence 1 of Article 1048 of the Polish Civil Code,[1] an intestate heir by signing a contract with a future testator may waive succession to him/her.[2] In turn, pursuant to Article 1049 § 1 Civil Code, waiver of succession also extends to the descendants of the person waiving succession, unless otherwise agreed. Article 1049 § 2 Civil Code provides that the person waiving succession and his/her descendants whom the waiver of succession concerns are excluded from inheriting as if they did not live to the opening the succession. The regulation referred to above is an exception to the ban on concluding agreements concerning inheriting from a living person (cf. Article 1047 Civil Code).[3] What is special about it is that it allows to determine (at least partly) the group of individuals who will inherit from the testator while the testator is still alive by excluding a certain person (certain individuals) from inheriting.[4] It needs to be assumed that the contract the subject of which is waiver of the right to succession in the future may concern not only the rights to inherit potentially vested in a given person as an heir of a whole but also a section of the

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[1] Act of 23 April 1964: Civil Code, consolidated text, Dz.U. 2017, item 459; hereinafter Civil Code.

[2] This institution does not originate from Roman law; it emerged in a later period. Cf. M. Załucki, *Wydziedziczenie w polskim prawie na tle porównawczym*, Warszawa 2010, p. 94; J.S. Piątowski, *Prawo spadkowe. Zarys wykładu*, 6th edn, Warszawa 2003, p. 62; R. Zych, *Abdicatio hereditatis in iure Polonia. Zrzeczenie się dziedziczenia w polskim porządku prawnym*, Acta Iuris Stetinensis No. 14, 2016, p. 6; E. Rott-Pietrzyk, *Umowa o zrzeczenie się dziedziczenia – uwagi de lege lata i de lege ferenda*, Rejent No. 3, 2006, p. 107. As regards its genesis in Polish law, see: G. Wolak, *Umowa zrzeczenia się dziedziczenia w polskim prawie cywilnym*, Warszawa 2016, pp. 65–83; M. Pazdan, *Umowa o zrzeczeniu się dziedziczenia w polskim prawie spadkowym*, Rejent No. 4, 1997, pp. 185–186.

[3] For more detail, see: G. Wolak, *Umowa zrzeczenia*, *op. cit*., pp. 29–41; R. Niemotko, *Sankcja nieważności umów o spadek po osobie żyjącej*, [in:] P. Stec, M. Załucki (eds), *Wokół rekodyfikacji prawa cywilnego. Prace jubileuszowe*, Kraków 2015, pp. 397–405.

[4] E. Niezbecka, *Skutki prawne testamentu negatywnego i wydziedziczenia*, Rejent No. 7/8, 1992, p. 16.

estate[5] or even only the right to legitim which would have been vested in the person waiving succession in compliance with Article 991 Civil Code.[6]

Waiver of succession requires entering into a contract in the form of a notarised deed *ad solemnitatem* (Article 1048 sentence 2 Civil Code in conjunction with Article 73 § 2 Civil Code). Thus, it is inadmissible to waive succession by entering into a contract in a different form. It is also impossible to waive succession based on a unilateral legal activity, regardless of the legal form of the declaration of will made in this manner.[7] However, a prior consent from a guardianship court is required for a waiver of succession to be valid in the case of a person who has no full legal capacity.[8] In such a case, by "granting permission to waive succession, the court assesses the legality of the legal action, i.e. whether it is admissible under legal regulations currently in force, and its expediency, i.e. whether it is beneficial for the child in economic terms or necessary for other than economic reasons".[9]

It is assumed in literature that waiver of succession does not lead to depriving the person waiving succession of his/her right to inherit,[10] which leads to the conclusion that a person waiving succession is excluded from inheriting only in the case where succession takes place in the statutory manner. This also means that in case a will is drawn up envisaging contribution to the person who has previously waived

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[5] As in the decision issued by the Supreme Court of 21 April 2004 on the matter, III CK 353/02 (LEX No. 585802), where it was concluded that it is admissible to waive succession of a fractional share of the estate otherwise than in the case of waiving inheritance of specific objects, which the Supreme Court ruled out. However, literature provides no uniform position on this issue. A similar view to that presented by the Supreme Court is expressed by G. Wolak (*Umowa zrzeczenia*, *op. cit*., pp. 295–320). However, views that it is admissible to waive a right to a specific portion of the estate are also present in literature; for more on this issue, see P. Księżak, *Zachowek w polskim prawie spadkowym*, Warszawa 2012, pp. 124–130; M. Pazdan, *Umowa o zrzeczeniu*, *op. cit*., pp. 193–194.

[6] The resolution of the Supreme Court of 17 March 2017 on the matter, III CZP 110/16 (LEX No. 2248747), awarding that it is admissible to conclude a waiver of the right to legitim (Article 1048 Civil Code). In particular, in the written reasons for this resolution, the Supreme Court aptly noted that there is no legal regulation in civil law that would directly allow waiving the right to legitim but, which is worth noting, there is also no legal regulation that would rule this out. Meanwhile, in the civil law system only the bans clearly envisaged by the legislator apply. The Supreme Court also emphasised that allowing for the possibility of waiving a legitim after a future testator results in a greater freedom of testation. In turn, different stances on the issue of admissibility of entering into a waiver of succession as regards the legitim alone have been presented in academic writings; cf. G. Wolak, *Umowa zrzeczenia*, *op. cit*., pp. 320–335; P. Księżak, *Zachowek*, *op. cit*., pp. 130–140; M. Panek, *Dopuszczalność zrzeczenia się zachowku w prawie polskim*, Studia Iuridica Toruniensia Vol. XVI, 2015, pp. 93–108. See also M. Niedośpiał, *Swoboda testowania*, Bielsko-Biała 2003, p. 19.

[7] Decision of the Supreme Court of 3 February 2005, II CK 322/04 (LEX No. 603811).

[8] G. Wolak, *Umowa zrzeczenia*, *op. cit*., pp. 168–169; J. Gwiazdomorski, *Prawo spadkowe w zarysie*, Warszawa, 1967, p. 71; E. Niezbecka, commentary on Article 1049 Civil Code (thesis 4), in A. Kidyba (ed.) et al., *Kodeks cywilny. Komentarz*, Vol. IV: *Spadki*, 4th edn, 2015 (LEX electronic version); S. Kalus, commentary on Article 156 FGC, in K. Piasecki (ed.) et al., *Kodeks rodzinny i opiekuńczy. Komentarz*, 5th edn, LexisNexis 2011 (LEX electronic version), and the literature quoted therein.

[9] G. Wolak, *Umowa zrzeczenia*, *op. cit*., p. 169.

[10] Because the inheriting capacity is a "part of legal capacity". See P. Księżak, *Zachowek*, *op. cit*., p. 122 and the literature quoted therein.

succeeding to the future testator, this person is not deprived of the possibility to acquire an estate based on the last will of the deceased person.[11] This viewpoint is also approved of in case law. In the resolution of 15 May 1972 concerning the matter, III CZP 15/72,[12] the Supreme Court awarded that by law waiver of succession by an intestate heir or beneficiary shall not exclude the possibility of succession by will (drawn up before or after entering into the waiver of succession contract).[13]

In legal practice, waiver of succession contracts are often concluded because the prospective testator has made various contributions (financial or personal) to the person waiving succession, although obviously this is not an obligatory element. A frequent motive for waiving succession is prior obtaining of a significant donation by the potential heir, which, given the desire to ensure fair treatment, gives rise to the will to settle the issue of future succession, especially with respect to a parent in case only one of the children has received significant financial support. Therefore, it is the will of the future testator to ensure that his/her estate is inherited only by other children who did not received financial contributions while the testator was still alive.[14] From the historical viewpoint, it was even a custom for a daughter who received an adequate dowry when getting married to waive succession to her parents.[15] Doubtlessly, in situations like these a waiver of succession contract better fulfils the goal of excluding a potential heir from a share in the estate than a negative will which does not lead to depriving of the right to legitim. However, it is worth bearing in mind that a person waiving succession does not decide in all cases to enter into the contract envisaged under Article 1048 Civil Code in connection with receiving tangible financial benefits from a prospective testator. Therefore, it may happen that such a contract will be concluded by a person who will thus deprive him/herself of potential benefits of inheriting from a prospective testator without receiving anything in return.

It needs to be added that, regardless of the fact whether the waiver of succession contract is concluded in connection with receiving a contribution by a person waiving succession, it cannot be classified in the category of paid contracts.[16]

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[11] G. Wolak, *Umowa zrzeczenia*, *op. cit*., p. 132–137, p. 266; M. Pazdan, *Umowa o zrzeczeniu*, *op. cit*., p. 194; R. Zych, *Abdicatio hereditatis*, *op. cit*., p. 8.

[12] LEX No. 1673122.

[13] When the Inheritance Law of 1946 was in force, the waiver of succession contract covered, unlike in the legal regulations currently in force, along with inheritance by law also inheritance by will. Cf. R. Zych, *Abdicatio hereditatis*, *op. cit*., p. 8; resolution of the Supreme Court of 15 My 1972, III CZP 15/72; cf. reasons for the resolution of the Supreme Court of 17 March 2017, III CZP 110/16, LEX No. 2248747.

[14] Cf. M. Załucki, *Wydziedziczenie*, *op. cit*., pp. 94–97, who points out that a waiver of succession may be concluded especially in those cases where the prospective testator at the same time makes a donation to the person waiving succession. See also: G. Wolak, *Umowa zrzeczenia*, *op. cit*., pp. 241–245; E. Rott-Pietrzyk, *Umowa o zrzeczenie*, *op. cit*., pp. 111–113; R. Zych, *Abdicatio hereditatis*, *op. cit*., pp. 6–7; M. Pazdan, *Umowa o zrzeczeniu*, *op. cit*., pp. 194–195, p. 198.

[15] A. Penkała, *Panieńskie ochędóstwo. Kwestie posagowe i wienne w małżeństwach szlachty województwa krakowskiego w czasach saskich*, Kraków 2016, p. 58.

[16] M. Pazdan, *Umowa o zrzeczeniu*, *op. cit*., p. 188.

3. CONSEQUENCES OF WAIVER OF SUCCESSION FOR A DESCENDANT

The legislator provides in Article 1049 § 1 Civil Code that in principle a contract on waiver of succession between the testator and an intestate heir also covers descendants of the waiving person. Unless otherwise agreed by the parties to the contract, descendants of the waiving person are treated on equal terms with the person waiving succession as if they did not live to the day of opening of the succession. Thus, they also become excluded from succeeding. This supplementary regulation also allows a reservation that the waiver of succession by descendants of the person waiving succession will affect only some of them.[17]

The legislator, without excluding the possibility of depriving descendants of the person waiving succession of the right to inherit has thus automatically allowed for individuals who even are not parties to the waiver of succession contract to become excluded from succession. Pursuant to Article 1048 Civil Code, parties to a contract are only the prospective testator and the person waiving succession.[18] However, due to the deed effected by the potential heir with the prospective testator a third party (a descendant of the person waiving succession) may be excluded from the right to succession, while this individual is neither a party to this contract nor has legal measures to counteract concluding the contract.[19] As it has been pointed out by Elżbieta Niezbecka "descendants become deprived of the possibility to inherit due to the will of third parties (parties to the contract). They can neither prevent nor annul this effect. This is so because these consequences are brought about statutorily and only the parties' will may annul or modify them. Descendants themselves cannot effectively counteract them."[20] Consent from descendants of the person waiving succession is not required to conclude a legally effective contract as provided for in Article 1047 Civil Code,[21] and this pertains to both minor and adult descendants. It is also assumed in the legal doctrine that there are no grounds to verify the motives for concluding the contract by the parties thereto, whether by any third party or a court.[22] Furthermore, the exclusion of descendants of the person waiving succes-

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[17] G. Wolak, *Umowa zrzeczenia*, *op. cit*., p. 279–281 and the standpoints quoted therein; J. Knabe, J. Ciszewski, commentary on Article 1049 Civil Code (thesis 2), in J. Ciszewski (ed.) et al., *Kodeks cywilny. Komentarz*, 2nd edn, LexisNexis 2014 (LEX electronic version); see also P. Borkowski, *Notarialne poświadczenie dziedziczenia*, Wolters Kluwer Polska, 2011, subchapter: 4.2.5. *Odrzucenie spadku i zrzeczenie się dziedziczenia* (LEX electronic version).

[18] In turn, succession can be waived by every potential heir to the prospective testator even if his/her statutory right to inherit is distant as regards the sequence of succession. However, the municipality of the last place of residence of the testator or the Treasury cannot act on behalf of the person waiving succession as *ultimus heres*. Cf. G. Wolak, *Umowa zrzeczenia*, *op. cit*., pp. 156–161; M. Pazdan, *Umowa o zrzeczeniu*, *op. cit*., p. 189; R. Zych, *Abdicatio hereditatis*, *op. cit*., pp. 7–8.

[19] Cf. J. Trzewik, *Wyłączenie od dziedziczenia a krąg osób uprawnionych do spadkobrania*, Roczniki Nauk Prawnych Vol. 19, No. 1, 2009, p. 127.

[20] E. Niezbecka, *Zrzeczenie się dziedziczenia i odrzucenie spadku a zdolność do dziedziczenia osób fizycznych*, Annales UMCS, Sectio G Ius, Vol. XXXIX, No. 8, 1992, p. 161.

[21] J. Knabe, J. Ciszewski, commentary on Article 1049 Civil Code (thesis 1), in J. Ciszewski (ed.) et al., *Kodeks cywilny*, *op. cit.*

[22] G. Wolak, *Umowa zrzeczenia*, *op. cit*., p. 282 and the literature quoted therein.

sion from inheriting extends not only to the descendants living on the day when the contract is concluded as envisaged under Article 1048 Civil Code but also to those who will be born later. It is also consistently believed that this concerns also those descendants of the person waiving succession whose rights will be determined already after the contract defined in Article 1048 Civil Code has been concluded.[23]

Seemingly, it is impossible to see any real infringement of financial rights of descendants of the person waiving succession in the construct of waiver of succession, which also leads to the exclusion of the descendants from succession. Principally, it is not they who had the right to inherit from the testator.[24]

However, the waiver of succession leads to the assumption that a person waiving succession did not live to the moment of opening the succession. Furthermore, the view is predominant in literature that the waiver of succession contract, extending also to descendants of the waiving person, is also effective when the person waiving succession did not outlive the testator.[25] In this situation, descendants of this person are excluded from inheriting, even though these individuals did not participate in concluding the contract and, in the case of death of the immediate heir they would be vested with the right to inherit from the prospective testator had the waiver of succession contract not been concluded.

4. WAIVER OF SUCCESSION COVERS ALSO A MINOR

In the present legal conditions there is no single provision that would regulate the issue of admissibility of waiving succession the effects of which would also extend to minor children of the waiving person, considering the need to obtain a prior consent thereto from a guardianship court.

There is a commonly shared view in academic writings that consent from a guardianship court is not required to conclude a waiver of succession contract, even if descendants of the waiving person are minors. In particular, Grzegorz Wolak points out to the fact that in the case of the regulation in question "there is no consent to concluding the contract from a third party who is not a party to the contract but who is affected by its consequences". G. Wolak has branded this kind of legal instrument as "strict" because the consequences of such a contract "affect descendants of the person waiving succession regardless of the fact whether they are interested in this and whether they agree to this"[26]. A similar view has been expressed among others by Elżbieta Skowrońska-Bocian, who pointed out that "(...) it should be assumed that the person waiving succession does not have to seek

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[23] E. Niezbecka, commentary on Article 1049 Civil Code (thesis 5), in A. Kidyba (ed.) et al., *Kodeks cywilny*, *op. cit*., and the literature quoted therein.

[24] As pointed out above, succession can be waived even by a person who him/herself, due to being a distant relative of the prospective testator, stands a small "chance" of becoming an heir. However, in legal practice such a contract is usually concluded by close relatives, in particular, those in the parent-child relationship.

[25] For more detail, see P. Księżak, *Zachowek*, *op. cit*., pp. 122–124, who criticises the different view presented by E. Niezbecka, *Zrzeczenie się dziedziczenia*, *op. cit*.

[26] G. Wolak, *Umowa zrzeczenia*, *op. cit*., p. 281 and the literature quoted therein.

consent from descendants to conclude the waiver of succession contract or consent from a court when the descendants are minors". In this author's opinion, "the effects of the waiver of succession contract in principle extend also to descendants of the person waiving succession. Therefore, in this case one deals with a situation which is rare in civil law where a contract has a direct effect on the legal situation of individuals who are not parties to this contract." In turn, Julita Zawadzka referring to the issue of consequences of the contract envisaged in Article 1048 Civil Code, in the case where the person waiving succession did not outlive the prospective testator, points out that "the person waiving succession decides by him/herself about the potential and future rights of his/her descendants to the extent that these rights are derived from his/her rights".[27]

There are no reasonable grounds to question the presented standpoints *de lege lata* also with regard to those cases where the potential heir waiving succession has parental authority over minor children and the waiver of succession contract leads to accepting a legal fiction that also these children may not live to the moment of opening the succession. It would be possible to attempt to refer to the systemic interpretation that the regulation in Article 1049 § 1 Civil Code should be applied in conjunction with Article 101 § 3 of the Polish Family and Guardianship Code[28] since the consequences of this legal act may also affect a minor, i.e. a child of the waiving person. However, attempts of this kind cause numerous practical difficulties and cannot lead to clear results. Meanwhile, legal practice explicitly indicates that waiver of succession contracts are concluded without prior consent thereto from a guardianship court.

Pursuant to Article 101 § 1 FGC, parents are obliged to manage the assets of the child under their parental care with due diligence. In turn, under § 3 of this article, parents may not, without consent from a guardianship court, carry out activities that exceed the scope of regular management or grant consent for the child to carry out such activities. Therefore, it should be considered whether *de lege lata* waiver of succession by a potential heir who has parental authority over minor children can be at all treated as an activity within the scope of managing the child's assets. It is pointed out in literature that an issue of exceeding regular asset management is essential from the point of view of this person's finances.[29] If a parent waives succession, there is no manifestation of direct interference with the financial condition of his/her child. In this situation, the minor is only potentially deprived of the possibility to obtain financial benefits from the succession in the future, and only assuming that had the waiver of succession not happened, such rights would have been vested in the child. This may happen because, as mentioned above, waiver of

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[27] J. Zawadzka, *Uwagi o czynnościach prawnych mortis causa*, [in:] B. Jelonek-Jarco (ed.) et al., *Usus magister est optimus: rozprawy prawnicze ofiarowane Profesorowi Andrzejowi Kubasowi*, Warszawa 2016, p. 286.

[28] Act of 25 February 1964: Family and Guardianship Code, Dz.U. 1964, No. 9, item 59, as amended; hereinafter FGC.

[29] Cf. A. Kunicki, *Pojęcie zwykłego zarządu w prawie rodzinnym i opiekuńczym*, Ruch Prawniczy, Ekonomiczny i Socjologiczny No. 3, 1968, p. 115, https://repozytorium.amu.edu.pl/handle/10593/18476 (accessed on 25.09.2019).

succession has an effect on descendants of the waiving person also in the case when such person dies before the testator. Moreover, a descendant of the person waiving succession is treated as one who has not lived to the moment of opening the succession and also loses the right to the legitim which might have been vested in him/her if the testator had drawn up a will. Therefore, in those special cases waiver of succession might have indirect effects on the financial sphere of a minor child of the person waiving succession, however, only if the waiving person in fact would not have survived to the moment of opening the succession, which on the date of concluding the waiver of succession contract is by nature an uncertain future event.

Therefore, given the legal regulations that are currently in force, there are no express grounds to assume beyond any doubt that waiver of succession which also affects minor children of the waiving person goes beyond regular management of the child's assets as stipulated in Article 101 § 3 FGC.

5. CARE FOR THE CHILD'S BEST INTERESTS

One of the key family law principles is protection of the child's best interests. The child's best interests, in addition to the sphere of emotional (spiritual) values, also concerns the financial aspect which should be properly secured.[30] As regards the financial sphere, the law should be shaped in a manner that would make it impossible to deprive the child of any significant financial benefits that are due to the child, even potentially, without control of a guardianship court.[31]

Carrying out a number of legal activities in the area of inheritance law already in the present legal situation to be valid requires prior consent from a guardianship court.[32] It is generally assumed in the judicature and literature that to reject succession on behalf of a minor child, it is necessary to obtain prior consent from a guardianship court.[33] It is pointed out, in particular, that to evaluate whether it is reasonable to reject an estate on behalf of a minor child, it is necessary to carry out a detailed and thorough comparative analysis of potential benefits of accepting and rejecting the estate left by the deceased testator.[34] A corresponding situation takes place when a minor would waive financial payments due to him/her in proceedings

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[30] For more detail, see J. Skibińska-Adamowicz, [in:] J. Ignaczewski (ed.) et al., *Komentarz do spraw rodzinnych*, 2nd edn, Warszawa 2014, p. 286.

[31] For more detail, see J. Słyk, *Orzekanie w sprawach o zezwolenie na dokonanie czynności przekraczającej zakres zwykłego zarządu majątkiem dziecka*, Prawo w Działaniu. Sprawy Cywilne No. 21, 2015, p. 201. See also T. Sokołowski, *Ochrona interesu majątkowego dziecka*, Ruch Prawniczy, Ekonomiczny i Socjologiczny, Vol. XLVII, No. 2, 1985, p. 115, who points out to the "need to protect those financial rights of the child which will arise only in the future".

[32] Cf. G. Jędrejek, commentary on Article 101 (thesis 14), in *Kodeks rodzinny i opiekuńczy. Komentarz*, 2017 (LEX electronic version).

[33] Like, e.g. the Supreme Court decision of 13 November 1998, II CKU 64/98, LEX No. 1215083.

[34] Cf. A. Partyk, *Glosa do postanowienia Sądu Najwyższego z dnia 20 listopada 2013 r. w sprawie I CSK 329/13*, LEX No. 1444970.

concerning the sharing of an estate.[35] In those cases, when a minor him/herself is a party to a waiver of succession contract (represented by a statutory representative), it is necessary to obtain a prior consent from a guardianship court to conclude the contract.[36]

From the practical point of view, entering into a waiver of succession contract leads to the same legal consequences for the children of the waiving person as in the case of rejection of the succession by the children themselves. Even though the actions of waiving succession and rejecting succession are different,[37] in both cases the law provides for a legal effect in the form of the fiction that a given person did not live to the moment of opening the succession (cf. Article 1020 Civil Code). Thus there are two legal activities in the legal system that can be taken by a parent, and the legal effects of both of them on the child are identical. Therefore, analysing the two legal constructs through the prism of their legal consequences, in my opinion, there are no grounds to differentiate between them as regards the need to obtain a consent from a guardianship court to carry out these activities. As it has already been pointed out, the admissibility of rejecting inheritance on behalf of a minor child depends on prior consent from a guardianship court, which in a given legal situation does not raise any doubts. Hence, is this proper that obtaining consent from a guardianship court is required for a given legal activity resulting in recognising that a minor has not lived to the moment of opening the succession, while for the other legal activity which has the same effect it is not necessary?

It is pointed out in judicial decisions that "any disposals made by parents on behalf of their minor child (...), unless they are contributing only, and thus may put at risk the child's financial interests, belong to the category of activities that go beyond regular management as defined in Article 103 § 3 FGC" (cf. the decision issued by the Court of Appeal in Gdańsk of 20 May 2015 in the case, V ACa 26/15[38]). In turn, it was assumed in the decision of the Court of Appeal in Łódź of 24 September 2014 in the case, I ACa 425/14,[39] that "a legal activity conducted by a statutory representative in matters that go beyond regular management is invalid if conducted without prior consent from a guardianship court. Such activity is unques-

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[35] The Supreme Court in the decision of 23 July 1998, III CKU 34/98 (LEX No. 1232690) recognised as defective the court's decision, according to which inherited estate had been acquired by one of the heirs without the obligation to pay off the other heirs, minor children. The Supreme Court pointed out that "waiving on behalf of the minor of her right to the estate left by her deceased father thus could not take place without prior consent from a guardianship court, while the waiver without such consent should not have any legal effects. A different stance adopted by the court concerning the custodian's statement (...) and depriving the minor of any benefits from the inheritance was a gross violation of the legal regulations quoted above."

[36] G. Wolak, *Umowa zrzeczenia*, *op. cit*., pp. 168–169; J. Gwiazdomorski, *Prawo spadkowe*, *op. cit*., p. 71; E. Niezbecka, commentary on Article 1049 Civil Code (thesis 4), in A. Kidyba (ed.) et al., *Kodeks cywilny*, *op. cit*.; S. Kalus, commentary on Article 156 FGC, in K. Piasecki (ed.) et al., *Kodeks*, *op. cit*.

[37] For more detail, see: G. Wolak, *Umowa zrzeczenia*, *op. cit*., pp. 245–251; A. Doliwa, [in:] B. Kordasiewicz (ed.) et al., *System Prawa Prywatnego*, Vol. 10: *Prawo spadkowe*, C.H. Beck, Warszawa 2009, pp. 924–925.

[38] LEX No. 1842294.

[39] LEX No. 1544878.

tionably invalid as being contrary to Article 58 § 1 Civil Code. (...) Proceedings for granting consent shall be conducted in the form of a legal action. This is so because the overriding goal of the regulation under Article 101 § 3 FGC is the best interests of the minor child and protection of the child's financial interests."

When analysing the consequences of waiving succession by a potential heir through the prism of the best interests of his/her minor children, it should be taken into account that loss of the status of even a potential heir or holder of the right to legitim (in the case the waiving person really has not lived to the moment of opening of the succession) may prove unbeneficial for the minor.

Accepting the legal fiction alone that a descendant of the person waiving succession has not lived to the moment of opening the succession gives rise to an effect in the form of depriving him/her of any rights to the estate. A descendant of the testator's child waiving succession is thus in a legal situation which is even worse than that of a descendant of the testator's disinherited child because the latter retains his/her own right to legitim,[40] and in the case the testator has not indicated any other beneficiaries in his/her will apart from disinheriting his/her child, descendants of the disinherited child acquire the estate as intestate heirs.[41]

In this context, care for the child's best interests, in my opinion, causes that waiving succession with effect on minor children should be a legal activity that requires prior consent from a guardianship court. It should not be forgotten that a waiver of succession contract (also one extending to minor descendants of the waiving person) can also be concluded where no benefit has been obtained by the person waiving his/her future inheritance rights. In my opinion, if a parent of a minor child makes a decision which may have effects of depriving his/her offspring of certain financial rights, such a decision cannot be dictated by reasons contradicting the child's best interests. It is the parent's obligation to take care that his/her minor child's

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[40] As it can be concluded from the resolution of the Supreme Court of 3 December 2015, III CZP 85/15 (LEX No. 1928533), a share in inheritance that would have been granted statutorily to a child who has been disinherited by the testator is vested in descendants of the disinherited person. In this decision the Supreme Court paid attention to the fact that "the standpoint that disinheriting a descendant leads only to depriving him/her of his/her right to legitim alone without excluding inheriting by his/her descendants by law has long been predominant in the judicial decisions of the Supreme Court. Disinheritance has only effect on the disinherited person but not on his/her descendants (Article 1011 Civil Code). Therefore, descendants of the disinherited person inherit from him by law as if he/she did not live to the moment of opening the succession. Descendants of the disinherited person can obviously be disinherited by a separate act of the testator. In case the testator has not indicated other heirs, his/her estate is inherited statutorily, and the disinherited person should be treated as if he/she did not live to the moment of opening the succession, and thus his/her descendants acquire the portion of inheritance vested in them *ex lege*." The Supreme Court's viewpoint regarding the need to recognise the disinherited as a person who has not lived to the moment of opening the succession has been questioned on numerous occasions in literature; cf. G. Wolak, *O skutkach wydziedziczenia zstępnego spadkodawcy*, Nowy Przegląd Notarialny No. 4 (66), 2015, who presents an overview of standpoints of the representatives and commentators of the doctrine concerning this issue. In my opinion, the view discussed in the decision of the Supreme Court should be seen as convincing and apt. Cf. also M. Załucki, *Wydziedziczenie*, *op. cit*., pp. 420–422. See also S. Kubsik, *Zachowek zstępnego wydziedziczonego oraz jego wysokość*, Rejent No. 9, 2012, p. 73 et seq.

[41] Cf. P. Księżak, *Zachowek*, *op. cit*., p. 207 et seq.

(being under his/her parental authority) interests are protected in the best possible manner also in the aspect of potential future financial claims. Family law protects the minor's best interests. Therefore, family courts are able to counteract any legal actions taken by parents that may harm their children's interests.

As already mentioned, in the present legal situation, this issue has not been successfully regulated, and legal practice reveals that waiver of succession contracts are concluded (approved by notaries) without any control from a guardianship court, also in the cases where the person waiving succession has a child under his/her parental care and the waiver of succession contract results in assuming that these children also did not live to the moment of opening the succession. However, in my opinion, legislative efforts should be made to ensure that in case a person waiving succession fails to seek consent from a guardianship court or does not receive the consent (if the guardianship court deems that concluding the waiver of succession contract which also has effect on minor children is contrary to their best interests), the legal consequences of the contract would not extend to children of the waiving person who were minors when the contract was concluded.

It is reasonable to implement the proposed legislative solution above all because it is necessary to introduce a legal mechanism that will exclude the possibility of effecting a legal activity by a parent which is not controllable in any manner, the negative consequences of which will directly affect a minor child. It is pointed out in literature, not without a reason, that "descendants may not (…) claim that a waiver of succession contract is invalid on the grounds of Article 58 § 2 Civil Code only because the effects of the contract extend also to them (as descendants of the waiving person) and the contract deprives them of legitim. This would mean circumvention of the clear provision under Article 1049 Civil Code and also of the principle that those entitled to inherit have no rights to the succession before its opening."[42] However, a distinction should be made between compliance of the waiver of succession contract with the provision of Article 1049 § 1 Civil Code and thus the absence of any grounds to claim that the contract is contrary to the rules of social co-existence and protection of the child's best interests. In my opinion, in this case there is a collision of legal norms concerning inheritance and family. The behaviour of a parent who waives succession with an effect extending also to his/her minor child should not be evaluated in terms of compliance of the legal activity with the law and rules of social co-existence alone (Article 58 § 1 and § 2 Civil Code in conjunction with Article 1049 § 1 Civil Code) but also from the point of view of family law norms. Article 1049 § 1 Civil Code allows one to conclude a waiver of succession contract which may have adverse legal consequences for a minor child of the person waiving succession. The principle originating from Article 87 FGC and Article 95 FGC that parents need to be guided by their child's best interests is contradictory to the possibility (which is not controlled in any manner) of depriving the minor child by his/her parent of succession rights, even if this is only potential. In my opinion, this makes it necessary to introduce the requirement to obtain consent from a guardianship court to a waiver of succession which also has impact on minor children of the waiving person.

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[42] G. Wolak, *Umowa*, *op. cit.*, p. 281.

6. COMMENTS *DE LEGE FERENDA*

Considering the reasons presented above, the legislator should take action to regulate whether a waiver of succession, which also has effects on minor children of the waiving person (when the waiver of succession contract does not include provisions excluding the rule provided under Article 1049 § 1 Civil Code), requires obtaining a prior consent from a guardianship court.

Before a waiver of succession, exerting effect also on a minor child of the person waiving succession, is concluded, the guardianship court should objectively verify *ad casum* whether concluding such contract is in fact unfavourable for the child. It is only upon obtaining a legally binding consent from a guardianship court to the waiver of succession in the above circumstances that the said contract could be concluded.

In such a case, the guardianship court would thus be tasked with determining a number of circumstances, in particular, motives for making the decision to conclude the waiver of succession and whether in particular circumstances of the case the waiver will not unreasonably deprive minor children of the waiving person of any inheritance rights, in particular, a potential right to legitim. As I have pointed out above, the loss of a potential right to legitim alone can be recognised by the guardianship court as detrimental to the minor child's best interests. It is worth adding that the guardianship court would have the possibility to employ the institution of listening to the minor (Article 576 of the Polish Code of Civil Procedure)[43] if, in the court's opinion, this would help issuing a just decision. In my opinion, the scope of procedures employed by the guardianship court in this case should be parallel to those adopted when deciding on granting consent to a waiver of succession effected by the minor him/herself (or any other person who has no full legal capacity) or to rejection of succession on behalf of a minor child.

It can be argued that in such a case the guardianship court's evaluation would refer to the condition existing when the decision on granting consent to the waiver was made, while a significant period may pass from that moment to the time of opening the succession. However, this does not mean that court's control of this kind would be meaningless. It is practically impossible to determine what the precise condition of the estate will be at the moment of the testator's death in an unknown future. This, however, should not be the main reference point for the guardianship court. The court should rather focus on checking whether there are circumstances that provide grounds for extending the effects of a waiver of succession to the waiving person's minor children. The absence of such circumstances may be the basis for the assessment that the waiving person's action is contrary to the principle of family law that the child's best interests need to be protected. From this point of view, the court should consider whether concluding a waiver of succession entails (or not) harming the child's best interests, taking into account the circumstances at the time when consent to concluding the contract is granted.

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[43] Act of 17 November 1964: Code of Civil Procedure, consolidated text, Dz.U. 2019, item 1460; hereinafter Code of Civil Procedure.

Considering the fact that, in the light of the arguments presented above, it is reasonable to impose a statutory requirement to obtain consent from a guardianship court to a waiver of succession which has effects also on minor children of the waiving person, the legal consequences of entering into this kind of contract without obtaining relevant consent from the court need to be taken into consideration. One option would be to introduce a solution that in such a case the contract would be absolutely null and void. However, this solution does not seem proper. The goal of the legal mechanism proposed by me is not the court's interference with the waiver of succession itself but to introduce an institution that will protect the minor's interests. Therefore, in my opinion, recognising that the waiver of succession has no effect on those children who were minors when the contract was concluded would be a proper legal effect of a waiver of succession. This would not require a prior consent from the guardianship court leading to recognising that also minor descendants of the person waiving succession have not lived to the moment of opening the succession. Although the view that "a legal activity conducted by a statutory representative covering matters that go beyond regular management without consent from a guardianship court is invalid" has been expressed in judicial rulings (cf. the decision of the Supreme Court of 5 February 1999, III CKN 1202/98[44]), adopting it in the case discussed in this paper would be improper. Firstly, there is no direct management of the child's assets. Secondly, deeming the entire waiver of succession contract absolutely invalid would be, as mentioned above, too severe a consequence. In my opinion, ineffectiveness of the waiver of succession contract only for minor children of the waiving person seems to be the most adequate solution since, on the one hand, it ensures sufficient protection of the child's essential interests, while on the other, it allows one to maintain the legal existence of the concluded contract.

The suggested solution will differentiate the legal situation of the person waiving succession, depending on their age on the day of entering into the waiver of succession contract. However, this differentiation seems inevitable if the legislative changes proposed above were to be introduced.

At the same time, to evaluate the admissibility of concluding a waiver of succession with respect to the need to obtain consent from a guardianship court, the condition existing on the day of signing the contract would be significant. Therefore, a relevant consent would only be required when the person waiving succession has minor children at the time of entering into the waiver of succession. In turn, if such children were born after the date of concluding the contract, the absence of consent from a guardianship court would not affect in any way the validity and effectiveness of the already conducted legal activity.

In this context it is also relevant to refer to the legal situation of a child who has been conceived but still is not born on the day when the waiver of succession is concluded by the child's parent. Article 927 § 2 Civil Code provides that a *nasciturus* has the right to inherit on condition that he/she is born alive. In terms of admissibility of concluding a waiver of succession contract which has effects also on the waiving person's descendants, the requirement to obtain consent from

[44] LEX No. 1213617.

a guardianship court should extend to children who have been conceived but are still unborn on the day of concluding the contract, if the person waiving succession knows about the fact that the child has been conceived. However, if on the day of concluding the waiver of succession the child has been conceived but the waiving person does not know about this, it is impossible to require from him/her to seek consent from a guardianship court to a waiver of succession which has effects also on the child. Therefore, if the waiving person becomes aware of the fact that the child has been conceived only after concluding the contract, this will not affect the validity and effectiveness of this legal activity, regardless of the lack of consent from a guardianship court to conducting it.

In the present legal situation, a court's decision with regard to granting consent to conducting a legal activity in the form of waiver of succession which has effects also on minor children of the waiving person would only be effective after becoming legally binding and could not be changed or revoked, if based on the consent legal effects have come to existence for third parties. This happens above all when the contract has already been concluded upon the court's consent.[45]

The group of participants in proceedings before a guardianship court initiated in order to obtain consent to waiving succession which has effects also on minor children of the waiving person should include all those concerned in compliance with Article 510 § 1 and 2 Code of Civil Procedure. Doubtlessly, those concerned in the case of proceedings of this kind should include the prospective testator and the potential heir waiving succession as parties to the contract which the consent directly concerns. The other parent of the minor child should also participate in the proceedings, considering the parental authority vested in him/her. The minor child him/herself, whose interests are the subject, is also directly concerned. Court proceedings the subject of which is also compliance of the waiver of succession with the protection of the best interests of the minor child of the waiving person would doubtlessly belong to the category stipulated in Article 98 § 3 FGC. In a matter of this kind representation of a minor by parents is excluded, while a custodian appointed by the guardianship court is the child's representative during the trial. Pursuant to Article 98 § 2(2) FGC, none of the parents may represent their child in the case of legal activities between the child and one of the parents or his/her spouse, unless the legal activity is a free contribution to the child or concerns means of support and upbringing due to the child from the other parent. This provision pursuant to § 3 of the aforementioned article is applied respectively in proceedings before a court or other state authorities. In turn, pursuant to Article 99 FGC, if none of the parents can represent a child being under their parental authority, the child should be represented by a custodian appointed by a guardianship court. Doubtlessly, a waiver of succession by a parent, if its effects also extend to his/her minor children, is not an activity of involving contribution for the child, nor is it linked with ensuring means of the child's upbringing and maintenance. Therefore, representation of the child by a procedural custodian would be necessary in this case.[46]

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[45] Cf. H. Ciepła, commentary on Article 101 FGC, in K. Piasecki (ed.) et al., *Kodeks*, *op. cit.*

[46] *Ibid.*, commentary on Article 99 FGC.

7. CONCLUSION

Taking a legal action directly affecting the sphere of rights and obligations of a minor child should be controlled by a court. A waiver of succession which has effects also on descendants of the waiving person may be a move that adversely affects the best interests of the minor in an essential area. For this reason, I believe that it is desirable to introduce legal mechanisms which will allow eliminating the threat that, in effect of a legal action taken by a parent who is not controlled in any manner, the child's inheritance rights are infringed upon as the child is recognised as if he/she did not live to the moment of opening the succession. The most proper solution, in my opinion, is to impose the obligation to obtain consent from a guardianship court by the waiving person to conduct the legal activity, if it has effects also on his/her minor descendants. In turn, the absence of such consent should result in recognising that the waiver of succession does not extend to those descendants of the waiving person who are minors when the contract is concluded.

I believe that the legislative solutions proposed above are necessary because in the present legal situation waiver of succession contracts have effects also on minor children. These contracts are not subject to any control whatsoever from the point of view of interests of the minors who become deprived of any potential inheritance rights. In my opinion, care for the best interests of children requires changing this practice, which is impossible without amending the relevant laws.

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WAIVER OF SUCCESSION WITH EFFECT ON A MINOR: COMMENTS *DE LEGE FERENDA*

Summary

In the current legal status, an intestate heir may conclude a contract with the person from whom he/she is to succeed, to waive succession to that person. It has the effect of treating the waiving person as if he/she did not live to the opening of the succession. However, the same treatment is also given to descendants of the person waiving succession, even though they are not parties to the contract. The issue of the need to obtain consent from a guardianship court to the waiver of succession, the effects of which also extend to minor children of the one who has waived the succession, has not been regulated. However, the *de lege lata* prevailing opinion is that such a consent is not required. Still, given that the effects of the waiver of succession covering a minor child are identical to the effects of rejecting the succession on behalf of a minor child (in both cases considered as not having lived to the opening of the succession), it seems appropriate to introduce into the legal system an obligation to obtain the consent of the guardianship court also to conclude a contract of waiving succession if its effects are extended

to minors of the waiving person. The reason for this is the protection of the best interests of the child, who as a result of a contract of waiving succession entered into by his/her parent may, in some cases, be even totally deprived of any rights under the inheritance law which would be applicable to him/her if the waiver of succession were not concluded.

Keywords: waiver of succession, minor descendants of the person waiving succession, consent of the guardianship court, best interests of the child

ZRZECZENIE SIĘ DZIEDZICZENIA WYWIERAJĄCE SKUTKI ODNOŚNIE MAŁOLETNIEGO DZIECKA – UWAGI *DE LEGE FERENDA*

Streszczenie

W obecnym stanie prawnym spadkobierca ustawowy może zawrzeć ze spadkodawcą umowę o zrzeczeniu się dziedziczenia. Jej skutkiem jest traktowanie zrzekającego się dziedziczenia tak, jakby nie dożył on otwarcia spadku. Jednakże tak samo traktowani są również zstępni zrzekającego się dziedziczenia, mimo że nie są oni stronami umowy. Problematyka potrzeby uzyskania zezwolenia sądu opiekuńczego na zrzeczenie się dziedziczenia, którego skutki rozciągają się również na małoletnie dzieci zrzekającego się, nie została unormowana. Dominuje jednak zapatrywanie, iż *de lege lata* zezwolenie takie nie jest wymagane. Biorąc pod uwagę fakt, że skutki zrzeczenia się dziedziczenia rozciągającego się na małoletnie dziecko są identyczne jak skutki odrzucenia spadku imieniem małoletniego dziecka (w obu przypadkach uważa się je za niedożywające otwarcia spadku), wydaje się celowym wprowadzenie do systemu prawnego obowiązku uzyskania zezwolenia sądu opiekuńczego również na zawarcie umowy o zrzeczeniu się dziedziczenia, jeżeli jej skutki obejmą małoletnie dzieci zrzekającego się. Przemawia za tym nadto wzgląd na ochronę dobra dziecka, które wobec zawarcia umowy zrzeczenia się dziedziczenia przez jego rodzica, może w niektórych przypadkach zostać nawet całkowicie pozbawione wszelkich uprawnień na gruncie prawa spadkowego, które by mu przysługiwały, gdyby umowa zrzeczenia się dziedziczenia nie została zawarta.

Słowa kluczowe: zrzeczenie się dziedziczenia, małoletni zstępni zrzekającego się dziedziczenia, zgoda sądu opiekuńczego, dobro dziecka

LA RENUNCIA DE HERENCIA QUE PRODUZCA CONSECUENCIAS PARA EL MENOR DE EDAD – COMENTARIOS *DE LEGE FERENDA*

Resumen

El ordenamiento jurídico actual prevé que el heredero legal puede suscribir con el testador un contrato de renuncia de la herencia. Su efecto consiste en que se trata al renunciante de la herencia tal como si no llegase con vida a la apertura de la herencia. Esto se aplica también para los descendientes del renunciante, aunque no sean parte del contrato. La problemática de necesidad de obtener autorización del tribunal de tutela para la renuncia de la herencia, cuyas consecuencias afectan a los hijos menores de edad, carece de regulación alguna. Predomina, sin embargo, la postura que *de lege lata* tal autorización no es necesaria. Teniendo en cuenta que las consecuencias de la renuncia de la herencia para los hijos menores son iguales a las consecuencias del repudio de la herencia en nombre de hijo menor (en ambos casos se considera que no llegaron con vida a la apertura de la herencia), parece razonable introducir

al sistema jurídico la obligación de obtener autorización del tribunal de tutela también para suscribir el contrato de renuncia de la herencia, en caso sus consecuencias afecten también a hijos menores del renunciante. Esto viene justificado por la protección del bien de niño que, debido a la suscripción del contrato de renuncia de la herencia por su progenitor, podrá en algunos casos incluso ser privado de cualquier derecho hereditario que le correspondería si el contrato de renuncia de la herencia no fuese suscrito.

Palabras claves: renuncia de la herencia, menores de edad descendientes del renunciante de la herencia, autorización del tribunal de tutela, bien del niño

ОТКАЗ ОТ НАСЛЕДОВАНИЯ, ИМЕЮЩИЙ ПОСЛЕДСТВИЯ ДЛЯ НЕСОВЕРШЕННОЛЕТНЕГО РЕБЕНКА: ЗАМЕЧАНИЯ *DE LEGE FERENDA*

Резюме

В соответствии с действующим законодательством, законный наследник может заключить с наследодателем договор об отказе от наследования. Вследствие такого договора статус лица, отказавшегося от наследования, приравнивается к статусу лица, не дожившего до момента открытия наследства. При этом тот же статус приобретают и потомки лица, отказавшегося от наследования, хотя они и не являются сторонами договора. На законодательном уровне не урегулирован вопрос о необходимости получения разрешения суда по опеке и попечительству на отказ от наследования, который имеет последствия для несовершеннолетних детей лица, отказывающегося от наследования. Впрочем, преобладает мнение, что *de lege lata* такое разрешение не требуется. Однако, учитывая тот факт, что отказ от наследования, совершаемый родственниками несовершеннолетнего ребенка по прямой восходящей линии имеет для него такие же последствия, как и отказ от наследства от имени несовершеннолетнего ребенка (в обоих случаях ребенок имеет такой же статус, как если бы он не дожил до момента открытия наследства), представляется целесообразным внести в законодательство обязанность получать разрешение суда по опеке и попечительству также в случае заключение договора об отказе от наследования, если его последствия распространяются на несовершеннолетних детей лица, отказывающегося от наследования. Дополнительным аргументом в пользу такого решения является защита интересов ребенка, который при заключении его родителем договора об отказе от наследования может в некоторых случаях полностью лишиться всех прав наследования, которыми он обладал бы, если бы договор об отказе от наследования не был заключен.

Ключевые слова: отказ от наследования, несовершеннолетние родственники по прямой нисходящей линии лица отказывающегося от наследования, разрешение суда по опеке и попечительству, интересы ребенка

DIE AUSSCHLAGUNG EINER ERBSCHAFT MIT WIRKUNG FÜR EINEN MINDERJÄHRIGEN – ANMERKUNGEN *DE LEGE FERENDA*

Zusammenfassung

Nach geltender Rechtslage kann ein gesetzlicher Erbe mit dem Erblasser einen Erbverzichtsvertrag abschließen. Durch diese Verzichtserklärung wird der das Erbe Ausschlagende so behandelt, als ob er beim Eintritt des Erbfalls nicht mehr am Leben wäre. Doch werden

genauso auch Verwandte in absteigender Linie behandelt, von denen die Erbschaft ausgeschlagen wird, obwohl sie keine Parteien des Vertrages sind. Die Problematik, dass für einen Erbverzicht, dessen Wirkung sich auch auf minderjährige Kinder des auf seinen Erbteil Verzichtenden erstreckt, eine vorherige Genehmigung durch das Vormundschaftsgericht erforderlich sein könnte, wurde nicht geregelt. Es ist jedoch die Sichtweise vorherrschend, dass eine derartige Genehmigung *de lege lata* nicht erforderlich ist. Berücksichtigt man aber, dass die Wirkung eines Erbverzichts, der sich auf ein minderjähriges Kind erstreckt, identisch zur Wirkung einer Ausschlagung des Erbes im Namen des minderjährigen Kindes ist (In beiden Fällen gilt dieses als beim Eintritt des Erbfalls nicht mehr am Leben), erscheint es zweckdienlich, die Pflicht zur Einholung einer Genehmigung durch das Vormundschaftsgericht auch auf den Fall des Abschlusses eines Erbverzichtsvertrags in das Rechtssystem aufzunehmen, wenn sich die Wirkung der Ausschlagung des Erbes auf minderjährige Kinder des auf seinen Erbteil Verzichtenden erstreckt. Dafür spricht außerdem die Sorge um den Schutz des Wohls von Kindern, die bei Abschluss eines Erbverzichtsvertrags durch einen Elternteil in bestimmten Fällen sogar jegliche erbrechtlichen Ansprüche einbüßen, die sie gehabt hätte, wenn der Erbverzichtsvertrag nicht geschlossen worden wäre.

Schlüsselwörter: Erbverzicht, Ausschlagung der Erbschaft, minderjährige Nachkommen eines das Erbe Ausschlagenden, Genehmigung durch das Vormundschaftsgericht, Kindeswohl

RENONCIATION À LA SUCCESSION QUI A DES EFFETS SUR LE MINEUR – REMARQUES *DE LEGE FERENDA*

Résumé

En vertu du statut juridique actuel, l'héritier légal peut conclure un accord de renonciation à la succession avec le testateur. Son effet est de traiter la personne qui renonce à la succession comme s'il n'avait pas survécu à l'ouverture de la succession. Cependant, les descendants de la personne qui renonce à la succession sont également traités de la même manière, même s'ils ne sont pas parties au contrat. La question de la nécessité d'obtenir l'autorisation du tribunal de tutelle pour renoncer à la succession, dont les conséquences s'étendent également aux enfants mineurs de la personne qui renonce, n'a pas été normalisée. Cependant, l'opinion qui prévaut est que *de lege lata*, une telle autorisation n'est pas requise. Considérant, toutefois, que les conséquences de la renonciation à la succession s'étendant à un enfant mineur sont identiques à celles du rejet d'une succession au nom de l'enfant mineur (dans les deux cas, on les considère comme incapable de survivre à l'ouverture de la succession), il semble utile d'introduire dans le système juridique l'obligation d'obtenir l'autorisation du tribunal de tutelle pour conclure un accord de renonciation à la succession si ses effets s'appliquent également aux enfants mineurs de la personne qui renonce à la succession. Cela est également justifié par la protection du bien de l'enfant qui, dans le cas d'un accord de renonciation à la succession conclu par son parent, peut même parfois être totalement privée de tout droit de succession qu'il aurait eu si l'accord de renonciation n'avait pas été conclu.

Mots-clés: renonciation à la succession, descendants mineurs d'une personne renonçant à la succession, autorisation du tribunal de tutelle, bien de l'enfant

RINUNCIA A UNA SUCCESSIONE CON EFFETTI NEI CONFRONTI DI UN MINORE: OSSERVAZIONI *DE LEGE FERENDA*

Sintesi

Nell'attuale situazione giuridica l'erede per legge può stipulare con il dante causa un contratto di rinuncia alla successione. Il suo effetto è considerare il rinunciante alla successione come se non fosse sopravvissuto al momento dell'apertura della successione. Tuttavia vengono considerati allo stesso modo i discendenti del rinunciante alla successione, nonostante il fatto che essi non siano parti del contratto. La problematica della necessità di ottenere un'autorizzazione del giudice tutelare per rinunciare a una successione i cui effetti si estendono anche ai figli minori del rinunciante, non è stata regolamentata. Domina tuttavia la convinzione che *de lege lata* tale autorizzazione non sia richiesta. Considerando tuttavia il fatto che gli effetti della rinuncia alla successione che si estende a un figlio minore sono identici agli effetti della rinuncia alla successione a nome del figlio minore (in entrambi i casi si considera non sopravvissuto all'apertura della successione) sembra opportuna l'introduzione nel sistema giuridico dell'obbligo di ottenere l'autorizzazione del giudice tutelare anche per la stipula di un contratto di rinuncia alla successione, se i suoi effetti comprendono anche figli minori del rinunciante. Depone a tal senso inoltre la premura per la tutela del bene del figlio, che nei confronti della stipula di un contratto di rinuncia alla successione da parte del genitore può in alcuni casi venire completamente privato di tutti i diritti sulla base del diritto della successione, che gli sarebbero spettati se il contratto di rinuncia alla successione non fosse stato stipulato.

Parole chiave: rinuncia alla successione, discendenti minori del rinunciante alla successione, consenso del giudice tutelare, bene del figlio

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