DIVISION OF AN EQUITY STAKE IN A COMPANY DUE TO DIVISION OF COMMON PROPERTY OF THE SPOUSES

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Slovenian family law and corporate law do not specify any special rules for cases in which a married couple use their common assets to obtain an equity stake in a company. The lack of specific rules results in a conflict between the rules of family law and corporate law. This article analyzes the conflict between family and corporate law rules in relation to the ownership of corporate rights obtained through common property of the spouses, and the division of corporate rights arising from a common stake in a company due to a division of common property of the spouses.

Keywords: marriage, common property of the spouses, division of common property of the spouses, company, equity stake in a company

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1. INTRODUCTION

The Marriage and Family Relations Act (Sln. *Zakon o zakonski zvezi in družinskih razmerjih*, hereinafter: the ZZZDR)[1] was created during the collective ownership period, when entrepreneurship was not yet developed in Slovenia. After Slovenia's independence in 1991 and the adoption of a new constitutional arrangement, entrepreneurship saw a rapid growth. Since the very beginnings, entrepreneurship has been taken up both by single individuals and spouses.[2] The property of some spouses increases significantly as a result of being involved in entrepreneurship. In these cases, an equity stake in a company usually represents the largest part of common property of the spouses. With regard to property relations between spouses, the ZZZDR does not define any special rules concerning spouses' equity stake in a company. Corporate law rules do not contain any such rules either.[3] The absence of special rules in both family and corporate legislation causes a conflict between their respective rules, making it unclear which should be given priority.

In selecting the organizational form of a company, spouses must follow the corporate law rules. They can only have an equity stake in those companies that are specified in the corporate rules (*numerus clausus*). The Companies Act (Sln. *Zakon o gospodarskih družbah*, hereinafter: the ZGD-1)[4] divides companies into limited companies (Sln. *kapitalske družbe*) and unlimited companies (Sln. *osebne družbe*).[5] Limited companies are the public limited company (Sln. *delniška družba*, d.d.), the European public limited company (Sln. *Evropska delniška družba*), the limited partnership with share capital (Sln. *komanditna delniška družba*, k.d.d.), and the limited liability company (Sln. *družba z omejeno*

1 Official Gazette of the Republic Slovenia (Ur. l. RS), no. 69/2004, 101/2007, 122/2007, 90/2011, 84/2012.

2 Extramarital union creates the same property-law consequences for the partners as if they were married (Art. 12 of the ZZZDR). Property relations between registered same-sex partners are also regulated the same way as for spouses (see Art. 9 of the Civil Partnership Registration Act, Ur. l. RS, no. 65/2005, 55/2009). Therefore, the term "spouse" is used in this article to refer to all three kinds of unions.

3 An exception to the rule is a stake in a limited liability company, for which the Companies Act (Sln. *Zakon o gospodarskih družbah*, ZGD-1, see Footnote 4) explicitly stipulates that it can be divided as part of common property of the spouses (Par. 4 Art. 483 of the ZGD-1).

4 Ur. l. RS, no. 65/2009, 83/2009, 33/2011, 91/2011, 100/2011, 32/2012, 57/2012, 44/2013.

5 Par. 3 Art. 3 of the ZGD-1.

odgovornostjo, d.o.o.). The European public liability company and the limited partnership with share capital are similar to the public limited company and therefore all the rules referring to the public limited company also apply to the common share owned by spouses in either of the two. Unlimited companies are the unlimited liability company (Sln. *družba z neomejeno odgovornostjo*, d.n.o.) and the limited partnership (Sln. *komanditna družba*, k.d.). The limited partnership is similar to the unlimited liability company and therefore all rules referring to spouses' equity stake in an unlimited liability company also apply to the limited partnership.[6]

2. CORPORATE RIGHTS OF OWNERSHIP ARISING FROM HOLDING A STAKE IN A COMPANY

According to the rules of Slovenian family law, assets that the spouses obtain through work during the marriage are considered common property of the spouses.[7] Common property also includes property obtained based on this common property (e.g., an item purchased with their common money). Property obtained in these two ways becomes common property *ipso iure* at the moment it is created or obtained. The rule on the creation of common property is compulsory and therefore the spouses cannot exclude it through a mutual agreement. According to family law, the spouses are therefore common holders of the corporate rights arising from a stake in a company. Despite this, only one of the spouses is entered in the corresponding register as the holder of the corporate rights. According to corporate rules, the spouse registered as the owner is deemed the holder of corporate rights arising from holding a stake in a company. This corporate rule is thus contrary to the creation of common property of the spouses, which according to family law is created *ipso iure* to the benefit of both spouses.

There is no doubt in Slovenian legal theory and case law that corporate rights arising from a stake in a limited company are part of common property of the spouses if they are acquired with joint assets.[8] This also applies to cases

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6 Pivka, H. M.; Kocbek, M., in: Kocbek, M. (ed.), *Veliki komentar Zakona o gospodarskih družbah (ZGD-1)*, Book 1, GV Založba, Ljubljana, 2006, pp. 548, 549; Ivanjko, Š.; Kocbek, M.; Prelič, S., *Korporacijsko pravo*, GV Založba, Pravna fakulteta Univerze v Mariboru, Ljubljana, 2009, p. 392.

7 Par. 2 Art. 51 of the ZZZDR.

8 Zabel, B., in: Juhart, M. (ed.); Plavšak, N. (ed.), *Obligacijski zakonik s komentarjem*, Book 4, GV Založba, Ljubljana, 2004, p. 996; Rijavec, V., *Udeležba zakoncev v kapi-*

when a spouse establishes a one-person limited company.[9] Common property of the spouses is the sum of all property rights the spouses obtain through work during their marriage or based on common assets.[10] Property rights also include corporate rights so there is no doubt that they can be treated as part of the common property of the spouses. The theory specifies that this also applies to cases in which only one spouse is entered as the holder in the central register of book-entry securities (in the case of a public limited company) or in the Court Register (in the case of a limited liability company). This is similar to when only one spouse is entered in the land registry as the owner of real estate. Real estate can be part of the common property of the spouses even though only one of the spouses is entered as the owner in the land registry. Common property of the spouses arises, *ipso iure,* when the conditions specified in the ZZZDR are fulfilled and, consequently, corporate rights are part of the common property of the spouses even though only one of the spouses is entered in the register.[11]

Slovenian law remains unclear as to whose property the equity stake in an unlimited company should be included in if one or both spouses acquire corporate rights with common assets. The ZGD-1 does not require any start-up

talskih gospodarskih družbah, Podjetje in delo 8/2006, p. 1706; Hudej, J.; Ščernjavič, I., *Sporna materialnopravna vprašanja skupnega premoženja s posebnim poudarkom na novejši sodni praksi*, Pravnik 11-12/2010, p. 761; judgment of the Supreme Court RS, no. II Ips 905/2008 of the 22.10.2009 – Stairs database; judgment of the Supreme Court RS, no. II Ips 205/2004 of the 16.12.2004 - Stairs database; judgment of the Supreme Court RS, no. II Ips 306/2009 z dne 24.2.2011 - Stairs database; Binz, M. K.; Sorg, M., *Die GmbH & Co. KG im Gesellschafts- und Steuerrecht,* C. H. Beck, München, 2010, p. 12; Schacht, V., in: Hense, B. (ed.); Müller, W. (ed.), *Beck'sches Handbuch der GmbH*, C. H. Beck, München, 1999, p. 855; Brandes, S., in: Bork, R. (ed.); Schäfer, C. (ed.), *GmbHG: Kommentar zum GmbH-Gesetz*, RWS Verlag Kommunikationsforum, Köln, 2010, p. 342 .

9 Roth, G. H., in: Altmeppen, H. (ed.); Roth, G. H. (ed.), *Gesetz betreffend die Gesellschaften mit beschränkter Haftung – Kommentar*, C. H. Beck, München, 2009, § 1, Rnd. 30; Pfister, B., in: Inhester, M. (ed.); Saenger, I. (ed.), *GmbhG: Handkommentar*, Nomos, Baden-Baden, 2011, p. 65; Schwaiger, H., in: Müller, W. (ed.); Winkeljohann, N. (ed.), *Beck'sches Handbuch der GmbH*, C. H. Beck, München, 2009, p. 75; Ring, G., in: Grziwotz, H. (ed.); Ring, G. (ed.), *Systematischer Praxiskommentar GmbH-Recht für Unternehmer und Berater*, Bundesanzeiger Verlag, Köln, 2009, p. 13.

10 Zupančič, K., *Družinsko pravo*, Uradni list RS, Ljubljana, 1999, p. 72; Zupančič, K. (ed.); Novak, B.; Žnidaršič Skubic, V.; Končina-Peternel, M., *Reforma družinskega prava, predlog novih predpisov s komentarjem*, Uradni list RS, Ljubljana, 2009, p. 179; Hudej, *op. cit.* 8, p. 749.

11 Rijavec, *op. cit.* 8, p. 1703; Hudej, *op. cit.* 8, p. 761.

capital for establishing an unlimited company; however, this does not mean that the partners are not required to make any investments in the company. In the nature of the matter, the partners must provide the conditions for the company to start operating. A partner can contribute not only money, but also work, expertise, experience, and physical objects.[12] Partners with a well-known name can also contribute their name, which becomes part of the company's firm, or they can contribute only their creditworthiness. All of this constitutes a property contribution based on which a partner acquires an equity stake in an unlimited company.[13] If spouses establish an unlimited company with their common assets or agree that their work in the company will constitute their contribution, the question arises whether their equity stake in the unlimited company is part of their common property.

The definition of common property – according to which all of the assets that the spouses acquire through work or based on their common assets during their marriage is *ipso iure* common property – speaks in favour of making an equity stake in an unlimited company part of common property. In line with this family law rule, the spouses jointly own the equity stake in an unlimited company regardless of the fact that only one of them is formally entered as the exclusive holder of the equity stake in the founding contract and the register. The fact speaking against making the stake in an unlimited company part of the common property is that, as a rule, an equity stake in an unlimited company is not transferrable. Namely, family law theory categorizes all of the non-transferrable individual rights of a spouse under personal property; for example, personal easements, the right to compensation for non-material damage, disability allowance, and monthly accident insurance payouts.[14]

The arguments that an equity stake in an unlimited company is in principle not transferrable and that there is a strong personal connection between the partners are not sufficiently convincing to speak against making an equity stake in an unlimited company part of the common property of the spouses. The non-transferability of an equity stake and the strong personal connection between partners in an unlimited company are not sufficiently significant features that the equity stake should qualify as personal property of the spouses.

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[12] Ivanjko, *op. cit.* 6, pp. 334, 341. Also applicable to limited partnerships, *mutatis mutandis*. See Pivka; Kocbek, *op. cit.* 6, Book 1, p. 549.

[13] Kocbek, M., in: Kocbek, *op. cit.* 6, Book 1, p. 508; Pivka, H. M.; Kocbek, M., in: Kocbek, *op. cit.* 6, Book 1, p. 549.

[14] Zupančič, *op. cit.* 10, p. 74.

An unlimited company is a company whose purpose is to perform a for-profit activity on the market. Thus its purpose is to make a profit rather than connect several natural persons in order to attain a specific goal. In my opinion, the permanent nature of performing a for-profit activity is the key reason why the equity stake of spouses in an unlimited company should be categorized under common property of the spouses.

Under Slovenian law, an equity stake in an unlimited company is similar to that in a limited liability company, and especially to that in a limited liability company with a small number of partners. An essential feature of an unlimited company and a limited liability company is that they both have the status of legal entity and are thus holders of rights and obligations in their own right. The partners do not own the company's property, but rather corporate rights in relation to the unlimited company or limited liability company based on their equity stakes. In terms of organization, an unlimited company is similar to a limited liability company, which is why I believe both an equity stake in an unlimited company and one in a limited company should be part of common property of the spouses.

No start-up capital is required to form an unlimited company. Therefore, the spouses can agree in the founding contract that their only contribution to the company will be their work.[15] In line with the ZZZDR, property acquired through work during marriage is deemed common property.[16] In my opinion, this kind of future commitment of the spouses to contribute their work to an unlimited company alone speaks in favour of categorizing their non-transferrable equity stake under common property of the spouses.

The view that an equity stake is part of common property if the spouses acquire it with common assets raises the question of whether the spouses can establish an unlimited company by themselves using their common assets. An unlimited company must have at least two partners.[17] Spouses that form an unlimited company with their common assets become common owners of both equity stakes and not exclusive owners of their individual equity stakes.

15 Ivanjko, *op. cit.* 6, pp. 334, 341, 394.

16 Par. 2 Art. 52 of the ZZZDR.

17 Kocbek, M., in: Kocbek, *op. cit.* 6, Book 2, p. 503. If for any reason only one partner remains in the company, he or she must do everything necessary within a year to make the company meet the requirements of the ZGD-1 or continue his or her activities as a sole trader. If he or she fails to do so and does not enter the change into the register, the company is wound up *ipso iure* (Art. 115 of the ZGD-1).

Thus, on the one hand, two different partners are entered in the founding contract and the Court Register and, on the other, under the compulsory property regime the two equity stakes are part of common property, which is why the spouses cannot be exclusive owners of their own individual stakes, but jointly own both equity stakes. Under family law rules, the two equity stakes belong to the same community of rights and so the same person is represented twice. Participation in an unlimited company is uniform and indivisible, and therefore one partner cannot own several equity stakes in a single company.[18] If one partner acquires an additional equity stake in an unlimited company, the stakes are combined into a larger stake.[19] The prohibition of a one-person unlimited company therefore does not allow spouses to participate in an unlimited company with their common assets if the unlimited company is formed only by the two and if the spouses are entered in the Court Register as common owners of both equity stakes.

Regarding the issue of a one-person unlimited company, the rules of family and corporate law can only be aligned if external relationships within the property community of the spouses are strictly distinguished from the internal ones. In terms of the external relationship, each spouse owns his or her own equity stake. Under corporate law rules, a partner is a person or entity that is entered in the Court Register as a partner. If the spouses are entered in the register as owners of their own individual equity stakes, two different persons participate in the unlimited company under corporate law. Hence, the corporate law rules according to which an unlimited company must include at least two different persons as partners are not violated because under these rules it suffices for two different persons to be entered in the register. The external relationship is independent of the internal relationship - that is, the relationship between the spouses regarding both equity stakes. Even though within the external relationship each spouse acts as the exclusive owner of the equity stake and is entered in the register as such, this does not affect the internal relationship between spouses. From the viewpoint of the internal relationship,

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[18] The objective indivisibility of equity participation in an unlimited company. See Röthel, A., in: Henssler, M. (ed.); Strohn, L (ed.), *Gesellschaftsrecht*, C. H. Beck, München, 2011, p. 193; Müller, W., in: Hoffmann, W. (ed.); Müller, W. (ed.), *Beck'sches Handbuch der Personengesellschaften*, C. H. Beck, München, 2009, p. 274; Sassenrath, G., in: Wertenbruch, J. (ed.); Westermann, H. P. (ed.), *Handbuch: Personengesellschaften*, Verlag Dr. Otto Schmidt, Köln, 2011, p. 492/6, 493.

[19] Röthel, A., in: Henssler, *op. cit.* 18, p. 193; Müller, W., in: Hoffman, *op. cit.* 18, p. 274; Sassenrath, G., in: Wertenbruch, *op. cit.* 18, pp. 492, 493.

it is deemed that both equity stakes constitute common property of the spouses. The internal relationship between the spouses as common owners of the equity stake is not regulated by corporate law rules and therefore, in terms of corporate law rules, it is irrelevant whether an entry in the register reflects to whom the equity stake belongs.

It should be emphasized that a company's property or items belonging to the company's property may not be part of common property.[20] Companies have the status of legal entities and thus legal capacity, and are therefore independent holders of rights and liabilities.[21] Hence, a company's property or the company itself is not part of common property.[22] Spouses may only be common owners of an equity stake as a sum of corporate rights.[23] Based on the ownership of corporate rights, they can exercise pecuniary and managerial rights towards the company.

3. DIVISION OF AN EQUITY STAKE IN A COMPANY FOR THE PURPOSE OF DIVISION OF COMMON PROPERTY OF THE SPOUSES

3.1. Methods of dividing equity stake in a company for the purpose of division of common property of the spouses under family and corporate law

As a rule, spouses demand that their common property be divided upon divorce or annulment of marriage, but they can also demand this while they are still married.[24] The common property is divided by agreement or at the request of one of the spouses.[25] Family law rules allow the spouses to agree on the manner of dividing their common property and carry out the division themselves. They can choose between several methods. They can divide items in kind or divide individual items into several parts (physical division); they can sell the items and split the profits or agree that the items be taken by one

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20 Hudej, *op. cit.* 8, p. 761.

21 See Art. 4 of the ZGD-1. Ivanjko, *op. cit.* 6, p. 461.

22 Judgment of the Supreme Court RS, no. II Ips 905/2008 of the 22.10.2009 - Stairs database.

23 Vatter, S., in: Spindler, G. (ed.); Stilz, E. (ed.), *Kommentar zum Aktiengesetz*, Book 1, C. H. Beck, München, 2007, pp. 43, 44.

24 Zupančič, *op. cit.* 10, p. 75.

25 Par. 2 Art. 58 of the ZZZDR.

spouse, who then reimburses the other (civil division).[26] If the spouses fail to divide their common property themselves, the court decides on the manner of the division and carries it out at a spouse's request. The court can perform either a physical or a civil division of items.[27]

Being part of the common property, an equity stake in a company is subject to the division of common property of the spouses. Under family law, there are various ways of dividing common property, including the physical division of an item. This method is problematic from the viewpoint of corporate law, which prohibits the division of an equity stake in a company. The exception to the rule is the limited liability company, in which a division of an equity stake for the purpose of division of common property of the spouses is explicitly allowed.[28]

With regard to the participation of spouses in public limited company, division in kind can only be carried out when the spouses are owners of corporate rights arising from owning multiple shares. Division in kind is carried out so that each spouse receives the number of shares that corresponds to his or her share in the common property. For example, if the common property includes corporate rights arising from owning ten shares in a specific public limited company and one spouse has a seventy percent and the other a thirty percent share in the common property, division in kind is carried out so that the spouses obtain corporate rights arising from seven and three shares respectively.

However, the division of corporate rights arising from shares is not possible if only one share belongs to the common property because this is prohibited under corporate law. The ZGD-1 stipulates that corporate rights arising from the same share are indivisible.[29] Spouses usually wish to physically divide the corporate rights arising from the same share – which is, however, not allowed under corporate law.[30] The prohibition of the physical division of corporate rights arising from one share means that the corporate rights arising from a single share may not be divided into several smaller parts. Thus, for example,

[26] Zupančič, *op. cit.* 10, p. 75.

[27] *Ibid.*, p. 76.

[28] Par. 4 Art. 483 of the ZGD-1.

[29] Par. 6 Art. 176 of the ZGD-1.

[30] Vatter, S., in: Spindler, *op. cit.* 23, p. 42; Lange, K. W., in: Henssler, *op. cit.* 18, p. 1389; Dauner-Lieb, B., in: Noack, U. (ed.); Zöllner, W. (ed.), *Kölner Kommentar zum Aktiengesetz*, Book 1, Carl Heymanns Verlag, Köln, 2011, p. 88; Hüffer, U., *Aktiengesetz*, C. H. Beck, München, 2008, p. 47.

a share with a face value of 100 EUR may not be divided into two shares with a face value of 50 EUR if all of the other shares in the public limited company have a face value of 100 EUR. With regard to the division of common property, this means that corporate rights arising from a single share cannot be divided in kind and therefore the spouses cannot agree on dividing the corporate rights in this way, nor can this type of division be ordered by the court. In addition to the corporate rights arising from shares, common property also includes other items and hence the spouse that did not receive any corporate rights from a share may receive another item from the common property or be paid off by the other spouse. If there are not enough other items in the common property or the spouse that receives the corporate rights arising from a share cannot reimburse the other spouse, the only option that remains for them or the court is to use the civil division method.

In dividing common property of the spouses, it is possible to convert it into fractionally owned property.[31] This means that each spouse's share of the item is defined in proportion to the whole (co-ownership). This concept of co-ownership may also be applied to corporate rights arising from the same share. Thus several people may own the corporate rights from a single share, in which every person either owns a fraction (co-ownership) or the shares are not specified (joint ownership).[32]

Even though the legislation provides for the formation of co-ownership and joint ownership of corporate rights arising from a single share, in Slovenia this is impossible to implement in practice. The Slovenian Central Securities Clearing Corporation (Sln. *Klirinško depotna družba*, hereinafter: the KDD)[33] always enters only one member of a community of owners in the central register.[34] This means that due to the KDD standard practice, it is impossible to enter in the central register either a community of co-owners or a community of joint

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31 Rijavec, V., in: Juhart, M. (ed.); Tratnik, M. (ed.); Vrenčur, R. (ed.), *Stvarnopravni zakonik: s komentarjem*, GV Založba, Ljubljana, 2004, p. 371.

32 The same as the German theory: see Cahn, A., in: Spindler, *op. cit.* 23, p. 581; Mildner, M., in: Schwerdtfeger, A. (ed.), *Gesellschaftsrecht*, Luchterhand, Neuwied, 2007, p. 1297.

33 The KDD keeps a share register of all shareholders on behalf of and for the account of a public limited company; see Par. 1 Art. 65 of the Book Entry Securities Act (Sln. *Zakon o nematerializiranih vrednostnih papirjih*; Ur. l. RS, no. 2/2007, 67/2007, 58/2009, 78/2011).

34 Explained by the KDD on 21 September 2012 by e-mail from info@kdd.si, author unknown.

owners. With regard to the division of the corporate rights arising from a single share for the purpose of the division of common property of the spouses, this means the division cannot be carried out by converting joint ownership into co-ownership.

In contrast to the rules governing other types of companies, corporate law explicitly regulates the division of the equity stake in a limited liability company for the purpose of dividing common property of the spouses. In the case of the division of common property, the ZGD-1 no longer insists on the prohibition of dividing an equity stake and exceptionally allows its division.[35] The spouses' equity stake is divided physically.[36] It is divided into two or more smaller stakes that become separate equity stakes.[37] The sum of values of all newly created equity stakes must equal the value of the previous single equity stake.[38] The value of every newly created stake cannot be lower than the prescribed minimum subscribed contribution (i.e., 50 EUR).[39]

The question is whether the physical division of an equity stake in a limited liability company for the purpose of the division of common property of the spouses is applicable in practice. In practice, common property is usually divided after a divorce, which is effected because the marriage cannot be sustained. It makes no sense to divide an equity stake among spouses that no longer get along and no longer wish to be together. If they do not get along as spouses, they will also not get along as partners in a company.

If the spouses do not decide to physically divide a jointly owned equity stake when dividing their common property or if this type of division is not ordered by the court, other methods of dividing common property are used. The equity stake can belong entirely to one spouse and the other spouse then receives more of the other items from the common property. If there are not enough other items, the spouse that receives the equity stake can reimburse

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35 Par. 4 Art. 483 of the ZGD-1.

36 Bayer, W.; Lutter, M., in: Hommelhoff, P. (ed.); Lutter, M. (ed.), *GmbH-Gesetz: Kommentar*, Verlag Dr. Otto Schmidt, Köln, 2004, p. 392; Jasper, U., in: Mayer, D. (ed.); Priester, H. J. (ed.), *Münchener Handbuch des Gesellschaftsrechts*, Book 3, C. H. Beck, München, 2003, p. 345; Ebbing, F., in: Michalski, L. (ed.), *Kommentar zum Gesetz betreffend die Gesellschaften mit beschränkter Haftung*, C. H. Beck, München, 2002, p. 1383.

37 Par. 1 Art. 483 of the ZGD-1.

38 Ivanjko, *op. cit.* 6, p. 887; Bayer, W.; Lutter, M., in: Hommelhoff, *op. cit.* 36, p. 392; Ebbing, F., in: Michalski, *op. cit.* 36, p. 1383.

39 Par. 2 Art. 483 in relation to Par. 1 Art. 475 of the ZGD-1.

the other spouse monetarily. A civil division is also possible – that is, selling the equity stake and splitting the proceeds among the spouses.[40]

The question that arises in the division of common property of the spouses is whether corporate rights can be divided in such a way that the spouses become fractional owners of corporate rights. Theory mentions this type of concept of dividing common property in connection with the ownership of a thing.[41] The spouses can thus divide a thing in their common property so that they become its fractional owners. Regarding corporate rights in a limited liability company, Slovenian case law has adopted the view that the spouses cannot divide their equity stake so that they become fractional owners of corporate rights because this type of division is impermissible due to integrity of an equity stake.[42] Personally, I disagree with this opinion because integrity of an equity stake means that the corporate rights arising from a stake are indivisible and that individual corporate rights arising from a stake may not be transferred of one's own accord; for example, a holder of corporate rights may not transfer only the voting rights to another holder and retain the other rights arising from the equity stake. However, if the corporate rights arising from an equity stake belong to several people or entities, this does not violate the integrity of the equity stake because it is not divided into parts due to the existence of several owners.[43] In my opinion, corporate rights arising from an equity stake can therefore belong to several persons, so that either every person owns a fraction (co-ownership) or that the shares are not specified (joint ownership). In both types of ownership, the equity stake retains its integrity because it is not divided due to the fact that the corporate rights are owned by several persons. Therefore, the spouses may divide the corporate rights arising from an equity stake by becoming their fractional owners.

The division of the spouses' equity stake does not depend on the number of partners and is therefore also possible in a one-person limited liability company.[44] After the division of a single equity stake of the spouses, the one-person limited liability company changes to a limited liability company with

40 For more on the division of common property of the spouses, see Zupančič, *op. cit.* 10, pp. 75, 76.

41 Rijavec, V., in: Juhart, *op. cit.* 31, p. 371.

42 Judgment of the Supreme Court RS, no. III Ips 40/2010 of the 20.3.2013 – Stairs database.

43 Zabel, B., in: Kocbek, *op. cit.* 6, Book 3, p. 98.

44 Goette, W., *Die GmbH – Darstellung anhand der Rechtsprechung des BGH*, C. H. Beck, München, 2002, p. 164.

several partners. If the limited liability company was established by one of the spouses and this spouse was entered in the Court Register, by dividing the equity stake the one-person limited liability company changes to a limited liability company with two equity stakes. The same applies if the spouses jointly own the only equity stake in a one-person limited liability company.

With regard to the division of the equity stake in a limited liability company, the ZGD-1 does not require the consent of other partners, but they may prohibit the division in advance through the contract of members.[45] Partners agree on this type of prohibition when they do not wish a third party to enter the company.[46] With spouses it has to be taken into account that in practice only one of them is entered in the Court Register as the holder of the equity stake. From the perspective of the company and other partners, only the registered spouse is deemed a partner, even though under substantive law corporate rights arising from an equity stake are part of the common property of the spouses. However, when the equity stake is divided for the purpose of dividing common property of the spouses, the partner's spouse also enters the limited liability company. Other partners may not agree with the entry of a third party into the company because a limited liability company is usually formed by persons that trust one another and work well together. Corporate law thus allows the partners to protect themselves against the entry of a third party and prohibit the division of the equity stake. In my opinion, the agreed-upon prohibition of division takes precedence over the family law rules on the division of common property of the spouses.

Corporate law rules only allow the division of participation in the case of limited liability companies. *A contrario* this means that in other types of companies the division of an equity stake is not permissible. When dividing the common property of the spouses, equity stakes in an unlimited company may not be divided so that two new equity stakes are formed from the common equity stake. Therefore, either a civil division is performed or only one spouse takes over the equity stake. The principle of non-transferability of the equity stake applies to the latter, whereby a third party cannot enter the company

[45] Par. 4 Art. 483 of the ZGD-1.

[46] Goette, *op. cit.* 128, p. 162; Ebbing, F., in: Michalski, *op. cit.* 36, p. 1383; Heidinger, A., in: Heckschen, H.; Heidinger, A., *Die GmbH in der Gestalltungs- und Beratungspraxis*, Carl Heymanns Verlag, München, 2009, p. 508; Eschenlohr, H., in: Hommelhoff, P. (ed.); Schmidt, D. (ed.); Sigle, A. (ed.), *Familiengesellschaften: Festschrift für Walter Sigle zum 70. Geburtstag*, Verlag Dr. Otto Schmidt, Köln, 2000, p. 132.

because of the close personal connection between the partners in an unlimited company. This entry is only possible with the consent of all of the other partners or based on the founding contract. Therefore, upon the division of common property the spouses or the court may not order that the spouse who has not been one of the partners until then should take over the equity stake unless this is envisaged in the founding contract or unless all the remaining partners in the unlimited company agree with it.[47]

3.2. Concealing property when holding an equity stake in a company

In practice only one spouse is registered as the owner of an equity stake in a company, even though it is acquired with common assets and is *ipso iure* part of the common property of the spouses. The registered spouse that used common assets to acquire the stake often works for the company and is employed there. The most popular type of company used is the one-person limited liability company, based on which many people perform an independent gainful activity. In these cases, the spouse who formed the company is employed in it and takes care of the business. This spouse considers the company as his or her own and as soon as he or she realizes that the common property will be divided, he or she uses different manoeuvres to hide "his" or "her" company from the other spouse and thus exclude it from the procedure of dividing their common property. However, the spouse forgets or does not acknowledge that the company was formed with common assets, which makes the equity stake in the company part of common property of the spouses by the law.

The most common manoeuvre a spouse uses to conceal his or her property is to transfer the jointly owned equity stake in the company to another natural person or company. The most interesting is the transfer of the equity stake to a company that the spouse establishes with his or her personal property precisely for the purpose of transferring this equity stake. Because the new company is formed with the spouse's personal property, the other spouse is not entitled to the equity stake in this company when the common property of the spouses is divided. The personal property remains in the hands of each spouse individually and is therefore not divided as part of the common property of the

[47] Jäger, A., in: Sudhoff, H. (ed.), *Personengesellschaften*, C. H. Beck, München, 1999, p. 189; Börger, U., in: Börger, U.; Göpinger, H., *Vereinbarungen anlässlich der Ehescheidung*, C. H. Beck, München, 2005, p. 449; Mutter, S., in: Gummert, H. (ed.), *Münchener Anwalts Handbuch Personengesellschaftsrecht*, C. H. Beck, München, 2005, § 6, Rnd. 294.

spouses. From the corporate law perspective, the transfer of a jointly owned equity stake in the company is not questionable because the registered spouse is deemed the one entitled to manage the corporate rights arising from the stake in the company. However, this type of transfer is questionable from the viewpoint of family law because the spouse converts an item from the common property into personal property and thus excludes the equity stake from the division of common property of the spouses.

Under family law, a legal transaction that one spouse concludes in relation to common property without the necessary agreement of the other spouse may be challenged by the other spouse, except if the contracting party of the spouse is in good faith. If the contracting party of the spouse is in good faith, the other spouse cannot challenge the legal transaction and may only demand compensation from the spouse who disposed of the equity stake without his or her consent.[48] When challenging a transfer to another company, the assessment of the good faith of the contracting party – in this case, another company – is the key for the success of the challenging. There are no general civil law rules on the good faith of a legal entity and therefore the rules of the Law of Property Code (Sln. *Stvarnopravni zakonik*, hereinafter: the SPZ)[49] should apply. Under these rules, a legal entity's good faith is assessed according to the good faith of its bodies and other persons who have an interest in an item belonging to the legal entity in terms of their field of activity.[50] If the body is a natural person, the body's good faith is assessed according to this person and, if the body is composed of several persons and one of them is established not to act in good faith, the entire multi-person body and consequently the legal entity itself is deemed not to act in good faith.[51]

When challenging a legal transaction that a spouse makes without the other spouse's consent, the assessment of the good faith of the spouse's contracting party is the key for the success of the challenging. The spouse's contracting party is a company and so its good faith is assessed in terms of its bodies. As a rule, the spouse establishes the new company in the form of a one-person limited liability company and transfers the equity stake to it; the newly established limited liability company becomes the holder of this stake, but the spouse retains his or her economic ownership over the transferred stake. The capital stock

[48] Zupančič, *op. cit.* 10, p. 74.

[49] Ur. l. RS, no. 87/2002, 18/2007.

[50] Art. 46 of the SPZ.

[51] Tratnik, M., in: Juhart, *op. cit.* 31, p. 273.

of the new limited liability company only consists of the spouse's contribution and thus, through this company, he or she controls the equity stake in the original limited liability company. In the new company, the spouse as the single partner can independently decide on matters connected with the company. In this case, he or she is the one that runs the company and so the company's good faith is assessed according to him or her. The spouse that transfers the equity stake to another company that he establishes with his or her personal property in order to hide the equity stake from the other spouse clearly does not act in good faith because he or she knows that he or she is dealing with common property without the consent of the other spouse; therefore, it is deemed that the new limited liability company to which the equity stake has been transferred also does not act in good faith. The same applies to cases in which a spouse transfers the equity stake to a company he or she owns together with other partners. Due to his or her lack of good faith, the company can also be deemed not to act in good faith. Therefore, the other spouse may challenge the legal transaction based on which the equity stake has been transferred to another company. In this way the other spouse makes the equity stake fall under common property that is subject to division.

The findings regarding the challenging of the legal transaction through which a spouse transfers the equity stake to another company are further applied to a wide range of encumbrances on the equity stake in favour of the other company in which the spouse has an equity stake. An example of this type of encumbrance is a pawn on the equity stake in a company. Under law of real property, a property right may also be subject to a pawn.[52] Property rights connected with the corporate rights arising from an equity stake in a company may therefore be subject to a pawn. By imposing a pawn on the equity stake in favour of the new company, the spouse transfers a certain property value from the property of the original company to the new company without actually transferring the equity stake.

A spouse that establishes a one-person limited liability company with common assets during marriage and is registered as the sole holder has the best opportunities for manipulation and redirecting the company's property.[53]

52 Par. 2 Art. 3 of the SPZ.

53 According to Article 169 of the ZGD-1, it is also possible to form a one-person public limited company, but due to the large minimum share capital required it is not a popular legal form of organization for performing an independent gainful activity used in practice. Therefore, only a one-person limited liability company is discussed in the remainder of this article, but all of the findings also apply to one-

Under corporate law, the registered partner of a one-person limited liability company has the right to manage the company alone. The corporate law theory illustrates this picturesquely with the metaphor of the partner being "the master of his own house".[54] Under corporate law, the spouse that establishes a one-person limited liability company and is registered as the sole owner has the right to run the company alone regardless of the fact that common property of the spouses was used to form the company. As the company's legal representative, the registered spouse may carry out legal transactions with other persons or entities independently on the company's behalf, and therefore in this case the opportunities to hide the property are the greatest. The spouse can do this by using his or her own assets to form a new one-person limited liability company in order to transfer the property from the initial company to it. In addition to the transfer of the stake's ownership in the original company to the new company discussed above, the spouse also has a free hand to carry out legal transactions between the two companies because he or she is the sole founder of both and thus also their legal representative who may independently decide on closing legal transactions. The spouse transfers the property from the original company to the new company so that the original limited liability company closes a legal transaction with the new limited liability company, through which it transfers the ownership of certain items to the new limited liability company at a value different than the market value. This way, the spouse can use up all of the property of the original company, which will have none or very little property when common property of the spouses is divided, and thus the non-registered spouse as the joint owner of the equity stake will receive less than he or she would otherwise be entitled to under family law. The intention to carry out a legal transaction in both companies is formed independently by the registered spouse, who is also the legal representative of both. Despite the fact that under family law the equity stake in a limited liability company is part of common property of the spouses and that the non-registered spouse is a joint owner of the stake, the non-registered spouse cannot prevent this type of conduct on the side of the registered spouse because, under corporate law, the latter is the only one entitled to run the one-person company. Moreover, the non-registered spouse cannot challenge such a legal transaction because the transaction is carried out between the two companies as legal entities and not between the spouse and a third party. In this case, the

person public limited company.

[54] Ivanjko, *op. cit.* 6, p. 944.

common property of the spouses is not used because the spouses do not own the company's property, but the company itself as a legal entity is the owner of this property.[55] In order to conclude a valid legal transaction, the company's intention must be formed in line with the corporate law rules. According to these rules, an intention is formed correctly when the decision on carrying out a legal transaction is adopted by the responsible body. In a one-person limited liability company, this is the registered spouse, who is the only one entitled to run the company and adopt decisions. The non-registered spouse can only prevent the company from deciding to carry out a harmful legal transaction if he or she can block the decision under corporate law; this means the spouse must be registered because otherwise he or she is not regarded a partner and does not have the right to run the company. Because the non-registered spouse is not registered, he or she cannot prevent the company from deciding to carry out a harmful legal transaction.

The registered spouse may also conceal the transfer of property to a new limited liability company if the condition of equality of contractual duties is met in a legal transaction between the original and new limited liability company. He or she can do this by having the original company meet its obligation (the transfer of ownership of a property item), and the new company fail to meet its contractual counter-obligation. The registered spouse decides that the original limited liability company will not sue the new company for not meeting its obligation. This *de facto* involves an unpaid transfer of property from one company to the other. As in the previous case, in which a spouse transfers the stake from one company to another, in this case the spouse that is registered as the only owner of the original company is the only one entitled to make decisions within the company. The non-registered spouse has no corporate rights and therefore cannot help shape the company's will. Furthermore, the non-registered spouse cannot file a suit on behalf of the original company demanding that the obligations be met because he is not the legal representative of the original company and has no active legitimacy to file the suit. In addition, the non-registered spouse cannot file a suit on the premise of being a joint owner of the equity stake because the creditor is the company and not the spouses as the joint owner of the equity stake. Under corporate and family law, the non-registered spouse thus has no legal remedies to force the new company to meet its obligations.

The transfer of ownership of an item from the original company to a new

[55] Art. 4 of the ZGD-1.

limited liability company is valid even if the new company does not meet its counter-obligation. Under the general rules of civil law, the condition for transferring the ownership of an item is an appropriate disposition and not the fulfilment of the counter-obligation (i.e., payment of the purchase price). This means that the ownership of an item from the original limited liability company is transferred to the new company, even though the new company fails to fulfil its counter-obligation.

The acts on the part of the registered spouse, with which he or she transfers the property of the original limited liability company to the new one and in which the original company does not receive any equal duty in exchange, causes damage to the original company. In this case, creditors can in principle use the legal institution of piercing the corporate veil, based on which the partners in a company are liable for the company's obligations to the creditors. Due to the damage caused to the property of the original company and thus the reduced value of the equity stake, the non-registered spouse receives less when the common property of the spouses is divided. Despite the damage, the non-registered spouse cannot use the institution of piercing the corporate veil because he or she is not a creditor of the original company, but a joint owner of the equity stake under family law.

In conclusion, among the manoeuvres used by the registered spouse to reduce the value of the original company to a minimum, one needs to mention the transfer of activities to the new company without the transfer of property. The spouse does this by establishing a new company with a similar name because he or she seeks to preserve the recognisability of the name. For example, a husband uses common assets to form a one-person limited liability company with the name *Simon Novak Florist*. He is employed in this company, providing services as a florist, whereas his wife is employed elsewhere. When they decide to get a divorce, the husband realizes that the division of their common property is inevitable. He regards the company *Simon Novak Florist* as his own and does not want to share it with his ex-wife and wants to reduce its value to a minimum in order to pay off his wife more easily. To this end, he uses his separate property after the dissolution of marriage to form a new one-person limited liability company with the name *Simon Novak Florist Services*. All of a sudden there is a new limited liability company appearing in legal transactions, with invoices addressed to it. In this way, the husband directs his customers to the new company, thus ensuring that its property begins to grow. He ceases to provide his services within the original limited liability company, due to which its property begins to shrink. This causes damage to the non-registered spouse because the equity stake is worth significantly less when common property of the spouses is divided or because, as a rule, the original company is declared bankrupt at that point. As with the transfers of property between the original and new limited liability company, under family and corporate law the non-registered spouse has no legal remedies to prevent the registered spouse from doing this.

Under family law, the non-registered spouse can challenge the legal transaction through which the registered spouse transfers the ownership of an equity stake, but under family and corporate rules he or she does not have any legal options to prevent a harmful legal transaction from being carried out between the original and the new company. In addition, the non-registered spouse cannot influence the original company's decision not to request the new company fulfil its counter-obligation, and cannot prevent the operations from being transferred to the new company. In my opinion, the only option that the non-registered spouse has in these cases is to file an action for damages against the spouse that used these types of manoeuvres to cause damage to the common property in order to increase his or her personal property.

In justifying the registered spouse's tort liability, the non-registered spouse must prove all of the assumptions regarding this liability: the damage, unlawfulness, causal connection between the unlawful act and the damage, and liability.[56] The problem already arises with proving the damage: common property of the spouses is not directly damaged because the principle of separating corporate property from that of the partners applies to legal entities.[57] The registered spouse uses various methods of property transfer in order to reduce the company's property, which has an indirect impact on the value of the equity stake in the company. I believe that, in order to determine the damage, one can use, *mutatis mutandis*, the criteria that the corporate law theory has developed in connection to the tort liability of members of the management and supervisory bodies.[58] Under tort law, any decrease in corporate property

[56] Novak, B., in: Juhart, M.; Možina, D.; Novak, B.; Polajnar-Pavčnik, A.; Žnidaršič Skubic, V., *Uvod v civilno pravo*, Uradni list RS, Ljubljana, 2011, pp. 236-243.

[57] Schäfer, C., in: Henssler, *op. cit.* 18, p. 637.

[58] In public limited companies, tort liability of members of the management and supervisory bodies is regulated in Article 263 of the ZGD-1. The injured parties may include the corporation, its shareholders or a group of shareholders, and creditors. One needs to note that, as individual persons, the shareholders are not actively legitimized to file a suit. See Bohinc, R., in: Kocbek, *op. cit.* 6, Book 2, pp. 317, 318.

cannot be deemed damage. The basic criterion is whether corporate expenses are necessary and justified. Unnecessary expenses and expenses harmful to the company include disproportionately high expenses, expenses due to personal interests of the management board members, and expenses that have completely missed their purpose or, upon careful business examination, are of no importance to the company. Therefore, theory defines damage as a decrease in property that might occur by taking into account a hypothetical formation and development of a company's property if the company is managed properly and with due diligence.[59] The legal transactions that the registered spouse carries out with his or her new company on behalf of the original company are unjustified if they conceal the property transfer to the new company. A good indicator of the property transfer is the inequality of obligations connected with the legal transaction or the failure to fulfil the counter obligation on the part of the new company. Thus the court must first determine the legal transactions or actions that the registered spouse used to transfer the property to the new company and thus caused damage to the original company. In doing this, the court can only focus on the registered spouse's legal transactions and other actions that were carried out after the relationship between the spouses started deteriorating. In searching for these types of legal transactions, the court must pay attention to the original company's contracting parties, with whom the registered spouse carried out a legal transaction on behalf of and for the account of the company or to the benefit of whom he or she performed any other actions. If the contracting party is a company in which the registered spouse is a shareholder, or any other person with whom the registered spouse may be in any way connected (e.g., a friend or a relative), the court must carefully examine this kind of legal transaction because this is usually where a property transfer has been concealed.

After identifying the registered spouse's legal transactions and actions with which he or she transferred the property and caused damage to the original company, the court must determine the value of the damage caused to the non-registered spouse. The court determines this by comparing the value of the equity stake after damage has been caused to the company and the value of the stake if no damage was caused to the original company.[60] The diffe-

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[59] Bratina, B., *Vidiki odgovornosti uprave delniške družbe in razmerja pri odpoklicu*, Podjetje in delo 5-6/1995, p. 643.

[60] This assessment requires expertise in evaluating the value of companies and therefore the court usually calls in a suitable expert.

rence equals the decrease in the stake's value. This is not yet the value of the damage caused to the non-registered spouse because the spouses jointly own the equity stake in the company. This damage depends on the spouse's share in the common property. Thus the non-registered spouse's damage equals the proportional share of the difference in the value of the equity stake because, if the stake's value had not decreased due to the registered spouse's actions, the non-registered spouse would have been entitled to the same share when dividing their common property.

The next tort liability assumption has to do with the unlawful nature of the registered spouse's actions. Any act or omission that violates the obligations of management and supervisory bodies is deemed an unlawful act by corporate law theory.[61] At first glance, the registered spouse's action is not unlawful because he or she is the only one registered and under corporate law has the right to independently manage the corporate rights arising from the equity stake in the company. Even though the registered spouse may be the only partner in the company and "a master of his own house", this does not mean that causing damage to the company is legal. Corporate law theory refers to this in connection with the protection of creditors.[62] The non-registered spouse, who is a joint owner of the equity stake under family law, is not the company's creditor. Therefore, I believe that in cases where the equity stake is part of the common property of the spouses, but only one spouse is registered as the owner, one should take a broader view of the registered spouse's unlawful action. Through various actions, the registered spouse causes damage not only to the company, but indirectly also to the other spouse. Due to a decreased value in the equity stake, the value of the common property also decreases by the same proportion. Even though the registered spouse takes all of the measures in line with the corporate law rules and does not cause damage to the creditors, I believe his or her actions are nonetheless unlawful if through these measures he or she causes damage to the common property and consequently to the non-registered spouse. The unlawful nature of such actions on the part of the registered spouse may be derived from the general prohibition of causing damage under Article 10 of the Code of Obligations (Sln. *Obligacijski zakonik*, OZ).[63] The general prohibition of causing damage in the property relations between the spouses means that the spouses may not cause damage to the

[61] Bratina, *op. cit.* 56, p. 643.

[62] Ivanjko, *op. cit.* 6, p. 944.

[63] Novak, B., in: Juhart *et al.*, *op. cit.* 56, p. 238.

common property. The registered spouse that transfers the original limited liability company's property to the new company in order to conceal property undoubtedly causes damage to the property of the original company and thus indirectly to the value of the equity stake in it. This spouse's actions are thus unlawful because by decreasing the value of the equity stake he or she reduces the common property and thus causes damage to the non-registered spouse.

In determining the causal connection between unlawful actions and damage, corporate law theory advocates the principle of adequate causality. According to this type of causality, members of management bodies are responsible for those damaging consequences that usually result from non-diligent management of the company.[64] In the case of damage caused to the non-registered spouse, the assessment of the causal connection between the registered spouse's unlawful action and damage in the form of reduced value of the equity stake is difficult and complex. A number of factors affect the company's value and consequently the value of an equity stake in this company. For example, its value can be reduced by a general economic crisis and may not be connected with an inadmissible action by the registered spouse. It is prudent to adopt the general viewpoint that all actions that the registered spouse uses to transfer the property to another company and that reduce the property of the original company cause a decrease in the value of the stake in this company and subsequently a decrease in the non-registered spouse's share in the common property. The registered spouse's liability for damage is not objective, so that the causality could be presumed; therefore, the causal connection must be proven by the non-registered spouse.[65]

The last assumption connected with tort liability is the liability of the one causing the damage. In line with the general rules of law of obligations, the burden of proof is reversed.[66] A member of the management or supervisory body must prove that he or she acted with the diligence of a good businessman in order not to be held liable for the damage.[67] The same must apply to the tort liability of a registered spouse due to decreasing the value of the equity stake in the company. The registered spouse must prove that he or she acted with the diligence of a good businessman in cases that caused a decrease in the company's and stake's value. The registered spouse must thus justify and

[64] Bohinc, R., in: Kocbek, *op. cit.* 6, Book 2, p. 315.

[65] Bratina, *op. cit.* 59, p. 643.

[66] Bohinc, R., in: Kocbek, *op. cit.* 6, Book 2, p. 318.

[67] Bratina, *op. cit.* 59, p. 644.

prove that he or she acted with due diligence in transferring the property and that he or she had no intention of causing damage to the original company.

4. CONCLUSION

Property relations between spouses in Slovenia are regulated by a compulsory matrimonial regime, according to which all of the assets that the spouses acquire through work during their marriage or with their common assets are, *ipso iure*, part of their common property. In practice, spouses often use their common assets to acquire an equity stake in a company. Therefore, corporate rights arising from holding an equity stake in a company are part of common property and subject to division when this property is divided. Corporate law does not allow an equity stake in a company to be divided due to a division of common property of the spouses, except in the case of limited liability companies. Therefore, a common equity stake in a company must be divided so that either one of the spouses takes the equity stake and reimburses the other spouse or that the equity stake is sold and the spouses split the proceeds.

In Slovenian practice, as a rule only one of the spouses is entered in the corresponding register as the owner of corporate rights arising from holding an equity stake in a company, even though the corporate rights have been obtained with common assets. In small companies, the registered spouse also works in this company and therefore deems the stake in it to be his. The registered spouse thus uses several ways not to make the equity stake in this company object to the division of common property. When the spouse transfers the equity stake to another company that he or she forms for this purpose independently with personal assets, his or her lack of good faith means that the entire company lacks good faith as well. Therefore, the non-registered spouse may challenge the transfer of the equity stake to the new company based on family law rules and have the equity stake again made part of the common property. With regard to the transfer of the company's property and operations to another company, the non-registered spouse cannot challenge this transfer because the registered spouse does not have a common property item at his disposal, but that of the company. Therefore, the only option left for the non-registered spouse is to file an action for damages against the registered spouse.

Sažetak

Gregor Dugar[*]

PODJELA UDJELA U DRUŠTVU KAO POSLJEDICA DIOBE BRAČNE STEČEVINE

Prema slovenskom je obiteljskom pravu imovina koju su bračni drugovi stekli radom za vrijeme trajanja bračne zajednice ili potječe iz te imovine ipso iure *bračna stečevina bračnih drugova. Bračni drugovi ne mogu se dogovoriti drukčije bračnim ugovorom. Zbog toga su članska prava u trgovačkim društvima koja bračni drugovi dobiju iz bračne imovine* ipso iure *bračna stečevina. U slovenskoj teoriji i praksi nema dileme da to vrijedi za društva kapitala. Sporno je mogu li i članska prava u društvu osoba biti bračna stečevina. Prema našem mišljenju članska prava u društvu osoba mogu biti, kao u slučaju društva kapitala, bračna stečevina bračnih drugova.*

Udio u trgovačkom društvu, koji je bračna stečevina, prema obiteljskom se pravu dijeli u slučaju razvoda braka. U Sloveniji je u registar trgovačkih društva upisan samo jedan bračni drug, iako je udio u trgovačkom društvu bračna stečevina. Upisani bračni drug, koji u tom društvu radi, može misliti da je udio u trgovačkom društvu isključivo njegov i zato ga želi isključiti iz diobe bračne stečevine. To se uglavnom događa u društvima kapitala s jednom osobom, a ona su vrlo česta u slovenskoj gospodarskoj praksi. Pravna sredstva neupisanog bračnog druga u slučaju kada upisani bračni drug obustavi udio u trgovačkom društvu pri diobi bračne stečevine ovisi o načinu kako je upisani bračni drug to napravio. Ako je upisani bračni drug prenio vlasništvo na udjelu u trgovačkom društvu trećoj osobi, neupisani bračni drug može taj pravni posao pobijati ako treća osoba nije postupala u dobroj vjeri. Ako je upisani bračni drug prenio imovinu ili gospodarske aktivnosti trgovačkog društva na drugo trgovačko društvo, neupisani bračni drug može tužiti upisanog bračnog druga samo za odštetu.

Ključne riječi: brak, bračna stečevina, podjela bračne stečevine, trgovačko društvo, udio u trgovačkom društvu