of execution the approvals on securing a claim in civil cases, especially in interaction between courts and government executive bodies aspect are represented.

Keywords: *securing a claim, government executive bodies, executing of approvals on securing a claim, kinds of securing a claim, attachment.*

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UDC: 347.9

WITNESS PRIVACY PROTECTION IN CIVIL PROCEEDINGS – SELECTED ISSUES

Protection of the privacy of individuals involved in various process roles in civil proceedings is one of the fundamental problems, especially in the context of the principle of transparency. In this article the author discusses the two main limitations of witnesses statements as evidence – the right to refuse to testify and the right to refuse to answer particular questions in terms of their use to protect the privacy of a witness. Instruments available to the court and the parties which essence is to limit the openness of the proceedings in appropriate cases are also very important. Some of these solutions may also serve to protect the privacy of individuals involved in the hearing.

Keywords: *witnesses statements as evidence, protection of privacy, taking of evidence.*

1. Introduction

Some civil cases because of the subject matter or subject of the non-trial proceedings are associated with the interference of the court during the hearing of evidence in the privacy of not only the parties (participants) of proceedings, but also can result in disclosure of private facts from witnesses' lives, if in the course of the proceedings such evidence will be carried out.

The concept of privacy is neither defined in legislation, nor in the doctrine, in a clear and indisputable way, and definitions created in that area usually represent, to a certain extent, derivative area of law, which the person creating a definition deals with. Although each of these definitions follows the basic assertion of the complicated structure of privacy, which is a collection of many subareas covering different aspects of human activity, which can be described as an intimate, private or family life. This complex character of privacy is confirmed, when it comes to a definition of private life, by B. Banaszak, who indicated that these are "qualities, inner personal (individual) experiences of a human and their evaluations, reflections on external events and their sensory impressions, as well as the state of health" [1, p. 295].

First of all, one should think about the nature of privacy in relation of an individual with common courts. According to A. Kopff "personal good in the form of private life is everything that, due to the justified isolation of the individual from the general community, is used for physical or mental development of one's personality, as well as for preservation of achieved social position". The author divides the private area into two basic areas: the intimate personal life and the private personal life. The first sphere of those includes personal experiences of a person, about which a person only informs the loved ones. The author points out that this information relates to the internal, intimate sphere of experiences of the individual and asserts that no circumstances may constitute justification for interference in this sphere. On the other hand, the area of private life includes the circumstances and events of personal and family life, which are shared with family members, as well as friends and colleagues [2, p. 32-35]. However, the framework of legal protection of private life does not include information of "public character", due to the fact that they do not contain messages related to private life.

As a result, in some cases, the problem creates dilemma between the desire of the court and the parties (participants) of proceedings to detect the truth in the course of the proceedings and the protection of the privacy of individuals, whose knowledge of certain facts can help to establish the factual basis for the decision. The principle of truth in civil proceedings results mainly from the provisions of Art. 3 of the Code of Civil Procedure (hereinafter referred to as CCP) [3]. Which provides that the parties and the participants of the proceedings are obliged to carry out procedural actions in accordance with good practice and give explanations as to the circumstances truthfully and without concealing anything, as well as present evidence. One of the measures of evidence that parties may apply for is statements from witnesses. It is therefore of fundamental importance to mention the provisions of Art. 268 CCP containing the oath, shaping the basic duty of the witness, as witnessed promise that they will "speak the plain truth, without hiding anything what is known to me." However, the question arises whether this obligation is absolute, or whether it is necessary to use solutions to protect the rights of the witness, when giving statements would lead to their violation. This also applies to the indicated privacy as one of the derivatives of the right to dignity as a fundamental human right.

This study will present only the issue of privacy protection of witnesses and their relatives, bypassing this important issue with respect to the parties and participants of the proceedings.

It seems that witness privacy protection is also important for the reason that it is often overlooked in the doctrine, which mainly focuses on the privacy protection of people whom proceedings before a civil court directly concern (parties or participants of non-trial proceedings).

2. The right to refuse to testify

The basic entitlement of the witness is the right to refuse to testify. It refers to a situation where the witness must testify in a case involving close relatives. This entitlement has a much wider subject range than the sphere of the private life, because it also applies to circumstances covering other areas of the life of the party (participant) of the proceedings, who is a close relative of the witness (e.g. business, relations between neighbours). However, in terms of cases in which the facts cover the sphere of private and family life, it is obvious that next to such values like loyalty to a family member, an essential role can play also the problem of disclosure of facts from this life which are common for witnesses and parties (participant) of the proceedings.

In accordance with Art. 261 § 1 CCP nobody has the right to refuse to testify as a witness, with the exception of spouses of the parties, their ascendants, descendants and siblings, as well as in-laws in the same line or degree, and those remaining in adrogation relations with the parties. The decision to exercise the right to refuse to testify belongs to the person entitled to these powers even if the person has not attained the age of 18 in the date of the hearing [4]. In this case, the court has a duty to explain in a manner accessible to a minor, what is the right to refuse to testify. Prior to the examination of the witness, he or she should be instructed by the President to both his rights, i.e. the right to refuse to testify and the right to refuse to answer the question (Art. 266 § 1 CCP). Failure to comply with this obligation repeals the punishment for false testimony [5]. At the same time not informing the witness of his right to refuse to testify is an procedural infringement which may affect the outcome of the case and this circumstance might be a reason for appeal (subject to the provisions of Art. 162 CCP). A witness who has already testified may still exercise the right to refuse to testify. In that case, the court should ignore this evidence and derogate from determining facts on the basis of this testimony. Granting the right to refuse to testify to a person who is not entitled to such right may also become a reason for appeal.

When it comes to the spouse of the party, this term takes into account all the people who are joined in marriage at the time of the testimony, even if the marriage is burdened with an obstacle (e.g. bigamous marriage). This issue is not subject to an independent evaluation of the court, because it should be based on civil status, or on judgments regarding this marriage. Ascendants are parents, grandparents, great-grandparents and so on. Descendants are children, grandchildren, great-grandchildren and so on. Siblings are brothers and sisters, including half and in-laws are relatives of the other spouse. Adrogation is a legal relationship established based on provisions of Art. 114 et seq. of the Family and Guardianship Code [6] with particular emphasis on Art. 121 and 124 CCP concerning the legal relationship between the adopter and the adoptee and their relatives.

As indicated in the literature in the case in which there is a joint participation other than uniform, the right to refuse to testify is entitled to the witness only as to the facts concerning the participant to which the witness is in consanguinity, affinity or adrogation specified to in Art. 261 § 1 CCP. The witness has however the right to refuse to testify as to any facts, without limitation, when the above relation with the uniform joint participant occurs in the case [7].

Due to the fact that the basis of this law are the emotions, experiences and beliefs of the witness, and especially the essence of his mental and emotional relationship with a party, the right to refuse to testify is neither limited in time, nor it is contingent upon the legal relationship between the witness and the party (provided that the relationship indicated in Art. 261 § 1 CCP ever existed). Consequently, the right to refuse to testify continues after termination of marriage or termination of adoption. However, the right to refuse to testify cannot be interpreted in a broadened way, and therefore this right is not entitled to the people who are actually in cohabitation with the party (in concubinage, in partnership).

Declaration of refusal to testify may be submitted in any form, prior to questioning the witness. It should include an indication of the reasons for refusal, which are subject to verification by the judicial body. However, the witness is not obliged to motivate specific reasons why he wants to exercise his right to refuse to testify. For unjustified refusal to testify the witness can face the sanction of a fine and arrest (Art. 276 CCP). Statement on the exercise of the right to refuse to testify can be revoked by a witness, but only up to the moment of submission of his testimony. After the hearing the right to refuse to testify expires, unless the witness, prior to testimony, was not informed about this right.

It is worth noting that this right is not absolute, because the legislature recognizes the need to protect other human rights – the right to know the origins, as well as the right to remain married or not. Therefore, the process resolution in an appropriate range limits the right to refuse to testify in cases that involve this kind of matter, in which relatives usually have a broader knowledge than others, which is crucial for the accuracy of the court's decision. As a consequence, the refusal to testify is not admissible in matters of status law, except in cases of divorce. In this case, it concerns the establishment or changes in civil status of a person resulting from birth, marriage, and adrogation. On the basis of the civil proceedings this is primarily about the proceedings in matrimonial matters (except in cases of separation, which does not affect the civil status of the spouse) and the proceedings in the cases of the relationships between parents and children. On the other hand, in non-trial proceedings it concerns matters of adrogation and a case of pronouncing a person

dead and declaration of death. Cases of divorce have been removed from this catalogue by the legislature probably due to their often conflicting course, which affects destructively the family bonds, especially if family members through their testimony would have to stand on the side of one of the spouses.

It is worth noting that it is the court's misconduct to state that the right to refuse to testify exercised by a relative means that the person had information indicating that an accident happened due to the fault of the plaintiff. The reasons for refusal of testify may vary, and exercising this right means that the information that the witness has are excluded from the evidence of the case, but this does not entitle to submission of petitions which could be unfavorable to the party which requested calling the witness [8]. A different approach would make this right illusory, because the witness would exercise it, knowing that it can be treated as a disadvantage for one party.

3. The right to refuse to answer particular questions

The fact that a person entitled to refuse to testify, according to Art. 261 § 1 CCP, did not exercise their law does not exclude the right to evade answering the question in the event of the conditions laid down in Art. 261 § 2 CCP. Under this provision, a witness may refuse to answer the question, if the testimony could expose them or their relatives for criminal liability, disgrace or serious and immediate damage to property, or if the testimony would be combined with a substantial violation of professional secrecy. The right to refuse to answer particular questions relates to the circumstances surrounding the witnesses or their close relatives, and those people are the ones that have been mentioned in Art. 261 § 1 CCP.

Narrowing the analysis only to the conditions relating to the private sphere, it is important mention the issues of criminal responsibility, disgrace and some cases of property damage. The threat for criminal responsibility must be real, and therefore the right to refuse does not apply, e.g. if the crime is barred by legal limitation. The doctrine also indicates that the right to refuse to answer the question is not excluded by the fact that the crime is one of the crimes listed in the Amnesty Act [9]. This right also does not apply to disciplinary responsibility or of a similar nature, e.g. by the provisions of the labor law. It should be noted that the risk of facing criminal prosecution, as well as simplification of the prosecution itself is enough. There is no need for that danger to stem from the fact testified by a witness. It is enough that it can stem from concluding from this fact [10, p. 639]. Similarly, the property damage should be real, and not only occur in a purely hypothetical form. In assessing this condition one should particularly pay special attention to the aspect of "severity", which has a relative character depending on the financial position and income of the person to whom these circumstances apply. In contrast, the concept of disgrace refers to a situation where the specific behaviour of a person, e.g. morally reprehensible, meets with a negative assessment of the environment in which the person lives, works, etc. These circumstances are assessed by the court, which should take into account the specific characteristics of the environment and norms of behaviour existing there.

The specific situation relating to the sphere of privacy is the cleric's right to refuse to answer to particular questions about fact entrusted to him in confession. In relation to the witness, this problem will be relevant when the facts known by a cleric refer not only to the parties but also to the element of intimate or private life of another witness (e.g. in the case of adultery). The literature mentions that if the seal of the confessional is supposed to become the basis for refusal to answers the questions, the following conditions must occur:

a) it must represent a legally recognized religion in Poland, i.e. acting in accordance with the law; this recognition may take the form of a law or act of the registration by the Minister of Internal Affairs;

b) a church or religious association represented by a cleric must include the category of clergy; this issue must be settled by the internal law of such a religious association (its canon law);

c) witnesses claiming to be a cleric must document their status in the church or religious association;

d) religion represented by a witness must use a confession as a sacrament; it has to be also "auricular" confession and not e.g. a general confession or other form of contact of the penitent with the clergy; this issue will be solved by the court, while getting acquainted with the internal law of the church or religious organization [11].

However, it is important to note that the lack of unequivocal understanding of the definition "cleric" and "confession" in Polish law provides no guarantee as to the scope and nature of the information eligible for protection. The literature suggests that this may have far-reaching consequences: it cannot be ruled out that it will not cause reluctance to confidential communication of the penitent with the clergy or even its total abandonment. In relations of this type it is very important for the penitent to believe that information communicated in confidence will not be disclosed. In the case of passing the information on religious grounds in addition to a sense of betrayal also further element of the infringement of religious freedom would take place [12, p. 67]. In the context of these considerations also of particular importance are situations when under a confession party or a third person entrusts the cleric information of the intimate nature, or at least – known only to a very small circle of people known by the party (participant) of the proceedings or a third person who is the witness next to the cleric.

It is worth noting that if a cleric breaks the secret confession through non-use of the right to refuse to answer particular questions, this does not produce any negative consequences on the grounds of the civil procedural law, the cleric, on the other hand, may face the canonical responsibility, e.g. priest of the Catholic Church will be, in this case, a subject of excommunication imposed on him by law (canon 1388 § 1 of the Code of Canon Law). Thus, if that person does not

benefit from the protection of secret confession, it may not only jeopardize the privacy of the party (participant) of the proceedings, but also enter the privacy of third parties (including other persons who can obtain the procedural status of the witness due to maintaining certain relationships with the party). This is particularly true when a former priest testifies, who due to his departure from the religious community, has decided not to respect its internal rules.

Therefore de legeferenda should be proposed introduction not only the cleric's right to refuse to answer particular questions, but an absolute prohibition on taking of the testimony of a cleric as to the facts, which he learned as part of confession. Consequently, it must be concluded that it would be appropriate to introduce structures to protect the secret confession, such as currently exists under the provisions of Art. 259 and 2591 CCP, which excludes the possibility of witnessing to persons who are required to protect classified information and protect the confidentiality of mediation. In this way the penitent (and others whose lives may relate to the facts revealed by the confession), would be secured regardless of the fate of the confessor and the evolution of his worldview. On the other hand, it is obvious that the penitent may at any time disclose information that he/she entrusted to the priest during the confession, as he/she decides on their privacy or publicity. However, this does not exempt a cleric from the obligation of secrecy of confession, because a different approach would go against the essence of the internal law of churches and religious associations that treat confession as a sacrament.

4. Conclusions

Those two rights – to refuse to testify and refuse to answer particular questions will form the backbone of the witness protection also in the sphere of intimacy and privacy. On a side note, it is worth mentioning that witnesses of a testament, who did not confirm the oral testament in writing, are called by the court for a hearing in order to confirm the contents of the testament. For the procedure of the hearing of witnesses of a testament the provisions on the proof of the witnesses in the proceedings are in use, with a difference that the witnesses of the testament cannot refuse to testify or answer the question, nor can they be exempted from the oath (Art. 662 CCP).

However, these rights are not the only instruments protecting the privacy of the witness, because, in specific cases, he/she can also get protection from the court. According to the Art. 153 § 1 CCP the court ex officio orders the holding of the whole hearing or any part of it in camera, if a public hearing of the case threatens public order or morality or if it may disclose circumstances which are under the protection of classified information. Thus, if the witness testifies as to the circumstances that threaten morality, while still falling within the private sphere of the witness, the court may take advantage of the right to conduct the hearing in camera. However, it should be stressed that in such a situation the witnesses themselves are not entitled to submit an appropriate petition, and this right lies only with the party within the framework defined by process resolution. Pursuant to Art. 153 § 3 CCP the court may also order the holding of a hearing or part of it behind closed doors at the request of a party, if the given reasons are reasonable, or if the details of family life are debated.

Similar importance in matrimonial matters has a construction introduced by the legislature in Art. 427 CCP, according to which the hearings are held behind closed doors unless both parties request a public hearing of the case, and the court decides that the evidence does not threaten morality. Examining of this circumstance and evaluation by the court may take place only after proper presentation by the parties of the facts which are going to be disclosed during the proceedings. It is rightly raised by the doctrine that all derogations from the principle of transparency permitted by the Code of Civil Procedure must be applied with caution [13, p. 175]. From the perspective of a witness the solution introduced in this provision is so imperfect that, in the event of joint petition of the parties and the positive decision of the court, the facts of the private life of the witness may be disclosed in the course of open evidence proceedings.

Thus, the solutions relating to the protection of privacy of the witness can be classified as those that are dependent on the will of the witness, and those that are determined by the actions of the court or by the petitions of the party (parties). In the latter case, the real need for protection of privacy of the witness will not always be met, which may raise doubts as to its legitimacy. However, one should assess differently those situations in which the protection of this sphere of life of the witness is limited due to the need to protect other values of comparable, if not greater importance, such as e.g. the right to know own identity. In these.

instances, the legislature intended to achieve an appropriate balance between the goods protected in civil proceedings and this must be regarded as accurate.

LIST OF REFERENCES

1. B. Banaszak, Konstytucja Rzeczypospolitej Polskiej. Komentarz, Warszawa 2012.
2. A. Kopff, Ochrona sfery życia prywatnego jednostki w świetle doktryny i orzecznictwa, Zeszyty Naukowe Uniwersytetu Jagiellońskiego 1982, No. 100.
3. Resolution of 17 November 1964 – the Code of Civil Procedure, Dz.U. (Journal of Law) of 2014, item 101, as amended.
4. Resolution of the Supreme Court of 20 December 1985, VI KZP 28/85, OSPiKA 1986, No. 11-12, item 232.
5. Judgment of the Supreme Court of 3 June 2002, III KKN 342/99, Prok. i Pr. 2003, No. 5, item 2.
6. Resolution of 25 February 1964 – the Family and Guardianship Code, Dz.U. (Journal of Law) of 2015, item 538, as amended.
7. E. Rudkowska-Ząbczyk, Komentarz do art. 261 k.p.c. [in:] Kodeks postępowania cywilnego. Komentarz, E. Marszałkowska-Krześ (ed.), Legalis 2015.

8. Judgment of the Supreme Court of 26 October 1971, I CR 446/71, BSN 1972, No. 2, item 27.
9. K. Piasecki, Komentarz do art. 261 k.p.c. [in:] Kodeks postępowania cywilnego. Komentarz, T. 1, K. Piasecki, A Marciniak (ed.), Warszawa 2014, Legalis.
10. L. Peiper, Komentarz do Kodeksu postępowania cywilnego i przepisów wprowadzających Kodeks postępowania cywilnego, (part I), t. I (Art. 1-392), Kraków 1934.
11. K. Knoppek, Komentarz do art. 261 Kodeksu postępowania cywilnego, LEX 2014.
12. M. Jurzyk, Ochrona spowiedzi w postępowaniu dowodowym a prawa penitenta i duchownego, Radca Prawny 2004, No. 2, LEX 2014.
13. A. Góra-Błaszczykowska, Zasady postępowania dowodowego, [in:] Dowody w postępowaniu cywilnym, Ł. Błaszczak, K. Markiewicz, E. Rudkowska-Ząbczyk (red.) Warszawa 2010.

Флага-Геружинська Кінга Андріївна

ЗАХИСТ КОНФІДЕНЦІЙНОСТІ СВІДКА В ПОРЯДКУ ЦИВІЛЬНОГО СУДОЧИНСТВА – ОКРЕМІ ПИТАННЯ

Захист приватного життя осіб, що беруть участь у різних процесуальних статусах в порядку цивільного судочинства є однією з основних проблем, особливо в контексті принципу прозорості. У цій статті автор досліджує два основних обмеження щодо показань свідків, як одного із виду доказів – право відмовитися від дачі показань і право відмовитися відповідати на конкретні запитання, з точки зору їх використання для захисту приватного життя свідка. Досліджуються також інструменти, що доступні суду і сторонам, суть яких полягає в обмеженні відкритості судового розгляду у відповідних випадках. Деякі з цих рішень можуть також служити для захисту приватного життя осіб, що беруть участь в судовому засіданні.

Ключові слова: *показання свідків як докази, захист приватного життя, використання доказів.*

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ЗАЩИТА КОНФИДЕНЦИАЛЬНОСТИ СВИДЕТЕЛЯ В ПОРЯДКЕ ГРАЖДАНСКОГО СУДОПРОИЗВОДСТВА – ОТДЕЛЬНЫЕ ВОПРОСЫ

Защита частной жизни лиц, которые принимают участие в разных процессуальных статусах в гражданском судопроизводстве является одной из основних проблем, особенно, в контексте принципа прозрачности. В этой статье автор исследует два основних ограничения относительно показаний свидетелей как одного из видов доказательств: право отказаться от дачи показаний и право отказаться отвечать на конкретние вопросы, с точки зрения их использования для защиты частной жизни свидетеля. Исследуются также инструменты доступные суду и сторонам, суть которых состоит в ограничение открытости судебного рассмотрения в определенных случаях. Некоторые из этих решений, могут также служить для защиты частной жизни лиц, которые участвуют в судебном заседании.

Ключевые слова: *показания свидетелей как доказательства, защита часной жизни, использование доказательств.*