THE COMMUNICATIVE ASPECTS OF THE SETTLEMENTS OF THE PARENT – CHILD CONTACTS AFTER THE DIVORCE (POLISH CASE-LAW AND THE INDICATION TO ECHR CASE-LAW)

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Abstract. The inspiration for the subsequent consideration is a strong conviction, that courts mean much more in the modern society, than just an arbiter in the disputes. They are role models in so many ways: they make legally desired standards of behavior, they give the proper meaning to the legal institutions by communicating their correct functioning, they verify in the practice the complexity and clarity of legal provisions and by its judges they can create the modern authorities to follow. There is a strong link between the role, that the domestic courts play (or should play) in the law-abiding state, and the impact they put into the society and its values, shaping the views for the young generation, through their consistent attitude in jurisprudence.

Authors analyze the chosen judgments of the domestic family courts, looking for the correct legal vision of the parental authority in Polish law in the first place and for the optimal standard of exercising it by parents in practice, i.a. after the divorce. The analysis is supposed to be the part of more general consideration according to the judicial view of the family as the basic unit of society and its functioning after any kind of breakup. Authors further examine, to what extent such model of regulation in the matter fulfils the general requirements of international and European law. Those considerations have two main goals: to investigate the contribution of Polish family courts into making international standard of parental authority, and to indicate what kind of support those courts can offer to the international society in this field.

Keywords: parental authority, family law, rights of children

INTRODUCTION

To communicate law comprehensively to its recipients and to reinforce the values protected in the society and expressed in the legal standards is one of the most important tasks of the creation of an independent and effective judiciary system. Any statement of the court can be and supposed to be analyzed in this context. As rightfully states J. Osiejewicz: *“The process of learning to respond to direct and indirect instructions begins already in early childhood. During the socialization period, various activities related to responding to instructions are developed and strengthened. Behaviors associated with the adoption of instructions change in age and professional context [...]”* (J. Osiejewicz, 2020).

In most of the cases the divorce of parents means for the children not only the life changing family breakdown, but also the collapse of the vision of family in general including the vision of their future family. From this perspective the importance of the way, in which the court will decide about the details of exercising the parental authority, in which the court will find the fair balance between that, what the parents should give and that what the children should have to take also when the family is tear apart, having in mind the very best interest of the child, cannot be overestimated.

The considerations of Authors have two main goals: to investigate, how the Polish family courts implement international standard of parental authority by applying the Polish law in the matter and to indicate what kind of support those courts can offer to the international society in this field. Authors analyze the chosen judgments of the domestic family courts, looking for the correct legal vision of the parental authority in Polish law in the first place, for the definition and the component factors of the institution of parental authority and for the optimal standard of exercising it by parents in practice, i.a. after the divorce. The analysis is the part of more general consideration according to the judicial view of the family as the basic unit of society and its functioning after any kind of breakup. Authors further examine, to what extend Polish model of regulation fulfils the general requirements of international and European law in the matter with special regard for the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome 4 Nov. 1950).

MATERIALS AND METHODS

According to Article 48 Section 1 of the Constitution of the Republic of Poland, parents shall have the right to bring up their children in accordance with their own convictions. Pursuant to Article 48 Section 2 of the Constitution, limitation or deprivation of parental rights may be effected only in the instances specified by statute and only on the basis of a final court judgment. Detailed regulations are stipulated in the statute of 25 February 1964 Polish Family and Guardianship Code; FGC (Kodeks Rodzinny i Opiekuńczy; KRO).

The main principle is that a minor child remains under parental authority until the age of majority (Article 92 FGC), which is held, as a rule, by both parents. Pursuant to the Article 93 § 1 FGC, both parents have parental authority. This means that each of the parents is the subject of parental authority. In accordance with the content of Article 94 § 1 FGC, if one of the parents is dead or does not have full legal capacity, parental authority is vested in

the other parent. The same applies when one of the parents is deprived of parental authority or when his parental authority is suspended. According to Article 94 § 3 FGC, if neither of the parents has parental authority or if the parents are unknown, custody is established for the child.

FGC does not contain a definition of parental authority. An indication for the interpretation of this provision may be precisely Article 95 § 1 FGC (Wierciński, 2014). It follows from the wording of Article 95 § 1 FGC that parental authority includes, in particular, the obligation and right of the parents to exercise custody of the person and property of the child and to raise the child, with respect for its dignity and rights. It should be emphasized that the legislator used the phrase "in particular" (Jędrejek, 2019). Article 95 § 1 FGC does not contain enumerative list of all components of parental authority. According to Article 96 § 1 FGC, the parents raise the child under their parental authority and lead the child. They are obliged to take care of the physical and spiritual development of the child and to prepare it adequately to work for the good of society according to its talents (Jędrejek, 2019; Stępień, 2019).

The analysis of above regulations leads to the conclusion that the general scope of parental authority is determined by the regulations of Article 95 FGC and Article 96 FGC (Jędrejek, 2019). Custody of the child includes in particular: raising the child, leading the child, providing the child appropriate living conditions and the obligation to care for the health and safety of the child. The raising of the child consists of: care for its proper mental and physical development; attention to developing abilities and talents; providing the child with an appropriate level of knowledge according to his abilities and predispositions. Moreover, the raising of the child includes caring for its fulfillment of compulsory education and taking into account the need to provide appropriate assistance in order to obtain satisfactory learning results by the child. Parents therefore decide on all educational matters related to the child, including, for example, secular and religious upbringing, including the choice of religion, shaping the rules of ethics and character of the child, diligence, conscientiousness, etc. It should be noted however, that according to the European Court of Human Rights' case – law, despite the strong conviction, that both parents should be able to direct their child's religious upbringing, the national courts should interpret the child's best interest in a way to restrict the exposure of the child to parental religious beliefs or practices in some circumstances like guarantying the child's future choice of religion, saving the physical integrity of the child, securing the child's contact and relationship with both parents, respecting the child's educational choices, and the child's relationship with both parents' religious community. The domestic courts should have a wide understanding of what benefits the child and should consider the cautious limitation in the parental teaching of their minority beliefs (see more: *Dogru v. France*, No. 27058/05, 4 December 2008, ECtHR; *Kervanci v. France*, No. 31645/04, 4 December 2008, *Grzelak v. Poland*, No 7710/02, 15 June 2010). As also indicated above, the preparation of a child for social life is equally important. Proper preparation of the child for future work may also include higher education, if its talents, ambitions and perseverance are sufficient to not only begin, but also continue and successfully complete the studies (Jędrejek, 2019; Trybulska-Skoczelaś, 2014; Seremak, 2021; Kucwaj, 2010).

It should be emphasized that the analysis of the proper performance of obligations under Article 96 FGC cannot be done automatically. The manner of their implementation, including the obligation to prepare for the profession, depends on the specific situation concerning the child. The duty to provide the child with necessary medical care is encompassed in the obligation of care for the physical development of the child (Article 96 § 1 FGC) (Jędrejek, 2019; Ciepła, 2011; Stępień, 2019).

The sphere of child management includes factual and legal actions such as: determination of the place of stay, temporarily entrusting the child to another person, choosing schools, choosing extracurricular activities, control of spending free time, control of access to information, etc. It is also necessary to protect the child from bad environmental influences, drug addiction, pedophilia, etc (Jędrejek, 2019; Trybulska-Skoczelas, 2014).

The most important rule is the clause which refers to the best interests of the child (Article 95 § 3 FGC). It is fundamental legal principle in family law when making decisions regarding the child. According to Article 95 § 3 FGC, parental authority should be exercised as required by the best interests of the child and the social interest.

Custody of the child's property is regulated primarily in Article 101 FGC. Pursuant to Article 101 § 1 FGC, the parents are obliged to exercise due diligence in managing the property of the child under their parental authority. Custody of the child's property includes: management of the property of the child, disposing of income from this property, settlement with property management, control of the financial situation of the child, taking actions to prevent any irregularities in the management board performed by other persons. It is worth noting that the management of the property of the child consists of factual and legal administration, and the right to represent the child is inextricably linked with it. Pursuant to Article 101 § 3 FGC, parents may not, without the consent of the guardianship court, perform actions exceeding the scope of ordinary management or consent to such actions by the child. The purpose of Article 101 § 3 FGC is to limit ability of the parents to act to the detriment of the child (Jędrejek, 2019; Sokołowski, 2013; Trybulska-Skoczelas, 2014; Romanow, 2021).

Art. 96 FGC expresses the principle of personal exercise of parental authority by the parents. Their duty to take care of the child and his property should be performed by them personally. The authority is exercised by parents on an exclusive basis, which means that no one can take care of them in this regard. It should be emphasized that parental authority is an inalienable and non-hereditary right. It may happen that due to various circumstances the exercise of parental authority will be entrusted to one of them without depriving the other parent of parental rights (Jędrejek, 2019; Supreme Court judgement 4 August 1999, II CKN 601/98).

The implementation of the above obligations of parents should be provided equally. This means that parents cannot consider certain responsibilities more important than others that will be neglected. There is no hierarchy of rights and obligations that are components of parental authority. The breach of any obligation constitutes a breach of parental authority. Therefore, it should be emphasized that the interference of the court with parental authority takes place when this authority is not properly exercised. What is more, the interference of the court with parental authority has to take place in divorce cases and in separation cases (Jędrejek, 2019; Trybulska-Skoczelas, 2014).

According to Article 58 § 1 FGC, in a divorce judgment, the court decides on parental authority over a joint minor child of both spouses and on contacts between parents and the child. The court takes into account the agreement written by the spouses on the manner of exercising parental responsibility and maintaining contact with the child after divorce, if it is in the best interests of the child. Article 58 § 1a FGC states as follows: *"In the absence of an agreement referred to in § 1, the court, taking into account the right of the child to be brought up by both parents, decides how to exercise parental authority jointly and maintain contact with the child after divorce. The court may entrust the exercise of parental authority to one of the parents, limiting the parental authority of the other to specific duties and rights in relation to the child, if it is in the best interest of the child"*.

Pursuant to Article 61 (3) § 1 FGC, the provisions of Article 57 FGC and Article 58 FGC apply to separation. Legal separation is an alternative for spouses who, for various reasons, do not want a divorce. The effects of separation, apart from the termination of marriage, are similar to those of divorce. According to Article 61 (6) § 1 FGC, at the joint request of the spouses, the court will abolish the separation. The unanimous request of the spouses is binding on the court, and the rationality of their decisions is not subject to control. The court only examines whether the will to end the separation was consciously and freely expressed (Sylwestrzak, 2020). Pursuant to Article 61 (6) § 3 FGC, when abolishing the separation, the court shall decide on parental authority over the joint minor child of the spouses.

The decision on parental authority lies with the divorce court and the guardianship court. There is no doubt that in the course of a divorce or separation case, the court hearing these cases takes over the functions of the guardianship court in terms of parental authority (Supreme Court resolution 11 April 2019, III CZP 105/18).

As long as the legislator regulated in Article 95 § 1 FGC the content of parental authority, Article 97 § 1 FGC refers to its performance (Jędrejek, 2019). According to Article 97 § 1 FGC, if both parents have parental authority, each of them is obliged and entitled to exercise it. The legislator granted parents with parental authority the right and obligation to exercise it independently. The wording of this provision shows that each of the parents may independently take actions relating to the person and property of the child, including actions on its behalf with other persons (Trybulska-Skoczelas, 2014).

According to Article 97 § 2 FGC, the parents decide together on the essential matters of the child. These matters are exceptions to the principle included in Article 97 § 1 FGC. The scope of important matters of the child can be divided into two groups of cases: those which are determined by their general nature and matters important due to their importance only in a given specific case (Sokołowski, 2013). Important matters of a child should be understood as both factual and legal actions. In these matters, parents should first of all work out an agreement. In the doctrine and jurisprudence it is assumed that these are matters related to, among others, change surname or first name of the child, choice of kindergarten, choice of school, choice of medical treatment (Trybulska-Skoczelas, 2014). For the matters referred to in Article 97 § 2 of FGC the jurisprudence also includes a change of citizenship by a child (Supreme Court judgement 6 November 1956, II CR 898/56). The decision on the place of stay of the child is a decision on an important family matter, too (Supreme Court resolution 23 Mai 2012, III CZP 21/12). Also, a departure of the child abroad to spend holidays

there requires the consent of both parents exercising parental authority (Supreme Court judgement 6 March 1985, III CRN 19/85). The case referred to in Article 97 § 2 FGC is, *inter alia*, the case for issuing a passport to the child. The decision on the participation in extracurricular activities of the child is a decision on an important family matter (Trybulska-Skoczelas, 2014).

Pursuant to Article 97 § 2 FGC, the parents decide together on the essential matters of the child, however, in the absence of an agreement between them the guardianship court decides. The issue is resolved by the guardianship court at the request of one of the parents. The ruling of the guardianship court on important matters of the child may take place only after the parents are allowed to submit statements, unless hearing them would be associated with excessive difficulties. The guardianship court should take steps to resolve the dispute amicably. When deciding on parental authority, the court should be guided primarily by the best interests of the child and the public interest, and not by the interests of one or both parents (Trybulska-Skoczelas, 2014; Ciepła, 2011; Jędrejek, 2019).

A breach by a parent of the obligation to jointly make decisions on the essential matters of the child may lead to judicial interference with parental authority under Article 109 FGC assuming that such behavior of the parent constitutes a threat to the welfare of the child. It may lead to depriving parental authority pursuant to Article 111 § 1 FGC when accepting such behavior as an abuse of parental authority (Trybulska-Skoczelas, 2014).

In Article 111 § 1 FGC the legislator indicated three premises justifying depriving parents or one of the parents of parental authority. The first premise is a permanent obstacle to the exercise of parental authority. The occurrence of a permanent obstacle constitutes the basis for the deprivation of parental authority. In the event of a temporary obstacle, there is a reason not for deprivation but for suspension of the exercise of parental authority (Article 110 FGC). The second premise depriving of parental authority is the abuse of parental authority, and the third one is gross neglect of obligations towards the child (Jędrejek, 2019). The assessment of behavior of the parents should also take into account the possibility of a negative impact on the upbringing process. In such a situation it is justified to deprive the parent of parental authority. Alcohol abuse, engaging in a criminal practice and evading the alimony obligations are sufficient reasons for depriving a child of parental authority pursuant to Article 111 § 1 FGC (Supreme Court judgement 10 Mai 2000, III CKN 775/00). It is worth noting that the deprivation of parental authority, although it is the most severe measure, does not have to be preceded by other “restrictive” ordinances (Supreme Court judgement 3 December 1998, II CKN 871/98).

Pursuant to Article 111 § 2 FGC, in the event of cessation of the cause, which was the basis for deprivation of parental authority the guardianship court may restore parental authority.

The guardianship court may, pursuant to Article 109 FGC, make any order which, in the given circumstances, is required by the best interests of the child, and thus – which is required for the proper spiritual, mental and physical development of the child. There is no doubt either in the jurisprudence or in the doctrine of the admissibility of issuing the following orders: ordering the parents to place the child in a hospital or sanatorium, prohibiting the discharge of the child from the hospital, expressing consent to perform the necessary surgery. In the case of the child who habitually consumes alcohol or other drugs leading to intoxication, the

court may order that the child to be placed in a psychiatric hospital or other appropriate treatment facility (Jędrejek, 2019).

Orders issued by the court in accordance with Article 109 FGC do not constitute reprisals against parents. Their sole purpose is to protect endangered welfare of the child. The issuing of orders is necessary in the event of improper exercise of parental authority. Such a measure is a warning to parents that they are not exercising their power correctly, which may lead to further restriction and, subsequently, to the deprivation of parental authority (Jędrejek, 2019; Supreme Court judgement 27 October 1997, III CKN 321/97).

In all matters relating to the person or property of the child, including matters relating to parental authority, the court is obliged to hear the child if its mental development, health and degree of maturity allow it. Moreover, the court is obliged to take into account, as far as possible, the reasonable wishes of the child (Article 576 § 2 Civil Procedure Code; CPC) (Jędrejek, 2019).

It follows from the wording of Article 97 § 2 FGC that “irrelevant” matters are handled by each of the parents. Naturally, parents should inform each other about them. However, in less important, especially current matters, each of the parents can and should act individually, although this cannot contradict the general arrangements already made. If one of the parents does not respect the rights of the other parent it is possible to enforce them to comply with these rights. However, due to the educational nature of parental authority, the basic sanction for failure to respect the rights of the other parent is restriction, and in gross cases even deprivation of parental authority (Jędrejek, 2019; Trybulska-Skoczelas, 2014).

In urgent matters, such as the health of a child, it should be assumed that each parent can exercise authority (Jędrejek, 2019).

The supplement to Article 95 § 1 FGC is Article 98 FGC which gives parents the right to represent their child. According to Article 98 § 1 FGC, the parents are the legal representatives of the child remaining under their parental authority. If the child remains under parental authority of both parents, each of them may act alone as the legal representative of the child. The statutory representation of parents referred to in Article 98 § 1 FGC covers the performance of substantive legal actions, actions before administrative organs and actions before courts (Trybulska-Skoczelas, 2014).

Pursuant to Article 66 CPC, a natural person without procedural capacity may take procedural steps only through a statutory representative. As indicated above, according to Article 98 § 1 FGC the parents are the legal representatives of the child under parental authority. Parents may therefore file claims in a trial on behalf of a child or motions in non-trial proceedings, and more broadly – take all procedural steps. Article 98 § 1 FGC introduces the principle of independent representation of the child by each of the parents. The provision of Article 97 FGC should not be understood that in essential matters relating to the child, the principle of independent representation of the child by each of the parents is excluded. One-person representation is also sufficient in important matters. The phrase “parents decide together” used in Article 97 § 2 FGC indicates that it is not about joint representation but about resolving a dispute regarding an important action concerning a child. However, the principle of one-person representation does not apply in the case of important matters of the child, if one of the parents has raised an objection (Jędrejek, 2019; Trybulska-Skoczelas, 2014).

In Article 98 § 2 FGC the legislator has included prohibitions regarding the representation of a child by parents. Pursuant to Article 98 FGC, the parents can always represent the child in court, unless it is a matter of legal transactions between children under their parental authority or between the child and one of the parents or their spouse. Also in matters other than those mentioned in Article 98 § 2 FGC, both procedural and non-trial, neither parent may represent a child if in a case in which parents and children act as parties or participants in the proceedings, a conflict of interests may arise between them. Then the interest of the child excludes representing by any of the parents (Jędrejek, 2019; Trybulska-Skoczelas, 2014; Stępień, 2019).

It follows from Article 98 § 2 FGC and Article 98 § 3 FGC that the exclusion of parental representation in proceedings should be assessed *ad casum* and accepted only when there is, even if only theoretically, the possibility of a conflict of interest. In any case in which parents and children are parties or participants, the court is obliged to investigate whether there is a hypothetical possibility of a conflict of interest between them. In such a situation neither parent can represent the child in court. The court hearing the given case may not reject the application, but is obliged to apply to the guardianship court for the appointment of a curator for the child (Article 99 FGC) (Jędrejek, 2019; Trybulska-Skoczelas, 2014).

It supposed to be noted also, that the European Convention on Human Rights (ECHR) contains just a few references *expressis verbis* to children, i.a. the right to respect for private and family life protected in Article 8 of the ECHR – have special meaning to children. According to the ECtHR jurisprudence the respect for family life is the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family. The recognition by ECtHR respect for family life under Article 8 of ECHR requires legal recognition of social and biological ties between parents and children. This has been made possible by applying the right of individual petition by children and parents as their representatives and has led to an increasing number of applications before the European Court of Human Rights.

The task of the curator is to perform procedural actions on behalf of and with effect for the child. Pursuant to Article 98 § 2 FGC, the curator representing the child is authorized to perform all actions related to the case, also in terms of appealing against a judgment and executing the judgment. In any event, the curator should be guided by the best interests of the child. The task of the curator is also to assist the court in collecting and assessing evidence from the point of view of the good of the child. Improper defense of the interests of the child by the curator does not justify the reopening of the proceedings, but may lead to liability for damages. If, in proceedings involving parents and a child, the child will not be represented by the curator, but by one of the parents, the proceedings will be null and void because the child is deprived of the ability to defend their rights (Article 379 Point 5 CPC) (Jędrejek, 2019). As indicated above, the clause which refers to the best interests of the child is fundamental legal principle in family law.

The analysis of Article 98 § 3 FGC in connection with Article 98 § 2 FGC leads to the conclusion that one of the parents may represent the child in the process of maintenance claimed from the other parent. The complainant is the child and the parent is the child's legal representative (Trybulska-Skoczelas, 2014).

CONCLUSIONS

The shape of parental authority regulation in Polish law seems to be optimal for the ensuring the child's best interests understood as a situation in which the child is brought up in a family in an atmosphere of love, peace, understanding and respecting its identity and in conditions that ensure its needs and personal development. The Polish courts express quite clearly, what is the content of the parental authority institution notwithstanding any shortcomings in the legal regulations. The relations between the provisions of Polish acts of law in the matter and the ECHR provisions are in fact incidental, because ECHR quite rarely refers to the children directly. However it should be noted, that in front of the ECtHR had place a few interesting cases, like *Zawadka v. Poland*, where both parents have been so deep in the mutual conflict, that they have been constantly refusing of any kind of cooperation between themselves despite the sake of their child. There is no doubt, that in the ECtHR's view the universal rule of the child's protection is to be guided by the best interest of the child in any circumstances – also in the conditions of family's conflicts. Because of that the lack of the strict obligation of the child's and its rights protection under the provisions of ECHR does not seem to be of such importance in practice.

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