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## Legal aspects of parent – child contact problems in Poland

### INTRODUCTION

Moving out of the house by one of the parents, resulting in lack of contact, is the most painful consequence of the end of adult's love for the child. All of this ultimately leads to depriving the child not only of the appropriate family model, but above all the correct image of the role of man and woman, since from that moment usually the child is raised only by one of them. It would seem obvious that a child needs contact with both parents or that this contact is a child's right guaranteed not only by Polish law, but also by international law – especially Convention on Contact concerning Children (2003)<sup>1</sup>, Convention on the rights of the child (1989)<sup>2</sup> or Convention on Human Rights and Fundamental Freedoms (1950)<sup>3</sup>.

The aim of this article is to indicate the role of the contact, its main features as well as problems, which occur while enforcing it<sup>4</sup>.

### I. CONTACT UNDER POLISH PROVISIONS

All rights and responsibilities of parents are regulated in the Act of 25 February 1964 Family and Guardianship Code (hereinafter referred to as FGC)<sup>5</sup>. Although the legal concept of contact was formulated before, the rule itself was introduced by an amendment to the Family and Guardianship Code of 6 November 2008<sup>6</sup>.

To begin with, it is worth mentioning that in general both legal parents acquire parental authority unless it has been restricted, limited, suspended or deprived. In those cases as well as in the situation when both parents have full parental authority,

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<sup>1</sup> Convention on Contact concerning Children, Treaty No. 192, Strasbourg, 15/05/2003, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/192>.

<sup>2</sup> Convention on the Rights of the Child, Resolution 44/25 of 20 November 1989, <http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>.

<sup>3</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Treaty No.005, Rome, 04/11/1950, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005>.

<sup>4</sup> The study is an attempt to synthetically discuss the most important problems of the doctoral thesis entitled: *Right and obligation of contact with a child*, J. Zajączkowska (ed.), Poznań 2018.

<sup>5</sup> Ustawa z 25.02.1964 r. – Kodeks rodzinny i opiekuńczy (Dz.U. z 2017 r. poz. 682).

<sup>6</sup> Ustawa z 6.11.2008 r. o zmianie ustawy – Kodeks rodzinny i opiekuńczy oraz niektórych innych ustaw (Dz.U. z 2008 r. Nr 220, poz. 1431 ze zm.).

but the child is residing permanently with one of them – contact guarantees that the relationship with the other continues. In accordance with Article 113 FGC: “Regardless of parental authority the parents and the child have the right and duty to stay in contact with each other”.

Next provisions show that the priority is given to general rule, which is the mutual consent between both parents who live apart. Only if they are not able to reach such an agreement the court will determine the way of maintaining the contact. In both situations the child’s best interest and child’s reasonable wishes are taken into account. This means that the court should hear the child in a separate room to have regard to the wishes and feelings of the child, considering the child’s maturity, mentality and understanding<sup>7</sup> (Article 216<sup>1</sup>, Article 586 of the Civil Procedure Code, hereinafter referred to as CPC)<sup>8</sup>. The source of this rule can be found in Polish Constitution, where according to Article 72 in the course of establishing the rights of a child the authorities shall consider and, insofar as possible, give priority to the views of the child<sup>9</sup>.

One of the essential elements of a parent and child relations are: parental authority, contact with a child and maintenance. According to Polish family law these rights and duties are separate and therefore – regulated in different branches of FGC. Branch 3 in the Chapter II (oddział 3, rozdział II) is devoted to contact with a child. According to Article 113 of this Code contact refers to face-to-face visits or other forms of indirect communication. The direct contact includes visiting the child, meeting with a child, taking the child outside its place of residence and direct communication (i.e. contact in prison). On the other hand the indirect contact includes correspondence and distance communication, but as the provision is written in the form of an open catalogue it only lists the most significant forms, so that all other means of maintaining contact could be awarded.

The natural and expected forms are the direct ones, the indirect contact should be ordered only if direct contact is not in the child’s best interests or as an adjunct to direct one<sup>10</sup>. The diversity of the forms is important also bearing in mind that the child needs time for his passions and hobbies as much as for meeting with friends, especially while growing older. The form of contact should differ depending on the age of the child, but also on the day of the week – for instance meetings after school should not disrupt in homework. One of the most delicate issues is whether a court should prohibit spending time with a parent and his or her new partner if this upsets a child (or more commonly – mother, which effects the child’s feelings, in many cases making this child feel guilty of having contact with the father and his new partner). It seems that in those situations the behaviour of the non-resident parent should be balanced, which usually should mean avoiding third person to be a part of the parent-child meeting. The child’s welfare is undoubtedly paramount. On the other hand, it may be indicated that the right to contact also includes the

<sup>7</sup> J. Zajączkowska, *Głos dziecka na wokandzie – o instytucji wysłuchania dziecka*, „Palestra” 2013, No. 58(7–8), p. 56 et seq.

<sup>8</sup> Ustawa z 17.11.1964 r. – Kodeks postępowania cywilnego (Dz.U. z 2018 r. poz. 155 ze zm.).

<sup>9</sup> The Constitution of the Republic of Poland of 2<sup>nd</sup> April 1997, published in: *Dziennik Ustaw* No. 78, Item 483 with amendments.

<sup>10</sup> J. Mitchell, *Children act private law proceedings: a handbook*, Bristol 2012, p. 418.

power to decide what third parties may be present when exercising this right, but even then the child's welfare is the limit of this authorisation. Undoubtedly, the new relationship should be strengthened so, that the child does not have constantly contact with new partners<sup>11</sup>.

This is also the reason that whenever it is necessary for the best interests of the child, the court will limit the contact between parent and a child with different intensity. In particular the court may prohibit meeting with a child or taking the child outside his or her place of permanent residence. It is also possible that the contact will be limited by allowing the parent to meet the child only in the presence of the other parent guardian, probation officer or other person designated by the court. Commonly it is the other parent (usually the mother) who is observing such a meeting, which in my opinion negatively affects on maintaining relationship. When it is necessary for the child's welfare, the court can restrict contacts to specific ways to communicate at a distance or even prohibit the distance communication completely. Therefore, if maintaining contact seriously threatens well-being of the child or violates it, the court prohibits it obligatory (Article 113<sup>3</sup> FGC).

What is very important, the court can change a decision on contacts if required by the best interests of the child. This regulation allows the court to vary an order involving children almost at any time. Despite this it should be proven that there has been a change in circumstances also if this means a change in child's needs for example when the child is older and wants to spend some more time with friends this will lead to reducing the time of contact. On the other hand, it can also be increased – the court can change contact arrangements also when one of the parents is deliberately limiting the time provided in a court's decision. Naturally this will be adjusted only when such an increase is in child's best interests as this is always the paramount premise.

Moreover, the court may impose some obligations on parents while ruling on the contacts i.e. by directing them to the family therapy professionals or providing family assistance. The aim of Article 113<sup>4</sup> FGC is to help parents to maintain contact with a child. Such help includes consultations, counselling, but also assistance at improving the living and working conditions of family members. It is argued in Polish doctrine whether this assistance is a form of limitation of contact especially when there is a courts control established<sup>12</sup>. The educative function aims at helping parents to understand their duties, which in effect allows a child to grow up with regard to his best interests.

The provisions of the section devoted to contact with a child are applied accordingly to the contacts with siblings, grandparents, kin in the direct line as well as other persons, if they had custody for a longer period of time. According to Article 113<sup>6</sup> FGC the right and obligation of contact with other than parent relatives shall be treated respectively, in other meaning with less intensity. The doctrine distinguishes the division of those entitled to three groups, the first of which includes persons connected to the child with kinship, the second concerns the relation of

<sup>11</sup> A. Zempel, *Sorge- und Umgangsrecht nichtehelicher Kinder einschliesslich des Umgangsrechtes des biologischen Vaters*, München 2013, p. 118.

<sup>12</sup> T. Sokołowski, *Prawo rodzinne. Zarys wykładu*, Poznań 2010, p. 165; E. Trybulska-Skoczelas [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, J. Wierciński (ed.), Warszawa 2014, p. 773.

affinity, the third – the actual nature – exercising custody of the child for a long time<sup>13</sup>. The last group raised the most doubts in the literature of the subject. Already in the opinion of the amendment, it was proposed to add the criterion of the welfare of the child, because it did not specify the group of people and because of the expression indicating a longer period of custody<sup>14</sup>. It is important to say that if the rights of other people, as in the case of parents are the duty of the child, it would be too heavy load for the child to enforce it, therefore the court should adjudicate on such matters with caution<sup>15</sup>. In turn, helpful in determining the period of custody of persons mentioned in Article 113<sup>6</sup> FGC *in fine* is to compare the child's age with the time of care – then a year may be a longer period for example if the child is several months old<sup>16</sup>. In the doctrine, as examples of other people indicated in the catalogue, a babysitter is indicated, who for the first few years of the child's life was co-educating him<sup>17</sup>, genetic parents<sup>18</sup>, uncles, aunts and cousins<sup>19</sup>, in particular the siblings of parents of the child and godparents<sup>20</sup>. The right holder will also include a long-term parent's life partner, parent's relatives or neighbours<sup>21</sup>. The great-grandparents as they are not mentioned in the catalogue could also belong to the abovementioned group if they were in custody for some period of time<sup>22</sup>. By comparing, in Minnesota, great-grandparents are listed next to grandparents as entitled to contact the child if they lived with him for a period of at least 12 months, but also if the deceased parent of the child is their grandson<sup>23</sup>. There, it was also indicated that one of the conditions for other persons to have contact with a child is living together for a period of at least two years<sup>24</sup>. Leaving aside the issue of the omission of the great-grandparents by the Polish legislator, it seems that the lack of an indication of the exact or approximate period for qualifying those entitled to contact with the child should be assessed positively with the special protection that is the premise of the good of the child<sup>25</sup>.

The legislator using the abovementioned concept refers to the provisions regulating the child's contact with parents. It should be noted, however, that he granted protection in the sphere of these contacts rather than a right and obligation similar to that from Article 113 FGC. This is reflected in the location of the discussed provision at the end of Branch 3. Therefore, it is essential to define the intensity of the right and obligation in particular relations to describe the intent of the legislator.

<sup>13</sup> J. Gajda [in:] *Kodeks rodzinny i opiekuńczy*, K. Pietrzykowski (ed.), Warszawa 2015, p. 701.

<sup>14</sup> W. Stojanowska, *Opinia dotycząca rządowego projektu ustawy – o zmianie ustawy – Kodeks rodzinny i opiekuńczy oraz niektórych innych ustaw*, druk nr 1166 z 15.03.2007 r., Biuro Analiz Sejmowych, p. 3.

<sup>15</sup> W. Stojanowska, *Nowelizacja prawa rodzinnego na podstawie ustaw z 6 listopada 2008 i 10 czerwca 2010. Analiza. Wykładnia. Komentarz* [in:] W. Stojanowska, M. Kosek (eds.), Warszawa 2011, p. 292.

<sup>16</sup> J. Gajda [in:] *Kodeks...*, p. 701.

<sup>17</sup> M. Andrzejewski, *Prawo rodzinne*, Warszawa 2014, p. 188.

<sup>18</sup> J. Gajda [in:] *Kodeks...*, p. 701.

<sup>19</sup> T. Justyński, *Prawo do kontaktów z dzieckiem w prawie polskim i obcym*, Warszawa 2011, p. 100.

<sup>20</sup> T. Sokołowski [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, H. Dolecki, T. Sokołowski (eds.), Warszawa 2010, p. 676.

<sup>21</sup> T. Sokołowski [in:] *Kodeks...*, p. 676.

<sup>22</sup> T. Justyński, Who proposes an interpretation of Article 113<sup>6</sup> FGC in such a way that grandparents can also be located within the broadly understood category of "grandparents" in: *Prawo...*, p. 98.

<sup>23</sup> Section 257C.08 pkt 1 i 3 in 2016 Minnesota Statutes, on Internet: [www.revisor.leg.state.mn.us](http://www.revisor.leg.state.mn.us).

<sup>24</sup> Section 257C.08 pkt 4 in 2016 Minnesota Statutes, on Internet: [www.revisor.leg.state.mn.us](http://www.revisor.leg.state.mn.us).

<sup>25</sup> W. Stojanowska, *Nowelizacja...*, pp. 292–293; T. Justyński, *Prawo...*, p. 122.

Regarding other relatives, due to the importance of their relationship with a child – the assumption of a different strength of right and obligation of contact should be made. There is an undeniable hierarchy determined by the legislator in Article 113<sup>6</sup> FGC. Following this path the rights siblings enjoy are derivative of their parents' rights. Consequently, it is even possible to assume that this is the secondary natural character of this relationship because of its source – the parental bond.

Similar conclusions should be drawn with regard to grandparents, who, by decision of the legislator are in the third consecutive group of persons after parents and siblings. Their right, despite the undeniably socially established role, does not seem to be a sufficient basis for deriving natural-legal character from this relationship. The legislator seems to have created in Article 113<sup>6</sup> FGC a hierarchy of people entitled to contact with the child, indicating the order and thus the intensity of rights and obligations, which are weakened successively after parents. Accordingly, the lower intensification concerns the assessment of the degree granted by the legal provision, which also indicates the proper way of adjudication by the court. This conclusion is in line with the previous one, which emphasizes the priority importance for the child's development of contact with the parent, then with the siblings, then the grandparents and then with other persons.

## II. LEGAL POSTULATES

The provision that could be introduced refers to a substantive legal basis for suspension of contacts; paying attention to the fact that such a suspension is based on the procedural legal principle, which in my opinion, should lead to considering the introduction of a material legal basis. This suspension would indicate the temporality of not maintaining contacts with the momentary obstacle and the automatic return to unchanged relations. In practice, this would mean that the right to take the child away from parent's residence every other weekend would automatically be restored without having to be re-examined by the court. Naturally, the restoration of the former type of contact should be dictated by the compliance with the statutory prerequisites, and hence the best interests of the child.

In addition, it would be a neutral concept that does not endanger the child's good. In this context, there is a lack of a neutral institution associated with an obstacle of a more "technical" than emotional nature. In the field of family law, which affects disputes between parents, it is worth striving to neutralize the conflict, and the proposed suspension of contact could certainly serve this purpose. From a psychological point of view, the parent should not feel discomfort or embarrassment by a court ruling prohibiting him or her to contact the child. The restriction dictated by a non-culpable obstacle on the parent's side may cause irreversible effects. A decision limiting the right to mutual contact may both discourage a parent and a child from returning and maintaining an earlier relationship. In other words, the consequence of such a solution also on the psychological level may be weakening child's interest. The prospect of temporariness, together with the objectivity of the suspension would allow to avoid inherently simple, and possibly final, court decisions.

For this reason, it is also important to postulate the introduction of obligatory mediation preceding court proceedings in matters of contacts. It seems the best

solution to establish the forms of contact with a child as a content of the settlement. It is pointed out that obligatory referral to mediation could be another chance, along with the parental agreement, to develop a common position before the parents' conflict-based attitudes are strengthened<sup>26</sup>. In the USA (i.e. in California or North Carolina) mediation is obligatory in matters of parental authority and contact (*custody and parenting time*)<sup>27</sup>. This means that the parties must attend a mediation meeting prior to participating in court proceedings, and failure to comply with this obligation may be considered an insult to the court. It is worth adding that in the state of California the model of obligatory mediation was introduced already in 1981<sup>28</sup>. It seems that the identical nature of contacts matters under Polish law also justifies such a postulate.

The right to information is also unexpressed in the Polish law – especially information about the child, but also about the parent. Providing mutual information, especially to the parent about the child, serves to maintain the bond even when the two people share a long distance. The right to information is one of the three forms of contact in the Convention on contact concerning children<sup>29</sup>, on which Polish regulations were modeled. In her understanding, contact defined as any form of communication between a child and other people also means providing information about the child to those entitled to contact. The lack of distinction of a separate regulation of the right to information does not mean that such a right does not exist.

Firstly, due to the validity of the Convention on contact being an international act, and therefore pursuant to Article 87 para 1 of the Polish Constitution in connection with Article 91 para 1 and 2 it is a source of universally binding law, and after being published in the Journal of Laws it is part of the national legal order and is directly applicable.

Secondly, it is necessary to pay attention to the open catalogue of contact forms in Article 113 para 2 FGC. The problem is in a way crucial for the bond – both for its creation and maintenance. This applies to contact, for example, with a small and shy child, when it is much easier to have knowledge from the parent who is staying with him every day. Also in relation to the older child, adolescent, passing the period of the so-called youthful rebellion or biased to the non-resident parent – the information this parent has (e.g. about problems with learning or with peers at school) will help to alleviate the conflict or re-bond, despite separate living. Moreover, there is no threat of interference in resident parent's right, become the right to information does not entail the right to co-decide on important matters of the child<sup>30</sup>.

In summary, the right to information is a non-intrusive way to help maintain a closer relationship. By getting information on a regular basis, the parent knows

<sup>26</sup> A. Czerderecka, *Rozwód a rywalizacja o opiekę nad dziećmi*, Warszawa 2010, p. 50.

<sup>27</sup> M. Deis, *California's Answer: Mandatory Mediation of Child Custody and Visitation Disputes*, "Journal on dispute resolution" Ohio 1985, pp. 149–179.

<sup>28</sup> L. Edwards, *Comments on the Miller Commission Report: A California Perspective*, "Pace Law Review" 2007, No. 4, Vol. 27, pp. 627–676.

<sup>29</sup> Convention on Contact concerning Children, Strasbourg, 15/05/2003, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/192>.

<sup>30</sup> E. Trybulska-Skoczelas [in:] *Kodeks...*, p. 769.

the needs, worries and successes of his child and has current knowledge about the child's progress and scientific achievements, as well as his current state of health. Thanks to this, he is not "isolated" from upbringing and influence on the child.

### III. LEGAL NATURE OF THE CONTACT

Fundamental importance in the matter of the nature of contact is the relationship between contact and parental authority and the recognition that mutual contact is absolutely necessary for the proper exercise of parental authority. Not only these two spheres are intertwined and are permanently connected with each other, but above all it is impossible to exercise parental authority without contact (i.e. including education or help). In the case of a parent who exercises parental authority, it is not only artificial, but it is virtually unnecessary to separate an independent right to contact. Hence, one of the issues concerns the right and obligation to contact in a full family (that is the one where there has not yet been a breakdown). Putting aside abovementioned problem, it should be acknowledged that the right to contact exists in the form that is given by an Article 113 FGC.

#### 1. Contact as a right and obligation

Historically, contact was treated as a right of the parent. The previous idea of contact was rather about a child that was passively visited by a parent who was realizing his or her right to contact. Therefore, literally expressing the child's right in the provision confirms and emphasizes its subjectivity. The most important consequence of the discussed approach is the fact that the child can demand his contact (with the possibility of expressing and demanding to be heard).

Imposing the obligation with regard to parent is widely accepted, but in the case of a child, however, there was a fear that it would be forced, which in consequence may have the opposite effect being incompatible with the child's welfare<sup>31</sup>. As a result the best interest of the parent could be put above the best interest of a child, while the court shall take child welfare into account and give it priority over the parent welfare<sup>32</sup>. Due to the limited ability to meet its own needs a child must remain under the care of parents. Hence the requirement to implement the obligation of contact, even if it entails the risk of initially forcing the child, must be assumed as done in accordance with the best interests of this child. Therefore, it should be highlighted that keeping contact is both the right and obligation of parents and also children.

It suffices to justify by pointing to an example of compulsory schooling, which is associated with the necessity of forcing the child to fulfil it. Similarly in the case of the obligation to learn or to function in a society or peer group. The aforementioned examples are on the one hand the duties of the child, but on the other also the duties of the parents resulting from their parental authority such as directing the child to school, despite the reluctance he or she expresses for their colleagues

<sup>31</sup> W. Stojanowska, *Nowelizacja...*, p. 267.

<sup>32</sup> Wyrok Sądu Najwyższego z 25.08.1981 r., III CRN 155/81 (Supreme Court as of 25 August 1981, III CRN 155/81), LEX No. 503248.

or teachers – so even if this entails the necessity of forcing the child. The same conclusion comes from the analysis of the existence of the duty to protect the health of the child, with whom parents intervene in the freedom of the child, perhaps contrary to his will or decision, but consistent with his good.

Despite the polemic concerning the formulation of the obligation on the child's side, it is not the essence. The real sense of the obligation is not only in the formulation of a warrant, but also in making both parties aware of the fact that maintaining it is not a voluntary decision that can be renounced.

It seems that by introducing the obligation of contact by the legislator, the right of the child not to maintain it may not exist at the same time. If a child had no obligation, one would suppose that he had such a right. Meanwhile, just as the duty of obedience to parents has a protective function – it serves to ensure the child's safety, the obligation of contact imposed on the child is also regulated for his own good. Despite the fact that the child is able to articulate his needs and wants, he may not be fully aware of their long-term consequences: in this case weakening of the relationship with one of the parents.

The most important consequence of the discussed approach is the fact that the child can demand his contact. Strengthening for him will be the knowledge about his own right, in accordance with the possibility of expressing and demanding to be heard. A minor may not want to exercise his right of contact (for example under the influence of the other parent), however, granting this right literally may also help the child to ignore this type of pressure, remaining aware that it is a subjective right enjoyed by him independently from the opinion of a parent living with him<sup>33</sup>. At the same time, there is a reflection about the inability of the child to claim.

As was noted, although the existence of the child's right to contact does not raise doubts, in practice it is actually the parent who has the right to enforce it. In other words, the child's right to contact becomes in effect the right to contact of that parent<sup>34</sup>. Therefore, it is also easier for the other parent to defend his or her interests in demanding a child's right to contact.

The abovementioned remarks emphasize the specificity of the rights and obligations, taking into account above all the fact that the child has the right to contact, but rather reaches it within the family structure. Thus, the actual existence of the child's claim should be recognized, but it is peculiar, because it has a family-law nature. It should be assumed that the postulate to allow the child to raise his own claim in the proceedings concerning him, in particular to maintain contact – still remains valid<sup>35</sup>. This applies especially to the parent-child relationship, but also to the contact with siblings, and to a lesser extent to other persons indicated in Article 113<sup>6</sup> FGC.

Moreover, the right to contact implies a duty to allow it. It should be clearly formulated that there is an obligation to nurture a child's relationship with a parent who lives apart. This means that such parent's claim should correspond with the duty of the parent who lives with a child not to interfere with contact. If the

<sup>33</sup> T. Justyński, *Prawo...*, p. 80.

<sup>34</sup> F. Kelly, *Enforcing a parent-child relationship at all costs? Supervised access orders in the canadian courts*, „Osgoode Hall Law Journal” 2011, No. 49(2), pp. 305–306.

<sup>35</sup> M. Grudzińska, *Kontakty z dzieckiem. Sądowe ustalenie. Orzecznictwo. Wzory*, Warszawa 2000, pp. 15–16.



Polish legislator aims at shaping a certain model of behaviour that can be considered a model of the relationship to which one should strive after the break-up of the family, it is necessary to formulate corresponding duties. This view justifies one of the foremost educational and legal functions fulfilled by legal norms that gradually influence and change the behaviour of family members. This is related to the phenomenon of internalization of standards, and thus the process of persuading a norm that is its own standard of conduct<sup>36</sup>. Such axiological association (and thus compliance of protected external standards with internal values) results in permanent readiness to comply with the norms, and establish a pro-normative attitude<sup>37</sup>. It is only in its effect that norms are socialized, which does not apply to all of the applicable legal norms. Therefore persuasive actions are more important than the control repressive actions. Also provisions devoted to enabling the parent to contact a child should fulfil the propagating role instead of establishing the system of sanctions. Its task should be to spread the idea of a free, and not difficult, right to contact.

Therefore, this postulate should be put forward, so that the parent's claim corresponds also with the obligation of the other parent not to disrupt contact.

## 2. Contact as a natural right

Contact is a form and expression of closeness and it has a natural character resulting from the parental bond. It is available to parents and the child by nature itself, obtaining – in the model approach – a wide, almost unlimited shape. It means that by nature this contact is not limited. In this sense, the contact from Article 113 FGC is a provision that regulates the natural bond and parental relationship, not the one that establishes and grants this right.

The consequence of defining such character as natural is in my opinion the existence of a presumption of the right to contact as compatible with best interests of the child. I believe that it would be reasonable to conclude that the presumption of contact as a child's inherent right is in principle consistent with child's welfare. This results in the assumption that the parent who wants to limit this right should prove the reasons for it, not the parent who asked for granting it. This would prevent the litigation being spread on this background. However, the presumption does not apply to persons other than parents, for the sake of the protection of parental authority. In this aspect, the legislator has, moreover, formulated a provision referring to these people in an "appropriate" manner, and on this basis it should be concluded that the right and obligation assume minimum intensity in relation to other than parents people – according to Article 113<sup>6</sup> FGC.

If the law is natural, it is impossible to determine the moment of its completion, nor can it be said that it expires on the basis of a certain norm of family law. In this sense, it is an inalienable, innate right.

As E. Holewińska-Łapińska points out, as well as referring to the existence of the natural right rules – "irrespective of appealing to the law of nature, the right

<sup>36</sup> K. Pałeczki, *Prawoznawstwo – prawo w porządku społecznym*, Warszawa 2003, p. 58.

<sup>37</sup> K. Pałeczki, *Prawoznawstwo...*, p. 70.

of the child to meet parents, raise them and not separate from them (against their will), except in special circumstances, when it best serves the well-being of children, it is described in the Convention on the Rights of the Child”<sup>38</sup>. Therefore, if one also accepts that the right to contact has a natural character, the possibility of limiting it is in effect very limited.

In principle, the prospect of finding a normative basis for a norm of the natural character under Polish law is to refer to Article 30 of the Constitution. It has been assumed that dignity is an inalienable, natural right and in turn, from the well-established idea of dignity comes the right to learn about its origin. As it is emphasized, the biological identity of a human being and its dignity constitute an inseparable unity. The right to information about one’s roots as part of the right to identity has long been recognized as an international human right. Article 8 of the Convention of the Rights of the Child protects the right to preserve identity, including family relations, apart from unlawful interference, while Article 7 of this Convention establishes the right to know and to be raised by parents. This could be concluded as follows: “It can be now claimed with some confidence from the available evidence that there is a psychological need in all people, manifest principally among those who grow up away from their original families, to know about their background, their genealogy, and their personal history if they are grow up feeling complete and whole”<sup>39</sup>.

Therefore, it can be assumed that since contact serves mutual knowledge, it is also possible to derive the right to this contact from the right to know one’s identity. In such a shape it would be a natural law, however, also having its normative source found in the Constitution.

Then, because of the legal nature mentioned above, it can also be assumed that the right and obligation of contact do not end because, since it results from the parental bond, it lasts as long as this bond. At the same time, as the legislator did not determine the ending moment of the right and obligation of contact, it is justified to adopt its continuation throughout the whole life. Similarly to Article 87 FGC according to which parents and children are required to mutual respect and support. In Polish doctrine it was found that those duties last as long as parental bond<sup>40</sup>. The idea that the contact could have no ending moment is analogical to the lasting obligation of support and it is also a consequence of a different shaping of related to contact – parental authority. Article 92 FGC states that the child remains until the age of majority under parental authority. This means that the parental authority expires (usually at the age of 18 or 16 in case of married women – according to Article 10 of Civil Code<sup>41</sup> and Article 10 para 1 FGC) by the power of law regardless of the will of both sides to continue it. However, the claim for the right to contact ends when the child reaches the age of majority, from that moment the child can decide on contact with parents and other people on its own. This does not mean the expiry of the obligation and consequences in the form of

<sup>38</sup> E. Holewińska-Łapińska, *Orzeczenie o umieszczeniu małoletniego w rodzinie zastępczej*, „Prawo w Działaniu. Sprawy cywilne” 2008, No. 4, p. 18.

<sup>39</sup> J. Triseliotis, *Obtaining birth certificates* [in:] *Adoption*, P. Bean (ed.), London 1984, p. 38.

<sup>40</sup> A. Sylwestrzak, *Obowiązki dziecka wobec rodziców*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2001, No. 3, p. 61 and following; J. Gajda [in:] *Kodeks...*, p. 693.

<sup>41</sup> Ustawa z 23.04.1964 r. – Kodeks cywilny (Dz.U. z 2017 r. poz. 459 ze zm.).

family law sanctions (i.e. disinheritance – Article 1008 pt. 3 of Civil Code – in the case of non-engagement with a parent’s life by an adult child, especially the lack of contact)<sup>42</sup>. The mere unenforceability of rights and obligations after the age of 18 does not mean that they should not be exercised.

The right and obligation of contact occur with varying intensity according to parents and children. Firstly, on the parents’ side it is more their obligation, then – the right. On the other hand, on the child’s side it is to a greater extent the right, and with the aging of parents – the child’s duty. Therefore, the existence of a specific “variable relation” (rotational) of the parents’ and children’s right and duty could be considered, according to which it is usually more a right at first, and later a duty; this relationship “rotates” over the years.

Applying the age category of the parties, in the initial phase of the minor’s growth above all the principal is the parents’ obligation to contact. However, in the further phase of parents’ life, together with a decrease in duty on their side, it increases on the side of an adult child and grows proportionally to the aging of parents.

As elderly people, parents have the right to expect not only help but also the physical presence of offspring. It is not an equivalent in any way, which means that for the child’s obligation, the way in which the parents themselves complied with the obligation to contact him is irrelevant.

It can be assumed that this change of the right and duty takes place when the child reaches the age of majority. It is an age that is not tantamount to becoming independent (even though the legislator, without assuming this, maintains the parents’ maintenance obligation towards children), but it constitutes a certain boundary of entering into adulthood. For most parents, this age means parting with a child for the period of further education, which is why, especially during this stage, the child’s turnover may be noted with the entitlement to a stronger visit to his parents than before. This obligation will naturally become more intense with the age and state of health of the parents, which failure to perform constitutes a serious violation in accordance with the inheritance law.

#### **IV. FEATURES OF THE PROCEDURE FOR THE ENFORCEMENT OF CONTACT**

There is no doubt that the exercise of the right and obligation of contact, even after a final judgment of a court, must be difficult if there is a conflict between the parent with whom the child lives and the one authorized to meet. The trouble with such a situation can be understood, but not when the child’s contact with the other parent is absolutely impossible. Statistically in Poland the father is still the one who usually has to “fight” to see his child. Because it is common to think that the mother knows what is best for the child, she also often expects the father to show that such contact should be granted to him. It is even worse when she agrees for sufficient – in her opinion – number of meetings or completely prevents them. Some of the judgments establishing contact with a child after divorce will

<sup>42</sup> T. Sokołowski [in:] *Kodeks...*, p. 660.

not be obeyed at all or it will not be possible to enforce them. The problem of how to make such contact work is discussed since the amendment of CPC from 13 August 2011<sup>43</sup>. Unfortunately until now the problem of interfering (usually by mothers) has not been solved.

One of the reasons is manipulating the view of the child by the parent who lives with a child, but on the other hand it is also the fault of allowing such resident parent to ignore the judgment. Since the amendment of 2011 the law guarantees solely financial sanctions for not obeying an order of the court. Earlier, the person who interfered in contact could have been punished with a fine even with possible change to arrest. Currently, such person is obliged to pay a sum of money to a person entitled to contact. What is important also a person who is entitled to contact could be required to pay this sum of money, because improper fulfilment of the obligation is the premise. In other words the financial penalty is addressed both to the parent who did not open the door of his house about the time set in the court ruling (or even did not open it), and to the one who did arrive too late or not at all.

However, improper enforcement of judgments by persons entitled to contact is statistically insignificant. Therefore, although the financial sums forcing to act in accordance with the court decision are directed to both parents, in practice they should ensure primarily the effectiveness of father's meetings with the child, and not the possibility of penalizing his lateness at the mother's request<sup>44</sup>.

Article 598<sup>15</sup> para 1 CPC indicates that if the person under whose custody the child remains does not perform or improperly performs duties arising from the decision or from a settlement concluded before the court or before the mediator in contact with the child, the court, considering the financial situation of that person, will endanger by ordering the payment of a sum of money to the person authorized to contact the child for each breach of duty. This procedure is called the first stage. If the threat of an order to pay a sum of money does not result in compliance with the court decision (or settlement) and the person is still not complying with it, the court will order payment for each breach of duty – which is the second stage of enforcing contact. According to Article 598<sup>16</sup> para 1 CPC the court orders payment of the sum of money, setting its amount due to the number of violations. Article 598<sup>17</sup> para 1 CPC provides the reimbursement of expenses incurred in connection with the preparation of contact with the child, including reimbursement of travel and subsistence expenses of a child or person accompanying a child, and costs of returning to a permanent residence. The reason for reimbursement is failure to perform or improper performance of obligations arising from the decision or from a settlement concluded before the court or before a mediator regarding contact with the child. The provision does not make the reimbursement of expenses solely dependent on the culpable condition, which suggests that the reimbursement request can also be justified in the case of non-culpable breach of duty.

Those proceedings relating to contact with a child can be initiated only on request as the provision excludes the possibility of court proceedings to act *ex officio*. The

<sup>43</sup> Ustawa z 26.05.2011 r. o zmianie ustawy – Kodeks postępowania cywilnego (Dz.U. z 2011 r. poz. 854).

<sup>44</sup> J. Zajączkowska, *Nietrudno pozbawić rodzica (ojca) kontaktów z dzieckiem*, „Rzeczpospolita” z 12.08.2017 r., <http://www.rp.pl/Rodzina/308129994-Nietrudno-pozbawic-ojca-kontaktow-z-dzieckiem.html>.

commencement of both the first and the second stage of the proceedings requires submitting the application. Before the order is issued at any stage, as regards the threat of payment of the sum of money, ordering payment of the sum of money and reimbursement of expenses, the court is obliged to listen to the participants.

Summarizing, enforcement proceedings in its amended form are not more efficient than in the previous one and penalties for noncompliance have not toughened over the years, which is the reason of the resumption of work on this problem by the Ministry of Justice<sup>45</sup>. The report of the Institute of Justice in 2016 showed that in about every fifth case the threat of monetary sanctions do not affect parents refusing permission to meet with minors<sup>46</sup>. This inefficiency might be due to the fact that it usually requires at least two hearings and at least two decisions, each of which is subject to appeal – which undoubtedly affects the duration of the proceedings until it becomes final. Bearing in mind that it commonly concerns a small child, time works to the detriment of the relationship.

Indicating the illness of a child has become one of the problems as such contact is unenforceable and it is not possible to punish for its refusal. Instead it is necessary to consider why this disease would in principle preclude the execution of court decisions on contacts.

In the case of a child who is often ill, it means that it could be necessary to regularly refuse meetings, e.g. in each subsequent month, if not more often. Meanwhile there is no obstacle for the parent to have a short meeting with the child, even sitting and holding a child's hand while he is asleep or even has a fever<sup>47</sup>. A child's illness or the mother's unproven assertion about it, just on the day of the contact – it is one of the ways to consistently eliminate the parent from the child's life.

In order to ensure greater exercising the right to contact one of the ideas is to make an overdue meeting. It should be considered already at the stage of establishing contacts through a clear indication that in the event of a failure of a meeting with a child on the indicated date, the entitled person will have the right to have a substitute contact on the other date. These substitute contacts are usually ordered by the courts, when there are problems with frequent cancellations of the meetings by the parent who lives with a child.

Persistent refusal by a resident parent to comply with an order resulting from the court's decision should not be neglected. It seems that the judges are reluctant to use restrictive methods other than severe financial penalty. One of the possible solutions is changing a child's residence if that is also in the child's best interest, but not solely to enforce meetings with the other parent. Other possible means to prevent the damage of relationship between parent and child is to limit the parental authority and transfer the child to foster care or related foster family. The aim is to change the way of thinking of both or one of the parents as well as to ensure the child to maintain the contact with each parent without an atmosphere of hostility.

<sup>45</sup> E. Świątochowska, *Ministerstwo pracuje nad problemem alienacji rodzicielskiej. Będą kary za utrudniania kontaktów z dziećmi?*, <http://prawo.gazetaprawna.pl/artykuly/1105815,kara-za-utrudnianie-kontaktow-z-potomstwem.html>.

<sup>46</sup> E. Holewińska-Łapińska, *Postępowania w sprawach o wykonywanie kontaktów z dzieckiem umorzone na podstawie art. 598<sup>20</sup> k.p.c.*, [https://www.iws.org.pl/pliki/files/Holewińska-Łapińska%20E.\\_Postępowania%20w%20sprawach%20o%20wykonywanie%20kontaktów%281%29.pdf](https://www.iws.org.pl/pliki/files/Holewińska-Łapińska%20E._Postępowania%20w%20sprawach%20o%20wykonywanie%20kontaktów%281%29.pdf).

<sup>47</sup> J. Zajączkowska, *Nietrudno...*

There is a possibility to initiate *ex officio* such proceedings by the judge, especially in the case of the parent's arguments about the child's unwillingness to meet. Instead such residing parent should not only not discourage a child, but even encourage him to have contact with the other parent. This is part of the proper exercise of parental authority.

This kind of sanction, especially after unsuccessful attempts to punish with a compulsory sum, seems to be a much more effective solution protecting the child's welfare. It is justified by indicating that preventing the child from contacting the closest ones obviously fulfils the premise of the threat to the child's welfare (Article 109 FGC). The behaviour of a parent who does not allow creation, and even worse, the continuation of the relationship between the other parent and a child is in itself a failure to exercise parental authority. Therefore, the persistent obstruction of contact, for example, with father and child by deliberately thwarting meetings is nothing other than fulfilling the statutory premise of endangering the child's welfare by the mother. Sometimes the doctrine goes further proposing consideration in extreme cases of the premise of Article 111 para 1 FGC, which is the abuse of parental authority allowing to change the child's place of residence by establishing it with the other parent<sup>48</sup>.

It should be pointed out that the child's best interests should be understood as a situation that assumes that this child is brought up in a family in an atmosphere of love, in conditions that ensure his needs and personal development. It does not require in-depth deduction to say that the intentional hindering of parental contacts such a child's welfare violates.

### Abstract

**Joanna Zajączkowska, *Legal aspects of parent – child contact problems in Poland***

*The article presents an analysis of provisions concerning contacts with children, which are relatively new regulation in Polish family law. The first part of article describes the most important legal aspects. The theoretical considerations are an attempt to determine the legal nature of contacts, showing that they are primarily of a family law nature, despite the right and obligation introduced by the legislator. This construction, despite the fact that it may seem as approaching the contractual nature, is essentially a family-legal relationship; the sanction and the claim related to the right of contact are also of this nature. Moreover, the parent-child contact has a natural legal character, resulting from the parental and personal relationship. In addition, the most important postulates indicate the introduction to the Polish family law the missing suspension of contacts, which have a neutral character. The third part of the article presents the most important problems related to exercising the right to contact and proposals to overcome them on the basis of existing provisions, which makes the considerations also practical for maintaining contact with the child.*

**Keywords:** *parent-child contact, divorce, the right to contact, the duty of contact, contact obligation, parental responsibility, parental authority, enforcement of contact, exercise of right and obligation of contact, interfering in contact*

<sup>48</sup> M. Andrzejewski, *Relacja rodzice i inne osoby dorosłe a dzieci w świetle nowych przepisów kodeksu rodzinnego i opiekuńczego i niektórych innych ustaw (wybrane problemy)*, „Acta Iuris Stetinensis” 2014, No. 821, p. 391.

## Streszczenie

### Joanna Zajączkowska, *Kontakty rodziców i dzieci w polskim prawie*

Artykuł przedstawia analizę instytucji kontaktów z dzieckiem, będącą stosunkowo nową regulacją w prawie rodzinnym. W pierwszej części następuje prezentacja najważniejszych aspektów prawnych instytucji. Rozważania teoretycznoprawne stanowią próbę określenia charakteru prawnego kontaktów, wykazując, że mają one przede wszystkim charakter rodzinnoprawny, pomimo nadanego przez ustawodawcę kształtu prawa i obowiązku. Konstrukcja ta pomimo, że wydawać by się mogło, iż zbliża się do stosunku zobowiązaniowego pozostaje w gruncie rzeczy stosunkiem o charakterze rodzinnoprawnym, taki też charakter ma sankcja oraz roszczenie związane z prawem do kontaktu. Instytucja ta ma ponadto charakter naturalnoprawny, wynikający z więzi rodzicielskiej, a także osobisty. Ponadto wśród najistotniejszych postulatów wskazano na słusność przyjęcia w polskim prawie rodzinnym brakującej instytucji zawieszenia kontaktów, mającej charakter neutralny. W trzeciej części artykułu przedstawione zostały najistotniejsze problemy dotyczące wykonywania kontaktów z dziećmi oraz propozycje ich przewyżczenia na gruncie istniejących przepisów, co sprawia, że rozważania mają również znaczenie praktyczne dla utrzymywania kontaktów z dzieckiem.

*Słowa kluczowe:* kontakty z dzieckiem, rozwód, prawo do kontaktu, obowiązek kontaktu, władza rodzicielska, utrudnianie kontaktów, wykonywanie kontaktów, egzekucja kontaktów