

Elżbieta Holewińska-Łapińska*

Establishment of Contacts between Grandparents and Minor Grandchildren in the Practice of Polish Courts

I. INTRODUCTION

The Family and Guardianship Code does not define the concept of ‘grandparents’. However, there is no doubt that they are relatives in direct line (Art. 67⁷ para. 1 of the Family and Guardianship Code¹), parents of each of the child’s parents². The ordinary role of grandparents in the life of grandchildren changes as the grandchildren grow up³. No major mistake will be made to consider typical a situation in which grandchildren maintain contacts with minor grandchildren with the approval of children’s parents. Yet, there are cases when grandparents are refused contacts with minor grandchildren or when these contacts are made difficult, this being, as a rule, a consequence of conflicts between children’s parents and their grandparents or between a grandmother/grandfather and the parent in direct custody of a child when the parents live in separation. In the latter situation, grandparents can demand that the court establish the contacts which pursues, beyond any doubt, since 13 June 2009, from Art. 113⁶ of the Family and Guardian Code⁴. The object of the remarks which follow will be a few reflections on the subject of the statutory provision referred to in light of the practice of its application.

* The author is a Professor in the Institute of Justice.

¹ Journal of Laws 2017, Item 682.

² The omission of great grandparents in Art. 113⁶ of the Family and Guardianship Code concerning people entitled to contacts with the child made T. Justyński (*Prawo do kontaktów z dzieckiem w prawie polskim i obcym*, Warszawa 2011, p. 98) put forward a thesis that the absence of a statutory definition of the concept of ‘grandparents’ and the fact that in colloquial language the concept refers to ascendant relatives in the direct line of the second degree does not exclude it from covering ‘great grandparents as well as further ascendants, as it used to be (...) in the French doctrine’.

³ Literature speaks of two phases in grandparents-grandchildren relations. In the first one grandparents take care of their little grandchildren remaining in frequent direct contacts with them. In this period strong emotional are forged which tend to weaken and occasionally vanish in the second phase of the relation, during grandchildren’s adolescence. See: A. Baranowska, *Starzenie się społeczeństwa i związane z tym konsekwencje – perspektywa socjologiczna* [in:] *Spoleczny wymiar życia i aktywności starszych osób*, A. Baranowska, E. Kościńska, K. Wasilewska-Ostrowska (eds.), Toruń 2013. P. Szukalski, *Dziadkowie, unuki i pradiadkowie: szkic demograficzny*, „Problemy Rodziny” 2001, No. 3, p. 19.

⁴ Law of 6 November 2008 on amendment to the law Family and Guardianship Code and a few other laws (Journal of Laws No. 220, Item 1431).

Pedagogues point to the important role of grandparents in the socialization process of grandchildren, in the transfer of ‘cultural values, norms and models’⁵. Grandparents provide parents with support in the process of caring about and bringing up children while for the grandchildren grandparents are a source of unconditional acceptance, love, feeling of having ‘roots’ and generational continuity⁶. The symbolic roles attributed to grandparents in families include these of ‘the anchor’ – a point of reference (their importance for grandchildren expresses itself in cultivating family contacts, ‘consolidation’ of the family, being a source of worldly wisdom, indicating the sense of basing life on core values, assistance in discovering the sense of life and shaping their own identity by grandchildren), ‘the guard/guardian’ (supporting grandchildren’s parents in the up-bringing and maintenance of the former, care for preserving family cohesion, being a source of nearness, acceptance), ‘the arbitrator-negotiator’ (in a situation of a grandchildren-parents conflict), ‘the historian’ (showing grandchildren continuity in the life of the family, transfer of tradition, history)⁷.

It is believed that a two-generation family (parents and few children) seems to prevail in our cultural circles these days. The ‘members of this family do not maintain deeper contacts with the wider family limiting contacts to the closest direct line relatives, neither are they particularly linked to the local community. Consequently, there are good grounds to describe this family as a closed, intimate group which isolates itself and its own matters from the external environment’⁸. However, there are still three-generation households, in particular when adult children having their own families are not fully self-sufficient economically. Grandparents usually belong to the group of ‘seniors’. Within this group, they still generate social capital, among others, performing numerous functions in the family, acting as ‘donors’ in the material and non-material field to other family members, including grandchildren⁹. The literature on the subject distinguishes a number of functions the house-holding (taking care of the family household), economic (financial support of the family owing to regular income mainly from pension), emotional-expressive (intergenerational emotional links built by seniors in the closest family), socializing, educational and cultural (transfer of tradition) and guardianship function¹⁰.

In retrospect, grandchildren positively assess the role of grandparents in their life. For instance, a study by the Center for Public Opinion Studies ‘*Co zawdzięczamy*

⁵ J.K. Wawrzyniak, *Opiekunczo-wychowawcza rola dziadków w rodzinie*, „Pedagogika Rodziny. Family Pedagogy” 2011, No. 1(2), p. 95, and the literature referred to M. Świdowska, *Znaczenie dziadków w naszym życiu – wybrane aspekty*, „Pedagogika Rodziny. Family Pedagogy” 2017, No. 7(1), p. 139–146.

⁶ K. Appelt, *Współcześni dziadkowie i ich znaczenie dla rozwoju wnuków* [in:] *Szanse rozwoju w okresie późnej dorosłości*, A. Brzezińska, K. Ober-Łopatka, R. Stec, K. Ziółkowska (eds.), Poznań 2007, pp. 75–95.

⁷ K. Appelt, *Współcześni...*, see: Fig. 4 ‘Aspekty roli babci/dziadka’. The author used the research findings of American researchers (USA) from the 80s of the 20th century but they seem to have maintained their validity also for the present situation of the majority of Polish families.

⁸ U. Kempnińska, *Rola seniorów w rodzinie*, „Pedagogika Społeczna” 2013, No. 4(50), p. 83.

⁹ P. Michoń, *Transfery międzypokoleniowe w rodzinie*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2012, No. 3, pp. 237–238). The causes of the transfers are very complex, diversified and interpreted differently in the literature on the subject, among others through the construction of models aimed at explaining the causes of their development (e.g. an ‘altruist’ model was developed, a model based on ‘reciprocity and exchange’, ‘a model of strategic heritage’ where the desired behaviours of children are obtained by making the threat of disinheritance plausible’).

¹⁰ E. Kościńska, *Kapitał społeczny seniorów jako źródło wsparcia rodziny*, „Pedagogika Społeczna” 2017/1(63), pp. 102–103, and the literature referred to.

swoim babciom i dziadkom?' (What do we owe to our grandmothers and grandfathers?), carried out in November 2000 showed that 59% of respondents felt gratitude towards their grandparents. In an analogous study conducted in December 2007 this feeling was expressed by 56% of respondents¹¹, and in 2012 as many as 72%¹².

What is necessary for the development of strong emotional ties are contacts between the parties since grandchildren's early childhood. This is essential as the strong tie and feeling of gratitude towards grandparents for the love, care and acceptance on their part received in childhood contributes to a positive prognosis for respect and support to be extended to grandparents when their social contacts become significantly limited in the 'post-productive age'¹³. It is hard to overestimate the significance of the aforesaid given the findings of numerous studies confirming the thesis that what has a major, positive influence on the welfare of seniors is the maintenance of social contacts in general and family contacts in particular¹⁴. It also favours the limitation of these forms of experiencing loneliness¹⁵ the role of which in the life of elderly people may prove destructive in nature¹⁶.

It is the parents of the minors who bear direct responsibility for the actual maintenance of contacts between grandparents and grandchildren and it is the parents' attitude that determines whether the contacts between grandparents and grandchildren have place and in what atmosphere. Parents should never lose sight of their own good example in the process of bringing up their children and guiding them. They should be well aware that it is in their own best interest to imbue their offspring with respect for parents, grandparents and seniors in general through their own example and attitude as this model of behaviour will stay engraved in their children's memory.

In Poland, it was long believed that contacts between close relatives, close people do not require statutory regulation. Maintenance of contacts between relatives (other than parents, also between grandparents and grandchildren), as a statutory

¹¹ Communiqués from studies conducted by Centre for Public Opinion Studies in preparation B. Wciórko, BS8/2001, Warsaw, January 2001; BS3/2008, Warsaw, January 2008.

¹² Study, entitled '*Rola dziadków w naszym życiu*' carried out in January 2012 (prepared by K. Kowalczyk, BS8/2012, Warsaw, January 2012).

¹³ M. Finogenow, *Rozwój w okresie późnej dorosłości – szanse i zagrożenia*. „Acta Universitatis Lodzianensis Folia Oeconomica” 2013, No. 297, p. 97, and the literature referred to.

¹⁴ K. Ziomek-Michalak, *Znaczenie rodziny w starzeniu się i starości człowieka*, „Roczniki Teologiczne”, Vol. LXII, Notebook 10–2015, pp. 176–192.

¹⁵ A survey of the concept of 'types of loneliness and prospects of interpreting it', given in Polish and foreign literature was presented by N.G. Piłkuła (N.G. Piłkuła, *Poczucie sensu życia osób starszych. Inspiracje do edukacji w starości*, Kraków 2016, in particular pp. 56–67). The author also carried out his own studies on the perception of the sense of life by Poles aged 60–74 living in Poland and in Canada, taking into account, among others, their relations with children and grandchildren. Although in both groups the majority of respondents them as good, close, positive ties were more common among Canadian Poles. 'Statements by Polish seniors revealed indifferent and negative relations which were not present in the statements made by people permanently residing in Canada'. The author also noted that 'Seniors from Poland appreciate and cultivate neighbourly relations which, to some extent, compensate for weaker relations and ties with the family. For the elderly, neighbourly relations constitute a permanent cultural model which tends to disappear in the young generation' (N.G. Piłkuła, *Poczucie...*, p. 185). Seniors from Canada cultivated mainly family ties, ensuring 'abroad' assistance and support to a higher extent than it can be expected from 'anonymous' neighbourhood (p. 186).

¹⁶ It is psychological loneliness (the feeling of 'solitude') defined as 'a perceived deficit of feeling on the part of other people, in particular the loved ones' as well as 'the perception of their own isolation or objectivity' that are particularly harmful and unfavourable (see also: W. Łukaszewski referred to by N.G. Piłkuła, *Poczucie...*, p. 58–59).

obligation, can only be indirectly derived from the obligation of mutual support borne by parents and children, irrespective of their age, specified in the Family Law of 22 January 1946¹⁷ and repeated in Art. 87 of the Family and Guardianship Code¹⁸.

The earliest notes to this provision pointed out that according to ‘the accepted principles of social coexistence the obligation to support each other – in the case of an essential need – exists not only between parents and children but also between grandparents and grandchildren as well as between siblings’¹⁹. Yet, no unambiguous mention is made about contacts between grandparents and grandchildren.

The obligation to support each other specified in Art. 87 of the Family and Guardianship Code can be seen as normative grounds for extending assistance to a child being of age and being a parent, who is no longer subject to parental authority, in performing the child’s obligations towards children (grandchildren to the parent-assisting person). The same norm can also provide grounds for guardianship actions by adult grandchildren towards grandparents as supporting parents in the performance of their obligation to support their own parents²⁰.

It can also be said that the obligation to support each other also generates indirectly the prohibition of behaviours which produce serious mental discomfort or suffering of the ‘other party’ and can be extended to a situation when contacts between one’s own parent and minor grandchildren are made impossible or difficult without any serious objective reasons. However, neither in Polish practice nor in literature, grandparents’ claims concerning contacts with grandchildren have ever been made on these grounds²¹. This may have been caused by the fact that, as a rule, it has been the child’s parent who performed direct custody over the child that refused contacts with grandchildren not to their own parents but to the parents of the current or former spouse/partner.

Numerous countries, also in Central and Eastern Europe²², have long had in their law system provisions confirming the right of grandchildren to contacts with grandchildren²³. In Poland, it was only the law of 6 November 2008, effective since 13 June 2009, that introduced a provision concerning contacts between a child and persons other than the child’s parents (Art. 113⁶ of the Family and Guardianship

¹⁷ Journal of Laws 1946, No. 6, Item 52.

¹⁸ In the Family Code of 1950 there was no provision of this kind which was explained in terms of a ‘particularly concise character’ of the code, with the obligation to support each other being derived from ‘ideological assumptions and general principles’. See also: B. Dobrzański in the commentary to Art. 35 of the Family Code commencing Section I ‘General Provisions’ Title II of the Code ‘Parents and Children’, *Family Code Commentary*, G. Grudziński, J. Ignatowicz (eds.), Warsaw 1959, p. 297. The author referred to underlines (therein) that ‘The extremely broad scope and nature of family coexistence cause that an entirely exhaustive legal formulation in this domain seems impossible’.

¹⁹ See also: B. Dobrzański [in:] *Family Code Commentary*, M. Grudziński, J. Ignatowicz (eds.), Warsaw 1966, p. 562.

²⁰ J. Haberko, *Dziadkowie-wnuki osobista więź prawnorodzinna i relacja prawnospadekowa*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2012, No. 3, p. 139 et seq.

²¹ T. Justyński (T. Justyński, *Prawo...*, pp. 88, 89, and literature quoted), discussing foreign legal solutions concerning contacts between grandparents and grandchildren, mentions that, for instance, Swiss and Belgian literature underlines ‘indirect contact between grandparents and grandchildren based on the grandparents relations with parents. Both patients have the obligation to mutual assistance and respect, and thus parents also have the obligation to make contacts with grandchildren possible (own underlining by the author).

²² For instance, in the Russian Federation, Art. 67 of the Family Code of 29 December 1995, Law No. 223-F3, SZRF 1996, No. 1, Item 16 with amendments, Art. 257 of the Family Code of Ukraine of 10 January 2002. A relevant provision was also stipulated in Soviet legislation – e.g. Art. 57 of the Marriage and Family Code of the RFSSR of 30 July 1969, SJ 1968, No. 17.

²³ See: T. Justyński, *Prawo...*, pp. 89–94.

Code)²⁴. The other persons specified included grandparents although previously their contacts with grandchildren had been in practice covered by court protection²⁵. The legislator did not devote particular attention to contacts between grandparents and grandchildren focusing on providing detailed regulation concerning contacts between parents and children. Art. 113⁶ of the Family and Guardianship Code provides for ‘adequate application’ of the provisions concerning contacts between parents and children to, among others, contacts between grandchildren and children. It is for this reason that it is necessary to signal the mutual obligation to keep in touch of parents and minor children as a starting point for the existence (or non-existence) of the obligation to maintain contacts between grandparents and grandchildren.

Article 113 para. 1 of the Family and Guardianship Code states that ‘parents as well as their child have the right and obligation to maintain contacts’. (Rationally, the mutual right and obligation of contact between the parent and the child can be discussed when the child does not remain in the direct custody of the contacts-expecting parent²⁶.) The reasons to the draft law introducing the legal provision referred to²⁷ point to the following: ‘The treatment of these contacts (*between parents and their child*) only in terms of the child’s right (as it is done, for instance, in German law) is not justified due to the fact that parents’ right would not then have its equivalent in the form of the child’s obligation. This is of particular importance with regard to contacts with an older child’.

As emphasized by Tomasz Justyński, ‘the obligation to maintain contacts with parents was not articulated in the Convention for the Child’s Rights nor in the Vilnius Convention on contacts with children, ratified by Poland, signed in Strasburg on 15 May 2003. What is sort of unusual in this context is a very clear position of the Polish legislator (...) which deserves cautious approval (...)’²⁸.

What contributed to the approval was the strengthening of the legal position of the parent entitled to contacts as a factor which should contribute to shaping the attitudes of both the ‘first-plan guardian’ of the child as well as the child itself in case the latter is reluctant (for a variety of reasons) to have contacts. The ‘caution of

²⁴ The earlier law of 12 March 2004 on social assistance ensured in Art. 70(3) pt. 3 to a child placed in a foster family or in an educational care center the maintenance of personal contacts with the family, referring to Art. 9 of the Convention for Child’s Rights. It was deemed the duty of the state to provide conditions for the child to be able to exercise this right. See also: M. Andrzejewski [in:] M. Andrzejewski, P. Gąsiorek, P. Ławrynowicz, M. Synoradzka (eds.), *Rodziny zastępcze-problematyka prawna*, Toruń 2006, pp. 124–125.

²⁵ Prior to 13 June 2009, contacts were specified in a court adjudication but the legal grounds for the settlement as well as the authorization to motion it gave rise to controversies (For instance, E. Płonka, J. Strzebińczyk, *Osobista styczność dziadków z małoletnimi wnukami*, “Nowe Prawo” 1981, No. 5. For a synthetic form on the subject of different legal grounds for establishing contacts with children see: M. Grudzińska: *Kontakty z dzieckiem*, Warszawa 2000). What was of particular importance for the practice of common courts was the ‘precedent-like’ resolution of the Supreme Court of 14 June 1988, III CZP 42/88, OSNCP 1989, No. 10, Item 156, a gloss by E. Holewińska-Łapińska (“Państwo Prawo” 1991, No. 2, pp. 107 et seq.), stating that: ‘Grandparents can demand regulation of personal contacts with grandchildren provided it is in the interest of the children’. Court practice in the period preceding the change of the legal status was established on the basis of an analysis of 287 cases in which establishment of contacts with 371 children was sought, with adjudications terminating the proceedings being made in the years 2005–2006 (E. Holewińska-Łapińska, *Orzekanie o osobistej styczności z małoletnimi innymi osób niż rodzice*, “Prawo w Działaniu” 2008, No. 4).

²⁶ P. Mostowik, *Kontakty dziecka z rodzicami, krewnymi i bliskimi a władza rodzicielska*, „Przegląd Sądowy” 2013, No. 3; P. Mostowik, *Kontakty matki i ojca z dzieckiem jako treść władzy rodzicielskiej* [in:] M. Nazar (ed.), *Prawo cywilne – stanowienie, wykładnia i stosowanie. Księga pamiątkowa dla uczczenia setnej rocznicy urodzin Profesora Jerzego Ignatowicza*, Lublin 2015.

²⁷ Print No. 888 of the Sejm of the Republic of Poland of the 6th term.

²⁸ T. Justyński, *Prawo...*, pp. 133, 134.

the approval²⁹ is related to the fears, expressed in literature, that an explicitly specified ‘obligation’ of the child can lead to marginalization of the obligation to ‘listen’ to the child³⁰, and even imposing contacts contrary to the child’s will³¹. This would be against the child’s good³², and in extreme cases it could even generate ‘mental distress’ and an irreversible trauma or even suicidal intents (...) in a frustrated child³³.

Contacts between close persons, tightly linked to the domain of emotions, are qualified as belonging to the domain of family life³⁴, or possibly, private life³⁵. They are also treated as an element of the protection-covered personal right called ‘emotional sphere connected to close people’³⁶. Its implementation to mutual satisfaction requires that the parties manifest a certain minimum level of mutual acceptance and consent necessary to maintain contacts. If a contact which one party strongly (and rationally in a given situation) objects to does take place, then its quality is mostly unlikely to satisfy the party which wants to establish contacts. This may be the reason why contacts are usually described (in particular in international agreements³⁷) as the right not the obligation of the person which is to be party to the contact. The obligation, on the other hand, is usually assigned to a person/persons being a third person/third persons to the contacting ‘pair’ which could potentially make the contact difficult, impossible, or simply disturb it. This third party should refrain from taking actions of this kind and occasionally also behave so as to make the contact possible where the implementation of the contact depends on them³⁸.

²⁹ T. Justyński, *Prawo...*, p. 135.

³⁰ On the subject of the application in court practice of the obligation to listen to the child see: M. Cieśliński, *Praktyka sądowa w zakresie wysłuchiwania małoletnich w postępowaniach cywilnych w kontekście przyjaznego wysłuchania dziecka*, „Prawo w Działaniu” 2015, No. 24; M. Cieśliński, *Stanowisko sędziów na temat wysłuchiwania małoletnich w postępowaniu cywilnym*, „Prawo w Działaniu” 2017, No. 29, p. 142 et seq.

³¹ W. Stojanowska [in:] *Nowelizacja prawa rodzinnego na podstawie ustaw z 6 listopada 2008 i 10 czerwca 2010. Analiza; Wykładnia; Komentarz*, Warszawa 2011, p. 267.

³² W. Stojanowska [in:] *Nowelizacja...* underlines that the same law introduced the child’s obligation to maintain contacts with the parent (Art. 113 para. 1 of the Family and Guardianship Code) imposed on parents the obligation ‘to take the child’s opinion into account’, and on the court the obligation to hear the child (Art. 95 para. 1 and 4 of the Family and Guardianship Code; Art. 216¹ of the Code of Civil Procedure).

³³ W. Stojanowska [in:] *Nowelizacja...*, p. 268.

³⁴ This seems to be confirmed by the jurisdiction of the European Court of Human Rights which contains an interpretation of Art. 8 of the European Convention for the Protection of Human Rights and Basic Freedoms of 4 November 1950, including cases in progress against Poland. For instance in the ECHR decision of 11 May 1999, LEX No. 41089, in case *Wielgosz v Poland*. The Court stated, among others, that Art. 8 of the Convention protects natural ties between the parent and the child, including direct contacts, as they are of *fundamental importance* while ‘Respect for the family. According to Art. 8 of the Convention assumes that this contact should not be forbidden unless there are serious reason which would justify a limitation in this respect’. The Court jurisdiction protects also relations between grandparents and grandchildren pursuant to Art. 8 of the European Convention for the protection of human rights (see for instance, the judgment of the Great Chamber of ECHR in case *Manuello and Nevi v Italy* of 20 January 2015, Petition No. 107/10 (see: gloss to this judgment by K.A. Grabowska, *Glosa do wyroku Wielkiej Izby ETPC w sprawie Manuello i Nevi przeciwko Włochom z 20 stycznia 2015 r., skarga nr 107/10*, “Studia Prawnicze KUL” 2015, No. 3(63), pp. 81–87 as well as the ECHR adjudication referred to therein).

³⁵ Private life embraces maintenance of ties also between persons which do not remain in family law relations but are close to each other or one another because of the existence of emotional ties. More on the subject in: M. Grudzińska, *Kontakty...*, p. 41 et seq.

³⁶ E. Płonka, J. Strzebińczyk, *Osobista styczność dziadków z małoletnimi wnukami*, “Nowe Prawo” 1981, No. 5, p. 19.

³⁷ For instance, Art. 9(3) of the United Nations Organization Convention for the Rights of the Child obliges States-Parties to respect the child’s right to maintain regular personal relations with both parents with the exception of cases where it is contrary to the best understood interest of the child.

³⁸ This is how the obligations of the ‘first-plan guardian’ of a minor or major remaining in the former’s custody are formulated. It is expected that he/she will prepare their charge for the contact and when the contact has the form of a meeting, ‘deliver’ the child (pupil) in a specified place and a specified time, and will not interfere in the course of the meeting unless the court decides otherwise.

It seems advisable to emphasize that the wording contained in Art. 113 para. 1 of the Family and Guardianship Code is characteristic of family-legal relations in which the behaviour of the subject of the family personal relation towards another subject of the same relation desired by the legislator is simultaneously the obligation and the right (for instance, both spouses have the right and the obligation of 'cohabitation', 'cooperation for the good of the family' – Art. 23 of the Family and Guardianship Code, the obligation and the right of the parent is to 'exercise custody over the person and the property of the child', 'bring-up the child' and guide the child – Art. 95 of the Family and Guardianship Code, Art. 96 of the Family and Guardianship Code).

Such an interpretation of the right as an obligation should stimulate a certain specific behaviour so that the social goal of a specific family law institution be reached (for instance, the durability and proper functioning of marriage where the spouses execute the obligation to cohabit, cooperate for the good of the family, mutual assistance and faithfulness referred to in Art. 23 of the Family and Guardianship Code, due preparation of the child 'for work for the good of the society, according to the child's capabilities' – Art. 96 para. 1 of the Family and Guardianship Code through the implementation of the right and duty of parents as regards custody over the person and Guardianship Code).

It seems important to emphasize that unlike in the case of other family law obligations being simultaneously rights, it is the obligation that is indicated in the first place. In Art. 113 para. 1 of the Family and Guardianship Code, the right to maintain contacts is the first to be specified. This sequence cannot be accidental. It is impossible to directly 'coerce' the 'obliged' to perform personal family law obligations being simultaneously rights even though the failure to perform the obligations can cause loss of the rights (for instance, in consequence of an adjudication of a divorce or deprivation of parental authority). The treatment of contacts between the parent and the child as a reciprocal right and obligation seems likely to produce a similar effect.

In spite of the fact that the right and obligation as regards contacts between parents and children are 'independent' of parental authority, it can be concluded that failure to maintain contacts with a child over which a parent does not perform direct custody is a form of 'stark neglect of obligations towards the child' (Art. 111 para. 1 of the Family and Guardianship Code). Where the child remains in foster custody and the parents do not maintain contacts with the child, this behaviour can be treated as 'a lasting failure to show interest in the child' (Art. 111 para. 1a of the Family and Guardianship Code). Failure of the parent to fulfill the obligation to keep in contact with the child can result in the parent being deprived of parental authority as no, even limited, parental authority can be exercised without any form of contact.

What is of particular importance is to set the limits of the obligation to maintain contacts on the part of the child (seemingly secondary in relation to the child's right to maintain contact), with respect for dignity, taking into account rational wishes of the minor and the obligation to obey parents (Art. 95 para. 2 of the Family and Guardianship Code). Where the child expresses a negative stance on contacts,

then, in all and any cases, it is necessary to individually assess its causes³⁹ as well as to consider the form of the contact (reluctance to have meetings can be respected in some way with some other, indirect forms of contact – for instance, letters, gifts and in extreme cases at least exchange of mutual personal information)⁴⁰.

What is also discussed in literature is the influence of emotional disorders in the child following a faulty educational approach of the child's 'first-plan guardian'. Particular significance in this respect is given to the disorder referred to as the syndrome of an 'alienated (rejected) parent' (*Parental Alienation Syndrome* – PAS). It was first described by an American psychiatrist, R.A. Gardner, in his publication of 1985, and is therefore often called *Gardner's syndrome*. At the turn of the 90s of the 20th century, this concept began to be criticised and even rejected, its validity being negated (on the grounds of its imprecision, non-scientific language, small study sample, omission of PAS in the DSM – IV classification of diseases). However, since then the criticism has waned though the described phenomenon is no longer attributed the features of 'disease' and the word 'syndrome' has disappeared from its description being replaced with '*parental alienation*'⁴¹. According to Gardner, as a result of being 'programmed' by the parent being its 'first-plan guardian', the child is indiscriminate in adopting as its own this parent's attitude and refusing to have contacts with the other parent (the 'alienated' parent being treated as an 'enemy') in the name of loyalty towards the former. What is of crucial importance in the context of the subject of the present study is the fact that the child exhibiting the disorder referred to as PAS extended the sphere of aggressive hostility to people related to the 'alienated' parent (including the latter's parents, that is the child's grandparents, other relatives and even friends).

It is the person performing direct custody over the child that assesses the child's attitude towards contacts with grandparents. Where this person (aware of the child's obligation and his/her own role in helping the child perform the obligation which is of legal and not only moral character) concludes that the contacts do not threaten the child's good and the reluctance of the minor has no serious grounds, then he/she should take appropriate pedagogical actions (including the use of professional counselling or family therapy), to persuade the child to fulfil the

³⁹ For instance, the position of the child that he/she finds meetings with the parent or that they prefer to do other, more attractive things in the time destined for such a meeting, should not be taken into account. Conversely, where the rejection of meetings is a consequence of objectively unacceptable behaviour of the person authorized (for instance, where during the meeting the person exhibits extreme hostility towards the other parent or another person close to the child, applies inadmissible 'educational' methods, sexually harasses the child, tolerates such behaviours on the part of third parties, or fails to ensure due care in consequence of the use of psychoactive substances).

⁴⁰ Art. 113 para. 2 of the Family and Guardianship Code does not provide a closed catalogue of forms of contacts but only examples such as staying with the child and direct communication, maintenance of correspondence, using means of remote communication. Foreign literature and judicature treats also giving presents and obtaining information about the child's matters (for instance, in the form of periodic reports on the child's development, health, education, right to see school certificates) as elements of the right to the maintenance of contacts (T. Justyński, *Prawo...*, p. 31).

⁴¹ On the psychological approach to this subject, see: A. Czerederecka, *Syndrom oddzielenia od drugoplanowej opieki (PAS)* – usefulness of the diagnosis in court examinations in the context of the criticism of the phenomenon, "Nowiny Psychologiczne" 2005, No. 3, pp. 31–44; A. Czerederecka, *Rozwód a rywalizacja o opiekę nad dziećmi*, Warszawa 2010, pp. 80–83, and the psychological literature referred to therein. In law literature, T. Justyński, *Parental Alienation Syndrome (PAS) w świetle prawa i judykatury niemieckiej* [in:] *Księga jubileuszowa Profesora Tadeusza Smyczyńskiego*, M. Andrzejewski, L. Kociucki, M. Łączkowska, A.N. Schultz (eds.), Toruń 2008, pp. 374–382.

obligation to maintain contact in the form best adjusted to the existing situation. It should be noted that minors frequently show reluctance to fulfil different duties (also obligations foreseen by the law system, e.g. the obligation of compulsory education, of periodic medical examinations, vaccinations, etc.) established for their good which does not authorize parents (the parent performing direct custody over the child) to resign from actions aimed at changing the child's attitude (to education, protection of one's own health, etc.). The failure of parents to 'break' the child's reluctance to fulfil the child's obligation (in particular, compulsory education obligation) can even result in interference by a guardianship court (various orders pursuant to Art. 109 of the Family and Guardianship Code, including, for instance, referring the minor to a 'daily care unit' or to a 'vocational preparation' – oriented institution).

The child should follow the recommendation given fulfilling in this way both its obligation to obey (Art. 95 para. 2 of the Family and Guardianship Code) and its obligation to maintain contact (Art. 113 para. 1 of the Family and Guardianship Code).

Where the child's negative attitude is justified, the child should not be forced to maintain contacts as this would create (a least) a condition of endangering this child's good.

A referral to the 'appropriate' application admits the possibility of modifying the contents of the provision to which the referral was applied. The above results from the meaning of the word 'appropriate', that is 'appropriate to the goal, destination, satisfying the required conditions, appropriate to somebody, proper, due'⁴². As a rule, reference leads to an analogous application of the provision indicated where its direct application is not possible⁴³. However, in general, the use of the expression 'appropriate application' can lead to different results which depend on the 'scope of reference' and the contents of individual provisions to which the referral was made ('applied provisions')⁴⁴.

Apart from contacts (Art. 113⁶ of the Family and Guardianship Code) and the maintenance obligation burdening direct line relatives, ascendants before descendants (Art. 128, 129 of the Family and Guardianship Code), the Family and Guardianship Code does not in principle contain provisions regulating relations between grandparents and grandchildren. Relations between parents and children, in particular minors, are of exceptional importance. In typical situations, it is the 'primary' and most important relation in human life. It is for this reason that it is the most exhaustively and extensively regulated (in particular Chapter II of the Code) and the obligation to maintain contacts should raise no doubts.

The relationship between grandparents and grandchildren ensues from the very close lineal consanguinity, though not as close as between the parent and the child which proceeds from the parent. In consequence 'appropriate' application of

⁴² *Uniwersalny słownik języka polskiego*, S. Dubisz (ed.), Warszawa 2003, Vol. III (O–Q), p. 130. The dictionary also points out that 'substitutes' of the word 'appropriately': 'adequately', 'as necessary', 'as it should be', 'duly', 'properly' (that is adequately to the conditions, situation, circumstances).

⁴³ Compare, for instance, M.M. Dębska in the commentary to para. 156 Principles (M.M. Dębska, *Zasady techniki prawodawczej. Komentarz*, Warszawa 2013).

⁴⁴ Terminology applied by J. Nowacki (J. Nowacki, "Odpowiednie" stosowanie przepisów prawa, "Państwo i Prawo" 1962, No. 3, p. 368).

Art. 113 para. 1 of the Family and Guardianship Code in relation to grandparents and grandchildren should take into account the resultant slightly weaker ties. Yet, it seems that as to the principle there is not only the right but also the obligation of contact maintenance between these relatives. The scope and intensity of the obligation depends on the circumstances of the factual state in a particular case. Where the child remains under parental authority, it is necessary to take into account that the performance of the right and obligation to the maintenance of contacts between grandparents and grandchildren should remain (in principle) within the limits set by the parents exercising the right and obligation to educate and guide the child which owes obedience to the parents. Both the parents and the grandparents should refrain from actions which could contribute to a loyalty conflict on the part of the child. Should this happen, the obligation to obey the parents when the latter forbid or limit (even groundlessly) contacts with grandparents, seems to supersede the child's obligation to contact grandparents. Most importantly, from the practical point of view, in such a situation the possibilities of the child (in particular below 13 years of age) as regards demanding contacts with grandparents are very limited and would always entail obtaining 'external' assistance, most likely considered to be directed 'against' the parent who forbids contacts (or makes them difficult)⁴⁵.

The treatment of mutual contacts between grandparents and grandchildren as their obligation is mainly of 'persuasive-educational' nature. It points to the desired model of family behaviours. An indirect sanction in the case of failure to perform this obligation is practically illusory. It might consist in a possibility to refuse the performance of the maintenance obligation towards the entitled person if – in a situation of deprivation – one of the parties would sue the other for alimony and in the given factual state the demand could be deemed contradictory to the principles of social coexistence (Art. 144¹ of the Family and Guardianship Code), in connection with the circumstances concerning the evasion of the obligation to maintain contacts in the past. The grandfather or grandmother could deprive the grandson of the compulsory portion of the inheritance if the absence of contacts were assessed as a manifestation of persistent evasion of the family obligations towards the testator (Art. 1008 pt. 3 of the Civil Code). This possibility would have to be linked to the appearance of a number of circumstances where a minor grandson refused contacts with a grandfather/grandmother persistently but groundlessly in a situation where the refusal was free and conscious (which must require an adequate level of development and would in practice concern teenage grandchildren) and did not result from the obligation of obedience towards parents or other objective circumstances.

II. GRANDPARENTS SEEKING THE COURT ESTABLISHMENT OF CONTACTS WITH MINOR GRANDCHILDREN IN THE PRACTICE OF COMMON COURTS

The analysed legal provisions under discussion are potentially addressed to a multimillion group of people (all minors of known origin, from at least one of parents,

⁴⁵ For instance, seeking the assistance of a school pedagogue, the Spokesman for the Child's Rights, a prosecutor, aid institutions, direct notification of a guardianship court with the purpose of establishing a curator to represent the child.

and their living grandparents). In practice, few of them actually seek court establishment of contacts. In 2016, there were 415 cases decided with a substantive judgment, brought in by grandparents pursuant to Art. 113⁶ of the Family and Guardianship Code, to establish contacts with 536 grandchildren, most frequently of a little over 5 years of age⁴⁶.

What constituted the emotional background of litigations were conflicts accompanying the dissolution of the children's parents marriage, in which generational families of each parent were involved (with varying intensity), most frequently adopting the position of their relatives 'adherents'.

Frequently, the litigation stemmed from the situation accompanying the divorce. In 23.1% of the cases, the children's parents were already divorced and in 9.6% of cases, the divorce proceedings of the parents were concurrent to the proceedings concerning grandparent's contacts with grandchildren. The conflict linked to the disintegration of conjugal life which was not accompanied by a divorce (separation) in a marriage or in a cohabitation union the parties to which having common children were planning to part or had already parted. What is crucial is the fact that the children which the grandparents wanted to maintain contacts with remained in the custody of the two parents only in 6.7% of cases. In most cases, it was the mothers who had custody over the children (73.6% of the cases) in fewer, the fathers (12.3% of the cases).

In 43.7% of the cases, in a joint motion for establishing contacts with grandchildren, it was both the parents of the father (paternal grandparents) who were proposers, in 30% the proposer was the father's mother, in 12% the mother's mother and in 9% both maternal grandparents. In the remaining cases the motion was lodged by fathers' mothers and by fathers of children's fathers.

The grandparents' letters, treated by courts as motions for the establishment of contacts with grandchildren, were diversified in their form (in 21.7% of the cases, they were handwritten) and contents. In 18% of the cases, they did not satisfy even the minimum correctness standard and in spite of it they initiated a proceeding closed with a substantive judgment. 89.4% of the motions contained demands as to the form and frequency of contacts. 74 of the motions (17.8%) requested that contacts be secured for the duration of the proceedings and the petitioners demanded adjudication of measures which would increase the likelihood of the actual performance of the established contacts ten times (in 8 motions they petitioned that the person having direct custody over the child be threatened with payment of a specific amount of money in case they made contacts impossible or difficult while in 2 cases they expected a family curator to be present during meetings with the child). In two cases, they proposed mediation to the 'second party' and declared

⁴⁶ To show the scale it suffices to mention that according to statistical data contained in the *GUS Demographic Yearbook*, Warsaw 2007, in 2006 there were 6 895 908 minors in Poland. The majority of them had live parents and two pairs of grandchildren, known in light of law. Court protection of their rights is sought by a definitely smaller number of people, usually in a situation of a crisis in the family. As rule, every year, following a divorce, there are approximately 50 thousand minors, common children of divorced parents, more. For instance, in 2016, 63 497 marriages were dissolved in a legally binding way, giving 54 06 minor children (including 22 853 only children). In the same year, there were 1 612 marriage separations which involved 1 315 minor children. Also, a certain number of cohabitation unions in which children were brought up broke up.

readiness to take part in it. In 39 cases (9.4%), the motions did not contain any particulars as regards expected contacts with grandchildren.

One form of contacts was expected by petitioners in 159 (38.3%) of the cases while several forms (from two to seven) in 209 (50.4%) of the cases. In the remaining cases, the demand was specified in another way or not specified at all.

Where the petitioners expected only one form of contacts – they motioned, most frequently (53% of the cases), that periodic meetings with grandchildren be adjudicated without the presence of the ‘first-plan custodian’ of the child, meetings away from the child’s place of residence (in one case they demanded several-hour meetings 5 times every week), and next (in 30% of cases) they desired to spend weekends with the grandchildren (with one or two nights spent in their flat by the child), with specified frequency (at best every two weeks).

Where the grandparents motioned for several forms of contact, then, most frequently (73% of petitioners), they wanted to spend with the grandchildren (without the presence of another person) part of every school break and every vacation, next (68%) part of the traditionally celebrated religious holidays (Christmas, Easter), weekends (66.5%) and expected (irrespective of other forms of contacts) systematic, periodic meetings with the child, away from the child’s place residence (48%). Other forms of contacts (for instance, occasional meetings such as birthdays or name days of each of the parties, Child’s, Grandmother’s, Grandfather’s days, 1st Communion, telephone and Skype calls were rarer.

Although proceedings are conducted in a non-litigious course, considering their mostly contentious character, petitioners often referred to the ‘contestant’ of the motion. This attitude was manifested by mothers of the grandchildren in 70.1% of the cases, by fathers in 11.1%, by both parents in 9.6% of cases while in 5% of the cases another entity having direct custody over grandchildren was indicated (foster family, care unit) and in the remaining cases petitioners did not specify who they perceive as the ‘contestant’. In 40% of the cases, petitioners and in 44% of the cases ‘contestants of the motion’ availed themselves of the assistance of a professional agent for litigation.

Only in every tenth case the first stance of the ‘contestant of the motion’ was fully acceptant (acceptance of the demands contained in the motion), in 44.8% of the cases it was entirely negative (the motion was demanded to be dismissed), in 33% it consisted in acceptance as regards the principle of contacts but in another form or with another frequency than that expected by the petitioners. In the remaining case it was either not given or was different in its contents.

The arguments used to justify the demands to dismiss the motion as a whole, in terms of their frequency presented as follows: petitioners maintain contacts with grandchildren actually within the framework of the child’s meetings with the parent not exercising current custody over the child which are frequent (43%), acceptance of the motion is contrary to the child’s good as the petitioners are not loyal, involving the child in the conflict between adults and ‘pitting’ the child against the parent who keeps direct custody over the child (26%), contacts are maintained without conflicts and their regulation by court is unnecessary (10%), the petitioner does not guarantee due custody over the child and has neglected the child in the past (5.4%). Most frequently (in 63.5% of the cases), the decision to dismiss the

motion was justified in terms of circumstances specific to a given case. Stances adopted by the 'parties' tended to be modified in the course of proceedings.

In 52 cases (12.3%) a proposal was put forward to hold mediation (in 49 cases such a proposal was made to the parties to the proceedings by the court and in 3 cases by the 'contestant of the motion', in 36 cases a mediation attempt was made⁴⁷ and in 28 a mediation settlement was concluded (78% of the cases in which mediation was undertaken).

In spite of the small number of mediations, as many as 67% of the cases terminated with the proceedings being discontinued due to the establishment of contacts in a settlement. Adjudications establishing contacts were passed in 23.5% of the cases. The most frequently established forms of contacts included weekend meetings and periodic, several-hour-long meetings without the presence of the 'first-plan guardian'.

Motions were dismissed in 29 cases (7% of the cases studied). Most frequently, it can be assumed (the majority of the adjudications were not provided with reasons justifying them) that what was decisive for the dismissal of the motion was that the adjudication of contacts would be contrary to the child's good as a rule in connection with a very severe, long-standing conflict between the petitioners and the parent (parents) of the child which failed to be eased in the course of the proceedings and the escalation of which was most likely to follow an attempt at maintaining contacts, in spite of the fact that in the past there were family relations between the mover and the child (e.g. prior to the parent's divorce the grandmother helped in the up-bringing of the child). This group of cases included also the case of a motion placed by a mentally ill person, not treated, whose behaviours (conditioned by the disease) produced a threat to the good of the child. In the remaining cases there was also a conflict between the person having direct custody over the child and the person demanding that contacts be established. However, what was decisive for the adjudication was the firm position of the child capable (due to its age and level of development) of making its own evaluation and decide that it does not want to meet with the person motioning for the establishment of contacts.

The mean duration of the proceedings from the submission of the motion to the court to the day of the issuance of the adjudication by the court of the first instance was 208.6 days, the median duration was 140 days (the median duration of proceedings with instance control was 156.5 days) and was thus relatively long. As a rule, the proceedings period was characterized by at least some degree of emotional tension which could contribute to deepening of the conflict situation. However, in part of the cases emotions calmed down in the course of long-lasting proceedings⁴⁸.

⁴⁷ In 22 cases mediation was conducted by a mediator from the list of the President of the District Court, in 8 from the mediation center, a non-governmental organization (most frequently it was the Polish Mediation Center), and in 2 from an academic mediation center, in the remaining – others.

⁴⁸ This can be attributed to a lot of circumstances which appeared with varying intensity in individual cases. Sometimes a longer duration of the proceedings favoured forging a compromise as regards forms and frequency of contacts. Most frequently, it was linked to the following events: (1) termination of the parents' divorce proceedings; (2) verification of the validity of the fears of the 'first-plan guardian' as to the negative influence on the child of contacts with the petitioner thanks to the implementation of the meetings adjudicated in the course of securing the claim for the duration of the proceedings; (3) effective mediation which resulted in a mediation settlement or a situation in which mediation indirectly contributed to a court settlement. Thus, the lengthening duration of the proceedings occasionally favoured a model of contacts acceptable to all the parties involved in the family conflict.

The establishment of contacts (also in the form of a settlement) does not give an assurance that they will be maintained conflict-free. Nevertheless, another study focusing on proceedings in cases concerning the implementation of adjudications and settlements establishing contacts revealed that only 7.8% of the cases studied concerned grandparents' motions⁴⁹. However, this does not authorize making an optimistic conclusion that in the majority of the cases for the court-mediated establishment of contacts between grandparents and grandchildren contacts are maintained in a conflict-free way.

Abstract

Elżbieta Holewińska-Łapińska, Establishment of contacts between grandparents and minor grandchildren in the practice of Polish courts

This article concerns contacts of grandparents with minor grandchildren (Art. 113⁶ of the Family and Guardianship Code); the related problems are presented against the backdrop of social and pedagogical aspects of intergenerational bonds. The author presents the thesis that contacts between grandparents and minor grandchildren should be perceived not only as a right, but also as a duty of the parties, though having a lesser intensity than the similar relationship between parents and their minor children. In case of a conflict between the standpoints of parents and children concerning contacts with grandparents, the primary duty of minor children is that of obedience towards parents, which takes precedence over the duty of contact with grandparents. Yet parents should exercise parental authority in such a way so as to avoid creating conflicts of loyalty on the children's part. Moreover, they should take steps to enable their children to discharge their legal duties, established in the minors' interest. The article also presents the basic findings from a study of court files in cases relating to grandparents' applications for establishment of their contacts with minor grandchildren.

Keywords: *grandmother, grandfather, grandparents, grandchildren, social capital, contacts, relatives, personal contact, family, right to contact, duty of contact, duty of obedience, socialisation, intergenerational relations, applicant, hearing a minor, private life, family life, family law*

Streszczenie

Elżbieta Holewińska-Łapińska, Ustalenie kontaktów dziadków z małoletnimi wnukami w praktyce polskich sądów

Przedmiotem artykułu jest problematyka kontaktów dziadków z małoletnimi wnukami (art. 113⁶ Kodeksu rodzinnego i opiekuńczego) przedstawiona na tle społecznych i pedagogicznych aspektów więzi międzypokoleniowych. Autorka prezentuje tezę, iż kontakty dziadków z małoletnimi wnukami należy postrzegać nie tylko jako uprawnienie ale i obowiązki stron, jednakże o mniejszej intensywności niż analogiczna relacja pomiędzy rodzicami a ich małoletnimi dziećmi. W przypadku kolizji stanowiska rodziców i dzieci w przedmiocie kontaktów z dziadkami na małoletnich dzieciach w pierwszej kolejności ciąży obowiązek posłuszeństwa wobec rodziców, który wyprzedza obowiązek kontaktowania się

⁴⁹ E. Holewińska-Łapińska, M. Domański, J. Słyk, *Orzecznictwo w sprawach o wykonywanie kontaktów z dziećmi*, "Prawo w Działaniu" 2015, No. 25, p. 19.

z dziadkami. Rodzice jednak powinni tak wykonywać władzę rodzicielską, aby unikać tworzenia konfliktu lojalności po stronie dzieci. Powinni też podejmować działania umożliwiające dzieciom wykonywanie ich obowiązków prawnych, ustanowionych dla dobra małoletnich. Artykuł przedstawia także podstawowe ustalenia badania akt sądowych w sprawach z wniosków dziadków o ustalenie ich kontaktów z małoletnimi wnukami.

Słowa kluczowe: babcia, dziadek, dziadkowie, wnuki, kapitał społeczny, kontakty, krewni, osobista styczność, rodzina, prawo do kontaktów, obowiązek kontaktowania się, obowiązek posłuszeństwa, socjalizacja, stosunki międzypokoleniowe, wnioskodawca, wysłuchanie małoletniego, życie prywatne, życie rodzinne, prawo rodzinne

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