

POLAND

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A. New Developments in the field of Divorce (since September 2002)

Since September 2002 Polish Divorce Law was emendated twice in very significant ways. First, in 2009 the large amendments of the Family and Guardianship Code (hereinafter referred to as the FGC) changed Article 58 § 1, § 1a and § 2 of FGC introducing the parental agreement. In 2015 Article 58 FGC was amended for a second time. Simultaneously and gradually the new regulation of Alternative Dispute Resolution (ADR) was introduced as a result of three amendments of 2005, 2010 and 2014.

Divorce is granted only by the court (not an administrative body¹) upon petition of one spouse. In Article 56 FGC there is only one positive premise for a decree of divorce, i.e. the permanent and irretrievable breakdown of marriage.

1. The parental agreement and shared custody after divorce

As the detailed provision of Article 58 FGC obliges the court which issues a divorce decree (or separation decision) to decide upon parental authority and contact, each divorce (or separation) decree contains a decision on the child's housing as an obligatory element. After divorce, a court regulates the issue of sole custody or joint custody of the common child (Article 58 FGC).

First amendment

Initially in 2009 the large amendments changing Article 58 §1, §1a and §2 FGC introduced the new institution of the **parental agreement** on the exercise of parental authority and contact. However, it was not yet required that the agreement was in written form. In addition, the new Articles 113 - 113⁶ FGC and Articles 582¹ §1, §2 and §3 of the Polish Civil Procedure Code (hereinafter referred to as the CPC) regulated in detail the exercise of contacts after divorce.

Under the new Article 58§ 1 FGC (in the version of 2009) the court decided in divorce judgments, on the parental authority and on the contact, taking into account an agreement between the spouses as to the manner of exercise of parental authority and contact. The court always scrutinized whether such an agreement is in the best interest

¹ The competence of administrative body would be recognized by Polish law as unconstitutional.

of the child. In addition, as a rule, siblings should be brought up together, unless the best interest of a child requires otherwise.

Under the new Article 58§ 1a FGC (in the version of 2009), in the absence of the agreement, the court could entrust the exercise of parental authority to only one of the parents while at the same time limiting the parental authority of the other parent to specific obligations and entitlements in relation to the person of the child, if this was in the best interest of the child. When parents submitted the agreement, the court could assign the exercise of parental authority to both the parents.

However, in the years following this first amendment, researchers gradually began to take the ECtHR jurisprudence on Article 8 ECHR into consideration.² Although in Polish jurisprudence the conception of the necessity of finding a more proper balance between the protection of the child's welfare and the protection of the parents' right to respect for family life was recognised as very controversial and disputable. As a result, the very disputable and controversial idea of shared care (alternate care, or symmetric care) by divorced parents for their child has become the subject of sharp discussion in the Polish doctrine. Some researchers recognize the idea of shared care, (which shall be granted to both parents in preciously equal level), as the optimal basic solution.³ Their views are based on the principle of equal protection of the human and constitutional rights of both parents, but the protection of the child interest's is then, in practice, put in second place.⁴ Other researchers underline the unconditional priority of the principle of the child's best interests over the protection of parents'

² T. Jasudowicz, O potrzebie upodmiotowienia rodziny (The Family as the Subject of Rights), in: M. Andrzejewski, M. Łączkowska, L. Kociucki, A. N. Schulz (Eds.), *Księga Jubileuszowa Profesora Tadeusza Smyczyńskiego (Jubilee Book for Professor Tadeusz Smyczyński)*, Toruń 2008, p. 204 et seqq.; T. Sokołowski, *Dobro dziecka wobec rzekomego prawa do adopcji (The Welfare of the Child in Face of the Alleged Right of Adopting Persons)*, in: Marek Andrzejewski (Ed.), *Związki partnerskie: Debata na temat projektowanych zmian prawnych, (Partnerhips. Debate upon the new proposals of regulation)*, Toruń 2013, p. 103 et seqq.; P. Mostowik Piotr, *Brak "strasburskiego" bądź "brukselskiego" obowiązku*, in: *Partnerhips...*, op. cit., p. 221 et seqq.; A.N.Schulz, *Ustalenie ojcostwa i utrzymywanie kontaktów z dzieckiem – niektóre prawa ojca w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka, (Establishment of Paternity and Maintaining Contact in Light of the Jurisprudence of the ECtHR)* in: *Jubilee Book for Professor Tadeusz Smyczyński*, op. cit.; A. Śledzińska-Simon, (Gloss to the Judgment of the ECtHR of 13 November 2012, 37359/09, H v. Finland, 1226384 LEX.

³ The shared care is only the new and very disputed idea. However currently, as a rule in large numbers of cases the asymmetric care is granted by the courts.

⁴ R. Kucharski, *Wspólna władza rodzicielska nad małoletnim dzieckiem w USA w świetle prawodawstwa i badań specjalistycznych (Joint Parental Authority over a Minor Child in the USA in Light of the Legislation and Professional Research)*, *Rodzina i Prawo (Family and Law)*, p. 35 et seqq.; J.Wierciński, *Kilka uwag o władzy rodzicielskiej nad małoletnim dzieckiem w razie rozvodu rodziców w ujęciu porównawczym (Comparative Analysis of Parental Authority with Respect to a Minor in Divorce Cases)*, *Studia Prawa Prywatnego* 2012, p. 24, who strongly supports the concept of purely shared care on the one hand, he notes the necessity of protecting the best interests of the child on the other hand.

rights. These researchers generally recognize the idea of symmetric care as conflicting with the best interests of minor children, because under Article 95 § 3 FGC, parental authority is established only to protect the child's welfare and the interests of society; the interests of the parents are not mentioned at all in the FGC.⁵ While critics of shared care do not directly cite the jurisprudence of the ECtHR as of yet, judgments such as *Y.C. v. the United Kingdom*⁶ or *Johansen v. Norway*⁷ will undoubtedly be widely discussed in the publications of the near future. Undoubtedly, the new concept of shared custody is connected to new conception of the private way of life of divorced persons.

Second amendment. Shared custody after divorce

As result of this discussion, after only 5 years, in 2015 the new regulation of Article 58 FGC was amended again. One change was made to Article 58 § 1 FGC: the **written form of the parental agreement** is now mandatory. The new provision of Art. 58²¹ § 4 CPC introduced the institutional **symmetric care**.

Most importantly, the previous rule of Article 58 § 1a FGC turned in different direction. Currently, in the absence of the parental agreement the court, taking into account the right of the child to be brought up by both parents, (as a rule) shall adjudicate as to the manner of **shared exercise of parental authority** (as symmetric care) and maintaining contact.

Secondly, instead of symmetric care, both parents can be granted the whole parental authority, but only one of them has the basic right and duty of 'executing the regular care upon the child'. This means that the dwelling of this parent is the residence of the child (*domicilium necessarium*). It is necessary to underline that the meaning and scope of the term 'executing the regular care upon the child' is the object of extensive discussion.

Only exceptionally may the court delegate the exercise of parental authority to one of the parents with a limitation of the parental authority of the other parent if this is in the best interest of the child.

⁵ W. Stojanowska, *Rozwód (Divorce)*, in: *System Prawa Prywatnego, (System of Private Law)*, t. 11, *Prawo rodzinne i opiekuńcze*, Ed.: T. Smoczyński. Warszawa, 2009. p. 777-782; J. Ignaczewski, *Komentarz do spraw rodzinnych*, 2012, p. 201 et seqq.; B. Czech, 2009, p. 500; T. Sokołowski, *Kodeks rodzinny i opiekuńczy: Komentarz (FGC Commentary)*, Ed.: H. Dolecki, T. Sokołowski, Warszawa 2013, p. 455.

⁶ *Y.C. v. the United Kingdom* (no. 4547/10), Judgment of 13 March 2012 (not reported), § 134.

⁷ *Johansen v. Norway* (no. 12750/02), Decision of 10 October 2002 (not reported).

The court has the duty to take into account the parental agreements about the method of executing parental authority and the contact with the child after divorce, if it is harmonious with the child's welfare. However, in the new (and very disputable) Article 58 § 1b FGC, upon joint motion of the parties the court **does not adjudicate on maintaining contacts** with a child.

2. Alternative Dispute Resolution (ADR)

The new regulation of Alternative Dispute Resolution (ADR) was gradually introduced as result of three amendments in 2005, 2010 and 2014. In Polish divorce law the court can direct spouses to professional mediation if, in the course of the proceedings, it recognizes that there still exists a possibility that the marriage may function correctly (Art. 436 § 1 CPC). The court also has the duty of suspending the proceedings if it is convinced that there still exists a possibility to maintain conjugal life (Art. 440 § 1 CPC). Such suspension can happen only once in the course of the entire divorce proceedings. However, a suspension of the proceeding is not allowed if marital cohabitation has already stopped. Mediation must be fully voluntary, both at the moment when it starts, and throughout its process (Art. 183¹ § 1 CPC). No penalty clause is allowed.

Out-of-court mediation is also applied. The court can direct spouses to mediation in every phase of the proceedings. The aim of the mediation is to obtain amicable settlement of all controversial issues (Article 445² § 1 CPC). The institution of mediation is generally (with regards to civil law proceedings) regulated in the CPC in Articles 183¹ - 183¹⁵ CPC, and provisions of the divorce procedure (Article 436 § 2 CPC) make a reference to these general provisions of mediation, accordingly. However, the different character of family matters must be preserved.

The mediation is organized out of court. Pursuant to Article 183² § 3 CPC, non-governmental organizations, acting within the scope of their statutory tasks, as well as universities can keep registers of mediators and create centers for mediation.

Family mediation concerns all matters relating to the fulfillment of the maintenance or future alimentations for child or spouse, if applicable.⁸ Mediation can also concern different issues, especially housing. The basic aim of mediation is to create sufficient room for reaching an agreement, in which spouses can either achieve reconciliation or at least agree to a solution for controversial post-divorce matters. This also includes parental agreement upon parental authority and contact as well as all property matters. The method of draft this parental agreement is strictly contractual: the parties

⁸ T. Sokołowski, *Rozwód (Divorce)*, in: *System Prawa Prywatnego, (System of Private Law)*, t. 11, *Prawo rodzinne i opiekuńcze*, Ed.: T. Smoczyński. Warszawa, 2009, p. 684 et seqq.

have to bargain or discuss each element of the exercise of parental authority. This is the same scope of issues which are decided upon in a divorce judgment.

Usually, the court scrutinizes the parental agreement to check if it is compatible with the best interests of the child. However, the court is never formally bound by such an agreement of spouses; the only one exception concerns the division of common property.

B. New Developments in the field of Maintenance between former spouses (since September 2002)

There have been no notable changes in Polish law regarding maintenance between former spouses.

C. New Developments in the field of Parental Responsibilities (since December 2004)

Since December 2004 the regulation of parental authority was emended significantly in 2009, 2010, 2011, 2015, and 2019.

1. Parental authority of parents living separately

Parents are considered to be living separately if they have never married or currently do not live in concubinage. The regulation relating to this issue was emended in part in a similar way as the regulations for divorced parents.

After the large amendment of Art. 107 § 1 FGC in 2015, if parental authority is vested in both parents living separately, the guardianship court, on the ground of the protection of the best interests of the child, may regulate the manner in which the authority is to be exercised and how contact with the child is to be maintained.

When parents submit the written agreement, in accordance with the best interests of the child, then the court leaves the exercise of parental authority to both the parents.

In the absence of parental agreement, the court takes into account the right of the child to be brought up by both parents and shall adjudicate as to the manner of shared exercise of parental authority and contact rights. Exceptionally, the court may assign the exercise of parental authority to one of the parents solely, if this is in the best interest of the child. Similar to Article 58 § 1b FGC, according to Art. 107 § 3 upon the joint motion of the parents, the court does not adjudicate on maintaining contacts with a child.

2. Contact. Division of parental authority into two institution

In 2008, the significant amendment of the FGC divided the institution of parental authority into two institutions: parental authority and the new institution of contact between parents and the child. As a result, contact operates outside of parental authority. Following Article 113 – 113⁶ FGC both parents and the child are obliged to and have a right to keep in touch with each other and their relatives. This contact includes: (a) contact with the child, such as visits, meetings, or taking the child outside the permanent residence; (b) getting in touch directly through physical conversations with specific persons, i.e. face-to-face contact (and not just by phone), (c) correspondence, and (d) keeping in touch by using other methods of communication, including electronic methods (telephone), radio communication or talking via the Internet.

In the event that the parents, or one of the parents, is separated from their children, they should, together, decide about the mode of keeping in touch with the child. If they cannot arrive at a consensus, the guardianship court will settle the dispute.

Previously, before the amendment of 2008, a major part of the domestic jurisprudence recognized contact as the object of parents' subjective rights. Also, nearly unanimously, the right of contact was considered separately from the institution of parental authority as protected by Article 48 of the Constitution, which grants parents 'the right to rear their children in accordance with their own convictions'.⁹ The standpoint of the Polish Supreme Court (SC) was much more diversified. First, the Polish SC agreed with the predominant conception in jurisprudence.¹⁰ This concept was subsequently supported in numerous judgments of the Polish SC, which underlined the necessity of removing parental authority before taking the more severe measure of banning contact.¹¹ This standpoint of the Polish SC was amended in 2006.¹² A substantial domestic discussion on the scope and legal character of contact rights had begun, and the judgments of the ECtHR, including those in the cases of *Santos Nunes v. Portugal*¹³ and *Dąbrowska v. Poland*, were especially influential.

As result of long discussion, the jurisprudence of the ECtHR was taken into account in the domestic debate. After two very important Strasbourg judgments – *Hoffmann v. Germany* and *Schultz v. Poland* – contact rights were recognized alongside a subjective

⁹ J. Gajda, *Kodeks rodzinny i opiekuńczy: Komentarz (FGC Commentary)*, Warszawa, 1999. p. 365.

¹⁰ The resolution of the Polish SC of 18 March 1968. III CZP 70/66. OSNCP. 1968. No. 5. Item 77 (known as the "SC Divorce Directive").

¹¹ Judgment (resolution) of the Polish SC of 21 October 2005. III CZP 75/05. OSNC. 2006. No. 9. § 142.

¹² Resolution of the Polish SC of 8 March 2006. III CZP 98/05. OSNC. 2006. No. 10. Item 15.

¹³ *Santos Nunes v. Portugal* (61173/08). Judgment of 22 May 2012.

right of the child existing beyond the scope of parental authority. Despite the different concept of contact rights chosen by the Polish SC, the Polish Committee for the Novelization of Civil Law recommended a draft amendment which fully separated contact from parental authority. The Polish Parliament decided to amend the regulation of this issue following this project. As a result, currently, after amendments in 2008 and 2011, contacts have been recognized as a legal institution fully separate from parental authority (Articles 58, 107, 113, 113¹ – 113⁶ FGC.). The Polish SC took the new regulation into account in its recent jurisprudence.¹⁴ However, the jurisprudence does not approach the new regulation homogenously and remarked that the division between contact rights and parental authority is overly sophisticated and irrational from a procedural point of view¹⁵ or recognize it as eccentric. Other authors suggest that the removal of parental authority should affect contact rights, just as a ban on contact should affect parental authority.¹⁶ The majority of the relevant Polish jurisprudence has agreed with the new concept of contact but has underlined the influence of the UNCRC¹⁷ and the European Convention on Contact concerning Children¹⁸ as the basic source of the new regulation. Other authors underline the necessity of discussing the judgments of the ECtHR, for example the influential cases of *Santos Nunes v. Portugal* and *Schneider v. Germany*.¹⁹

3. Maintaining contact and removal a child from an unauthorized person

In 2001 the large amendments of the Polish CPC introduced the new detailed regulation of the removal a child from an unauthorized person: Article 598¹ - 598¹³ CPC.²⁰ Subsequently in 2008 amendments of the CPC established the detailed regulation of the maintaining contacts: Articles 598⁶¹⁵ - 598⁶²¹ CPC. At last, in 2015, the new Article 582¹ § 4 CPC introduced the institution of shared custody of parental authority and contact of parents living separately.

4. Prohibition of corporal punishment

¹⁴ Judgment of the Polish SC of 23 May 2012. III CZP 21/12. LEX No. 1168215.

¹⁵ J. Ignaczewski, *Komentarz do spraw kontaktów z dzieckiem*, (Contacts. Commentary), Warszawa, 2011. P. 24 et seqq.

¹⁶ T. Justyński, *Prawo do kontaktów* (Contacts). Warszawa, 2011. P. 113 et seqq.

¹⁷ In 1978, the Polish State put forward the very first draft of this Convention: Hammarberg T. *The Best interest of the child – what it means and what it demands from adults*, *Children’s Rights and Human Development*, Ed.: J.C. Willems. Antferp-Oxford-Portland, 2010. P. 582.

¹⁸ *European Convention on Contact concerning Children*, Strasbourg, 15 May 2003.

¹⁹ T. Sokołowski, *Kodeks rodzinny i opiekuńczy. Komentarz* (FGC Commentary), Eds.: H. Dolecki, T. Sokołowski. Warszawa 2013, p. 799 et seqq.

²⁰ J. Gudowski (in:) *Kodeks postępowania cywilnego. Komentarz*, (CPC Commentary), Eed.: T. Ereciński, Warszawa 2007, vol. III, p. 204; J. Bodio, w: *Kodeks postępowania cywilnego. Komentarz*, (CPC Commentary), J. Bodio, T. Demendecki, A. Jakubecki, O. Marcewicz, P. Telenga, M.P. Wójcik, Warszawa 2008.

Since 2010 and the new Art. 96¹ FGC, the persons exercising parental authority or guardianship or custody over a minor are not allowed to use corporal punishment.

5. Foster care

Polish family law has detailed regulation of 'foster care' in Articles 112 - 112⁸ FGC. In addition, the Legal Act of foster care of 2011 regulates this matter extensively in more than 200 articles. In essence, the legal parents and the foster parents can execute the same elements of parental authority jointly. The Polish FGC provides that the only two decision-makers regarding the child's serious medical treatment are the mother and father.

Parental responsibility is recognized in Art. as "a duty and right" of parents. The general clause of child welfare is regulated in Article 95 § 1, § 3 FGC. The hearing of the child is regulated in Article 96 § 4 FGC.

6. The new institution of the 'barrister of the child': a professional custodian as representative of the child

In 2019 a significant amendment of the FGC introduced a new detailed regulation of the custody in the area of the representation of a child. If neither parent may represent a child, the guardianship court appoints a custodian.

As a rule, following Article 99¹ § 1 FGC a child's custodian is a barrister or legal counselor, who has a special knowledge of family law and the legal issues relating to the child, to a case where representation of a child is required, or have completed special training regarding the rules of representation of a child, rights or needs of a child. However, if the difficulty of the case does not require more, the custodian may only have a degree in law and demonstrated knowledge on the child's needs. Exceptionally, upon special circumstances when the case is very uncomplicated a custodian may also be a lay person. In accordance with Article 99² § 1 FGC a custodian shall provide the parent of the child, at their request, with detailed information necessary for the proper exercise of parental authority, provided that the good of the child is protected. The custodian has a duty to acquire information on the child, their health condition and family situation. Following Article 99² § 2 FGC the custodian may also request information concerning the child's state of affairs from all appropriate authorities or institutions as well as from associations and social organizations. Article 99² § 3 FGC states that if the mental development, health condition and the degree of maturity of a child allows, the custodian representing the child shall contact them and inform them about the legal actions taken, the course of the proceedings and the method of its completion, as well as the consequences of legal actions taken for their situation, taking in consideration that this information is understandable and personalized to the degree of the child's development.

The custodian has professional duties and shall especially keep secret the circumstances of the case (Art. 99² § 4 FGC) and under Art.99³ FGC receives the significant and proper remuneration of the custodian and the reimbursement of all expenses.

7. Parental administration of child's property

In 2009 the amendments of Article 104 FGC extended the regulation on the parental administration of child's property. The guardianship court may now order the parents to prepare an inventory of the child's significant property and submit it to the court as well as to provide notification of any main changes in that property, in particular of acquisition of valuable assets by the child (Art. 104 § 1 FGC). Following Article 104 § 1 FGC the court, where reasonably justified, may establish the value of transactions involving movable property, money and securities that the child or the parents may conclude each year without approval from the court. After termination of the parental administration, the parents shall return the child's property administered by them to the child or his legal representative. At the request of the child or his legal representative, submitted within a year of termination of administration, the parents shall submit a report on administration of the child's property. However, the request may not concern income from the property collected when exercising parental authority.

8. Name and surname of the child

After amendments in 2009 the name of the child is regulated in Article 89¹ and Art. 90¹ FGC. According to Art. 89¹ FGC, children descending from the same parents have the same surname, subject to the provisions concerning the child's consent required for surname change. Following Art. 90¹ FGC the surname of a child is a combination of the child's mother's surname and father's surname or a combination of the surname of one parent and the surname of his or her spouse who is not the child's parent. The surname may not consist of more than two elements. The child's surname shall consist of the first elements of the combined surnames.

D. New Developments in the field of Property relations between spouses (since August 2008)

There have been no notable changes in Polish law regarding property relations between spouses.

E. New Developments in the field of De Facto Unions (since February 2015)

1. Concubinage and protection of privacy and family life

In Poland, the family may be also composed of a mother or a father and a child without marriage. Conjugal unions of persons who have not contracted a marriage is treated as a concubinage. The concubinage (similar to the unregistered partnership) as a unit between woman and man only has a private character, but it can be transferred into a family situation following maternity and paternity connected with delivering of the common child of the partners. From this point of view it is indispensable to divide all private phenomena into two groups: the transformable phenomena and the nontransferable phenomena.²¹ If a concubinage is transformed into a family it receives the full scale protection from the State.

2. Polish long experience

It is necessary to underline that Poland has a very long tradition of the total legal freedom of homosexual relations, which are allowed without any punishment since 1932. This legal freedom of homosexual relations was not reached in many other European countries until the last decades of the 20th Century. As a great number of various social units having only private character, the homosexual units have the completely legal protection of Polish Civil Code by the construction of substantive personal rights of privacy.

²¹ T. Sokołowski, A. Mączyński, Ways of family life, in: *Rapports Polonais, XXth Congress of Comparative Law, AIDC/IACL, Fukuoka, Japan, July 2018*, ed.: B. Lewaszkiewicz-Petrykowska. Łódź, 2018. p. 27-56.