Chapter V

Poland: Parental Authority

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1. The historical context of a modern legal parent-child relationship

Without referring to history older than the end of World War II, it can be said that in terms of the legal structure of the parent-child–state relationship, from then until now, there have been two radically different periods with regard to the position of the state's legal status in relation to raising children.

In the first period, which lasted until 1989, Poland belonged to the so-called "people's democracies," in which the authorities sought to implement the idea of a socialist state to eventually introduce a communist system. However, pursuing this goal did not entail the permeation of the Family and Guardianship Code enforced on January 1, 1965 (hereinafter referred to as FGC)[1] with ideological threads. Although the Code was adopted during the period of strong expansion of communism, the statements formulated there were ideologically neutral.[2] As a result, after the fall of the communist system in 1989, it was not necessary to repeal this legal act. On the other hand, several amendments have been added since then, especially in marriage law (marriage contract, matrimonial property regimes, divorce, separation) and in the provision concerning the parent-child relationship (filiation, parental authority, foster care, adoption, maintenance obligations).[3]

1 Ct. Journal of Laws of 2020, Item 1359.
2 Fiedorczyk, 2014, pp. 697–742; Nazar, 2005, pp. 81–110; Holewińska-Łapińska, 2009, pp. 1023–1025.
3 Ignatowicz, Nazar, 2016, pp. 45–62.

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Family law regulations, owingto the presence of many ambiguous phrases (which is not an allegation but a natural feature of this branch of civil law), including general clauses, should be read in the context of the state's political system and the then-valid constitution. Therefore, the phrases contained in the FGC take on a different meaning depending on the context assigned to them in the currently binding Constitution (until and since 1989, especially since the adoption of the Constitution of the Republic of Poland of April 2, 1997[4], henceforth referred as the Constitution RP).[5] The flexibility of the FGC regulations gave judges (and still does) the opportunity to focus their attention only on substantive issues, which prevented the courts from interpreting them oppressively toward parents whose impact on their children's upbringing was questionable from the point of view of the assumptions of the official communist doctrine. No historical reports suggest that the courts interfered with the sphere of parental authority to persecute parents for their involvement in opposition activities that were illegal at that time or, for example, for raising children in a religious spirit. This also applies to the period of martial law (1981–1983), when the repressions against those contesting communism were massive and drastic (internment camps, imprisonment, dismissal, beatings, and murders by the so-called unknown perpetrators).

Unfortunately, examples of an ideological approach to family law in the scientific literature were abundant but not dominant, and their number decreased each year.

The parent-child relationship is also regulated outside of the FGC. Of particular importance here is educational law as it creates a framework for educational activities in relation to children.

Unlike the ideologically neutral FGC regulations, the education law in force in Poland until the political breakthrough of 1989 was extremely ideologized in the communist spirit,[6] and its content was meticulously implemented in the practice of schools and educational welfare institutions, such as children's homes. In many families, children obtained knowledge about the history of Poland from their parents and other relatives in a version diametrically different from that taught at schools, where curricula were imposed.[7]Simultaneously, compliant luminaries of legal science and pedagogy preached about the primacy of the communist party in raising children,[8] which was manifested in the politicization of scouting, bans on youth organizations if they did not declare support for communism, and—above all—in the curricula, especially of such subjects as the Polish language and literature, history, and social sciences. Since the communist party constituted the state authorities and usurped power to determine the direction of children's education and upbringing, it is possible to define the state system as authoritarian and, in some aspects, even totalitarian.

4 Journal of Laws of 1997, no 78 Item 483 as amended.

5 Andrzejewski, 2021a, pp. 7–10.

6 Journal of Laws of 15 July 1961 on the development of the system of education, Journal of Laws of 1961 no. 32 Item 160 as amended.

7 Cywiński, 1978.

8 Kozakiewicz, 1976, pp. 74–84.

After the political breakthrough of 1989, the ideological legal solutions were dismissed, and the main function of the school was education, which, with time, also embraced support for the family in its upbringing endeavor.[9] The Art. 47 of the Constitution RP provided that the family is an autonomous unit, and parents have primacy over public institutions in raising their children.[10] The state is assigned a supporting role in relation to parents, and it orders to support them in performing their parental tasks (see Section 6). Such a direction is also indicated in the United Nations Convention on the Rights of the Child[11] (preamble, Art. 5 and 18; hereinafter referred to as the UNCRC), the provisions of which are a kind of directive addressed to the states as parties, so that they focus their efforts on supporting parents—especially in performing the care-educational and economic functions of the family—to protect the rights of the child.[12]

2. Current issues justifying research on the parent-child relationship

2.1. Parents and the state

The debate on the role of parents, including their special position and tasks in relation to the child, is being held in the context of the relationship between state and family. The debate has been perennial and universal in character because it has taken place in all political systems except during the communist period, during which it was not held owingto preventive censorship. In Poland and other countries of Central Europe, the institution that opposed the oppressive attitude of the state toward families was the Catholic Church.[13] Within its Polish structures, it offered educational and welfare programs for a significant percentage of children and adolescents. These programs were an important educational and upbringing alternative to the one provided by the state. Religion was taught in parishes (i.e., outside the control of the state) and in the cities; the Light-Life Movement (also referred to as the Oasis Movement) enjoyed popularity among young people.[14]

Today, in Poland, a dispute has once again erupted over the position of parents and the role of the state in relation to children. The parents' position is threatened by the spread of the *gender* ideology and the philosophical trend known as neo-Marxism.

9 Act of 7 September of 1991 on the educational system, Journal of Laws No.95, Item 425 as amended; Act of 16 December of 2016 on Educational Law, ct. Journal of Laws of 2021, Item 1082 as amended.
10 Art. 48, Art. 53(3), Art. 70(3).
11 Journal of Laws of 1991, No. 120, Item 526.
12 Smyczyński, 1999, pp. 149–166; 2012, pp. 14–16; Andrzejewski, 2012, pp. 41–46.
13 Cywiński, 1993.
14 Terlikowski, 2021.

Many Western countrieshave adopted legal acts and resolutions of various bodies (especially political but also scientific) that openly undermine the so far generally unquestionable positive role of the family, especially as a model environment for children to grow up in. In their view, the family is a source of oppression rather than of harmonious growth.[15]

In the debate on state interference in family life, the subject of the dispute is not whether the state can interfere (whether it has substantive and formally legally defined competencies to do so), but instead, it concerns the scope of such interference. The admissibility—and sometimes the necessity—of state intervention in the life of families is determined by Articles 18 and 71 of the Constitution RP, which oblige the state to support the family as well as the married couple, maternity, and parenthood, with the reservation that the courts may restrict or deprive parents of their parental rights if the prerequisites for such restrictions set out in the FGC are met.[16] The core of the problem is how to strike a balance between the state's overprotective attitude toward families (i.e., patriarchalism violates the autonomy of the family and destroys its resourcefulness) and an excessively lenient attitude toward the highly reprehensible behavior of parents, or a hasty or excessively firm one if persuasive measures have not been used beforehand.

2.2. Contemporary problems with upbringing

The list of contemporary parenting challenges should begin with the role of multimedia, which generate, for children and young people, a superficial way to communicate that is often inaccessible to the adult generation. A great impediment to upbringing is the fact that parents do not know enough about the content to which their children are exposed on the Internet and are therefore unable to discuss it, let alone correct or counteract its impact.

Upbringing is also hindered by the universal process of change in the social roles performed by women and men. In times of intensive change, stability—so conducive to parenting—has become a scarce commodity. It has been replaced by the reality of permanent change. Women and men's difficulties in fulfilling their roles as mothers and fathers raising children in a new way, as well as difficulties in mutual understanding (parental alignment), create an unstable ground for the growth of their children.[17]

The destabilizing force of the above factors is strengthened by the influence of the media. Many media productions, so attractive in terms of plot, color, and artistic elements, have an intentionally destructive effect on upbringing and family relations.

Moreover, easy access to pornography is found demoralizing as it fosters the attitudes of objectification of oneself and others.

15 Roszkowski, 2019, pp. 485–554.

16 Borysiak, 2016, pp. 1182–1211; cf. Art. 48(2) of the Constitution RP.

17 Kujawska and Huber, 2010; Augustyn, 2009; Melosik, 2006; Kocik, 2006, pp. 336–352.

Central Europe has no areas of acute poverty, but serious parenting problems are caused by the incompetent use of wealth as a result of parents' involvement (including professional one) outside the home, which usually happens at the expense of building bonds with their children. As a result, parents share their parenting and educational functions with a variety of institutions (in addition to schools, also nurseries, kindergartens, and social, sports, cultural, and religious organizations). One of the consequences of this sharing is a discrepancy in the messages conveyed to children between those from within the family and those from outside. Of course, the situation in which the parents "absolve" themselves of the responsibility of raising their children, claiming that this is the task of the school and other institutions, is not rare.

Of special note is the proliferation (especially in Western Europe) of laws giving children excessive freedom to decide for themselves (with the knowledge and support of public institutions), which, simultaneously, marginalizes the role of parents. Pro-family standards of human rights protection are ignored also by the UNCRC, which emphasizes the high importance of parents and family. The misinterpretation of the UNCRC's provisions by some activists, politicians, as well as educators and lawyers generates opposition (tension) between children and the adult world (especially parents). It is enough to point to the simplified—and therefore harmful—sex education[18] or the abortion law that enables underage women (with the help of public institutions) to terminate a pregnancy without the parents' knowledge. Worthy of mention is also the use of the educational system to indoctrinate children in matters of worldview that are contrary to the official educational programs adopted by schools and accepted by parents.

As in every important issue, semantics plays an important role in the reflection on the parent–child relationship. The terminological confusion[19] that is being created nowadays leads to the questioning of important concepts in this field. A case in point is the official gender terminology adopted in some countries (e.g., "parent 1" and "parent 2" to replace "mother" and "father," just as "two people getting married" replaces "man" and "woman"). A displacement of the term "parental authority" by the term "parental responsibility" is also questionable, as will be discussed in Section 5.

3. The protection of parental authority in the system of sources of law

The catalog of sources of law concerning—directly or indirectly—the protection of the relationship between parents and children is extensive. The following provisions of the Constitution RP are worth quoting:

18 Kuby, 2013
19 Keyes, 2018.

Article 18. Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.
Art. 33. Men and women shall have equal rights in family, political, social, and economic life in the Republic of Poland.
Art. 38. The Republic of Poland shall ensure the legal protection of the life of every human being.
Art. 47. Everyone shall have the right to legal protection of their private and family life, of their honor and good reputation, and to make decisions about their persona.
Art. 48. 1. Parents shall have the right to rear their children in accordance with their own convictions. Such upbringing shall respect the degree of maturity of a child as well as their freedom of conscience and belief and also their convictions. 2. The limitation or deprivation of parental rights may be effected only in the instances specified by statute and only on the basis of a final court judgment.
Art. 53 (3). Parents shall have the right to ensure their children a moral and religious upbringing and teaching in accordance with their convictions. The provisions of Article 48, para. 1 shall apply as appropriate.
Art. 70 (3). Parents shall have the right to choose schools other than public for their children. Citizens and institutions shall have the right to establish primary and secondary schools and institutions of higher education and educational development institutions. The conditions for establishing and operating non-public schools, the participation of public authorities in their financing, as well as the principles of educational supervision of such schools and educational development institutions shall be specified by statute.
Art. 71 (1). The State, in its social and economic policy, shall take into account the good of the family. Families, finding themselves in difficult material and social circumstances—particularly those with many children or a single parent—shall have the right to special assistance from public authorities. (2) A mother, before and after birth, shall have the right to special assistance from public authorities to the extent specified by statute.
Art. 72 (1) The Republic of Poland shall ensure protection of the rights of the child. […] (2) A child deprived of parental care shall have the right to care and assistance provided by public authorities. (3) Organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, insofar as possible, give priority to the views of the child. […]

In this field, international standards are set especially by the following:

- UNCRC and several other universal and regional conventions,[20] including, in particular, Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[21]
- The Council of Europe's resolutions and recommendations,[22]

20 Smyczyński and Andrzejewski, 2020, pp. 23–24, 211–213, 260–262.
21 Nowicki, 2010, pp. 508–566; Jasudowicz, 1999a.
22 Safjan, 1993; Jasudowicz, 1999; Jaros, 2012.

– EU Regulations (in particular Council Regulation [EC] No. 2201/2003 of November 27, 2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation [EC] No. 1347/2000, the so-called Brussels II bis).[23]

Among national regulations, the most important are the FGC provisions,[24] which will be repeatedly mentioned, as well as the laws mentioned in Sections 3, 6, and 10.2. of this report and the list of legal acts.

The legal doctrine has highlighted the usefulness of separating a set of norms defined as "law concerning the family," which are scattered over numerous legal acts from various branches of law and which all share the function of protecting the family.[25] The consequence of this view is the directive that the legislative and executive acts on family protection should form an axiologically, formally, and pragmatically coherent whole together with the family-related regulations of the Constitution RP and the FGC. In relation to legal acts that have already been adopted, a postulate is formulated that their provisions should be applied in a manner consistent with the provisions of the FGC and the Constitution RP. The implementation of these seemingly obvious postulates is difficult to achieve in practice.

4. The concept of parental authority

Parental authority consists of the powers, duties, and competencies of parents with regard to their care of the child and custody over the child's property. It is also manifested in their representation of the child within the framework of statutory representation. The concept covers all the behaviors (including decisions) of parents in relation to the child as well as their behavior in relation to other parties with respect to the child. The concept of parental authority includes only those behaviors and decisions that serve the spiritual (mental) and physical development of the child, namely those that are in the child's best interests (see Section 6). The behaviors that are contrary to the child's best interests are referred to as abusive.

Parental authority consists of three legal relationships of parents[26]:

a) with the child (family law relationship),
b) with the state (administrative law relationship),
c) with third parties (civil law relationship).

23 Journal of Laws of European Union, L 338 of December 23, 2003.
24 Articles 87–127 FGC.
25 Ziembiński, 1983, p. 126; Telusiewicz, 2013; Andrzejewski, 2003 pp. 51–63.
26 Sokołowski, 1987, pp. 41–57.

The essence of the first is in the parents' powers, duties, and competencies in relation to their child (custody of the person, of the property, and statutory representation). The second concerns the administrative obligations imposed on parents (registration of the child in the registry office, compulsory medical examinations and vaccinations, compulsory school attendance) and the state's interference in the form of judicial intervention in the parent–child relationship. The third offers the possibility for parents to request that the state take their child away from unauthorized persons.

Since the exercise of parental authority includes actions undertaken in the interest of the child (for their well-being), the use of violence or demoralizing behavior that takes advantage of the position of the more powerful party toward the child is treated as an abuse of parental authority, and as such, it deserves a negative reaction by the law in the form of termination of such parental authority.[27] If the parents' behavior does not meet the conditions for the termination of parental authority but threatens the child's well-being, then the court will restrict parental authority to correct their behavior.[28]

On the primacy of parents in raising their children, see Section 6, and on legal custody (surrogate parental authority), see Sections 12 and 14.

5. Parental "authority" or parental "responsibility": the (not only) terminological dispute

In Poland, there is an ongoing dispute between the supporters of the term "parental authority" used in Polish legal acts[29] and the proponents of abandoning it and replacing it with the term "parental responsibility." As already mentioned, what is at stake here is not only the accurate reflection of the designator's essence but also the parents' position in relation to the child and the state.

Supporters of the change have argued that the term "authority," when used to describe the parent–child relationship, contradicts the idea of the child's subjectivity and the need for respect for the child; in its name, it refers to the paternal authority known in Roman law, which was restrictive toward the child. They posit that the term "parental responsibility" captures the essence of this relationship and reflects the desired attitude of the parents toward the child as persons responsibly performing tasks in relation to their children. It has been pointed out that this very term is used in the documents of the Council of Europe as well as, for example, in the documents of the academic body, the Commission on European Family Law.[30]

27 Art. 111 § 1 FGC
28 Art. 109 §1 of FGC; see Section 10.
29 Articles 93-113[8] FGC
30 Wysocka-Bar, 2018, pp. 701–722; Sokołowski, 2021, pp. 227–248.

In Poland, this view was most strongly articulated in the content of the draft of the Family Code submitted in 2018 by the then Ombudsman for Children and in its justification.[31] No constitutionally entitled institution took the opportunity to bring it to the Sejm, the Polish Parliament, and it was strongly criticized in the doctrine.[32]

The legal definition of "parental responsibility" found in Art. 2(7) and (8) of the Council Regulation (European Community) No. 2201/2003 of November 27, 2003 reads as follows:

> /…/7. the term "parental responsibility" shall mean all rights and duties relating to the person or the property of a child, which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access;
> 8. the term "holder of parental responsibility" shall mean any person having parental responsibility over a child;/…/

Conceived in this way, "parental responsibility" as a category is situated in public law, which makes a significant difference when compared to the civil law construction of legal rights on which the concept of "parental authority" is founded.[33]

The concept of "parental responsibility" used in the draft of the Family Code presented by the Children's Ombudsman[34] defines it "as a task, but also as an attitude to and relationship of the parents with the child," which makes a dogmatic analysis difficult, especially since the cited provision of the draft also states that parental responsibility entails bearing responsibility.[35]

In the justification of the proposal, it was pointed out that the word "responsibility" was used in the sense developed in the personalistic philosophy and ideologically affiliated pedagogy. In the statements made therein, it is easy to notice that they refer to the "responsibility" of the subject "for someone," "for something," "to someone for something," and "to oneself for something." It is understood as the life attitude of someone who will not fail, will be supportive, will not yield to the temptation of egoism but will be patient, merciful, and the like. Thus understood, "responsibility" has an affirmative value, and a responsible person is the one who can be set as an example for others.[36]

Despite the frequently raised proposal to change it, the term "parental authority" has been retained in the FGC because

31 https://brpd.gov.pl/aktualnosci/rpd-prezentuje-nowy-oczekiwany-spolecznie-kodeks-rodzinny (Accessed: August 26, 2021).
32 Nazar, 2019, pp. 7–25; Andrzejewski, 2019, pp. 9–42; Sokołowski, 2020, pp. 205–236; Bugajski, 2021, pp. 105–130.
33 Sokołowski, 2020, p. 215.
34 Art. 21(10).
35 Sokołowski, 2020, p. 215.
36 Wojtyła, 2001; Molesztak, 2007, p. 417–431; Rynio, 2021; Stadniczeńko and Zamelski, 2016, pp. 96–110; Budajczak, 2012, pp. 107–116.

- it has democratic origins: it was introduced at the beginning of the twentieth century to put the position of the mother on an equal footing with that of the father[37];
- it is incorrect to equate parental authority with paternal authority;
- it is widely understood in society;
- the word "authority" is not used to condone aggression toward the child[38];
- there is a danger that the replacement of "parental authority" with "parental responsibility" will lower the parents' legal position in the minds of society; to promote this notion is to support (intentionally or unintentionally) the process aimed at weakening the institution of the family and the family relationship between parents and children[39];
- and above all because
- the character of a legal relationship is determined by its content rather than its name.[40]

Moreover, it should be emphasized that in light of the provisions of the FGC, the desired attitude of parents toward their child amounts precisely to what is referred to in pedagogy and philosophy as responsibility for the child.[41] Their legal position does not imply the parents exercise an authority understood as the right to rule over the child by making arbitrary decisions. Rather, the law obliges parents to behave in a way that is marked by concern for the child. This implies an attitude of service and devotion to the child and a focus on the best interest of the child.[42] A change in terminology would not change the legal position of parents and their children (see Sections 6 and 9.1).

It has also been pointed out that, in the legal language used by lawyers and in the legal language used to formulate legal acts, "responsibility" has—more or less—but always negative connotations. Someone is responsible for causing damage, committing a crime, failing to fulfill an obligation or a misdemeanor; for these reasons, the person will bear responsibility, that is, they will suffer the deserved negative legal consequences (sanctions). A case in point is Article 427 of the Civil Code (henceforth CC) on parents being liable for damage caused by a child (fault in supervision). Opponents of the change argue that the linguistic tradition of using the word "responsibility"—contrary to the intention of the proponents of its introduction—would give a negative normative context to the legal position of the parents toward the child.

At the end, a word of remark may be added, namely that the word "authority" does not evoke enthusiasm among supporters of the existing terminology. However, the strengths of the term "parental authority" can easily be demonstrated against the

37 Sokołowski, 2021, p. 230.
38 Nazar, 2013, pp. 112–113.
39 Sokołowski, 2021, p. 230.
40 Strzebińczyk, 2011, pp. 237–243.
41 Andrzejewski, 2018, pp. 225–242.
42 Andrzejewski,2018, pp. 225–242.

background of the weaknesses of "parental responsibility" and the concerns raised by the anticipated effects that its possible introduction may bring forth. It was worrying to observe that the term was promoted in Poland by circles treating children's rights in a way that antagonizes the world of children with the world of adults. In this context, a proposal was made to introduce the term "parental custody"[43] into the FGC, which captures the essence of the psychological and pedagogical relationship between parents and children better than the term "authority" and, simultaneously, does not evoke the reservations formulated in relation to the concept of "responsibility."

The debate continues.

6. Axiological and constitutional grounds for the protection of parental authority

Of particular importance for the protection of the family are those legal norms that are defined as "principles of law." This notion has been developed by the legal doctrine. The "principles of law" should be understood as norms expressing directives of great importance and wide application, which are aimed at the protection of certain values (their validity is strongly axiologically justified) and the realization of important goals. They are sometimes expressed in specific provisions, but more often, the basis for their identification can be found in several different provisions and sometimes also in norms interpreted from these provisions.[44]

The protection of the family and such aspects of family life as maternity, paternity, parenthood, fulfillment of economic and educational needs, a sense of security, and other needs have their foundation in the provisions of the Constitution RP. The normative status of these family "regulations" corresponds to their solid and consistent axiological justification. This is worth emphasizing in view of the evolution of law in many European countries in the direction to erode the family institution, involving, *inter alia*, the position of parents.

All constitutional principles of law concerning the family and relations within this social group mostly reflect ideas previously expressed in international documents setting out the standards for the protection of human rights. Among them, one should point out, in particular, the following principles in the Constitution RP:

1) the principle of the primacy of parents in the child upbringing,[45]
2) the principle of the privacy of family life,[46]

43 Strzebińczyk, 2011, p. 243.
44 Wronkowska, Zieliński, and Ziembiński, 1974; Kordela, 2012.
45 Art. 48.
46 Art. 47.

3) the principle of the good of the child,[47]
4) the principle of the protection of the family,[48]
5) the principle of equal legal status of men and women in family life,[49]
6) the principle of subsidiarity (preamble) in the approach of public institutions to families,
7) the judicial protection of children in their relationship with their parents.[50]

Re. (1), the primacy of parents in raising a child is taken over in the Polish law from documents cataloging human rights, among which the most important is the United Nations Convention on the Rights of the Child (UNCRC), the preamble of which affirms the family. As regards the norms, the rank of parents and their paramount importance for the development of a child are expressed in Art. 5 and Art. 18 as well as, in a certain sense, in Art.8 and Art. 9 (see Sections1, 2.1., 4).

Parents exercising parental authority, an element of which is the child upbringing and guidance, may do so in accordance with their own convictions. In this respect, they have primacy, that is, precedence over the organs of the state that are obliged to support the parents.[51] This primacy of parents is also reflected in Articles 53(3) and 70(3) of the Constitution RP on the prerogative of parents in the religious upbringing of the child and in the choice of education (school). Abusing this primacy by parents to engage in behavior contrary to the good of the child constitutes the basis for the termination of parental authority.[52]

Re. (2), the principle of protection of the privacy of family life[53] safeguards the autonomy of the family vis-à-vis the state and third parties. In an autonomous family, parents pursue their own idea of life, which involves also their child formation. If the parents are supported in their upbringing by various institutions, including public ones (nurseries, kindergartens, schools, day-care centers, organizations such as scouting, and so on), this support is given at the will of the parents who, within the framework of primacy in upbringing and autonomy, have chosen this path. Autonomy, like primacy, does not prevent the state from intervening in the life of the family if, within the family group, the weak are abused, neglected, or not protected.

Re. (3), the principle of the good of the child is the most important principle of family law.[54] The "good of the child" is understood as the optimal configuration of circumstances relating to the child. The configuration of circumstances spans over a long period of time and is conducted with the view of a long-term perspective, which

47 Art. 72.
48 Arts 18, 71.
49 Art. 33(1).
50 Art. 48(2).
51 Borysiak, 2016, pp. 1198–1207; Art. 48(1) of the Constitution RP
52 Długoszewska, 2012, pp. 228–282; Borysiak, 2016, pp. 1207–1211; and Art. 111 § 1a FGC.
53 Wild 2016, pp. 1161–1118.
54 Radwański, 1981, pp. 3–26; Stojanowska, 1979; Ignatowicz and Nazar, 2016, p. 75; Sokołowski, 2020, pp. 209–212; Smyczyński and Andrzejewski, 2020, pp. 26–27.

is rooted in the awareness of creating the child's future (i.e., shaping the child as a person who will soon become a grown-up).[55] This principle requires searching for this optimal configuration of the circumstances concerning the child in every case in which courts and administrative authorities solve legal problems that directly or indirectly concern the child. Its meaning is identical to the concept of "the best interests of the child" used in Article 3 of the UNCRC.

Re. (4),in light of the Constitution RP, a family that is under state protection consists of a married couple, married parents and their children, a single-parent family (parent with a child or with children), as well as a cohabiting couple, provided that it raises children.[56] Forms of cohabitation other than marriage do not offer children the same protection as that afforded to children of married parents. In particular, only a child born to a married woman is presumed to have descended from the mother's husband. If a child is born to an unmarried woman, the father is identified through an acknowledgment of paternity or court filiation proceedings (see Section 7.2.).

The principle of family protection is mainly understood from the point of view of the economic—and also social—impact of the state within the framework of the implementation of social policy goals. By its very nature, social policy[57] is focused on areas requiring intervention; hence, Art. 71 of the Constitution RP mentions support for impoverished, single-parent, and multi-child families. Among numerous laws supporting families in fulfilling their economic needs, the following should be pointed out: Act of November 28, 2002 on family benefits[58]; Act of February 11, 2016 on state aid in the upbringing of children (the so-child support benefit called 500+ Act[59]); Act of December 17, 1998 on pensions from the Social Insurance Fund[60] (especially provisions on survivors' pension); and Act of March 12, 2004 on social assistance and others.[61]

In recent years, the good of the family has been seen particularly through the prism of health protection, including mental health, as well as compulsory vaccinations.

It should be stressed that the social support of the family or its individual members cannot overtake family-legal maintenance obligations as this would be contrary to the constitutional principle of subsidiarity. The state's role is to ensure that these obligations are fulfilled, especially if the ones obliged to meet them are the parents.[62] The relevant regulations are contained in the FGC;[63] the Code of Civil

55 Radwański, 1981, pp. 3–26; Sokołowski, 1987, pp. 54–57; 2013, p. 13; 2020, pp. 207–215; Andrzejewski, 2021b, pp. 29–51; Stojanowska, 1979, 1993, pp. 217–233; Strzebińczyk, 2011, pp. 313–323; Mostowik, 2014, pp. 54–74; Jaros, 2015, pp. 102–116.

56 Ignatowicz and Nazar, 2016, pp. 29-34; Borysiak, 2016, pp. 487–490.

57 Kosek, 2009, pp.1073–1085.

58 Ct. Journal of Laws of 2022, Item 615.

59 Ct. Journal of Laws of 2019, Item 2407 as amended.

60 Ct. Journal of Laws of 2022, Item 504.

61 Ct. Journal of Laws of 2021, Item 2268 as amended.

62 Andrzejewski, 2003, pp. 131–162; Nitecki, 2008, pp. 58–87, 95–102.

63 Art. 27, Art. 60, Arts128–144[1]

Procedure[64] (provisions on enforcement proceedings; hereinafter, the CCP); the Act of September 7, 2007 on assistance to persons entitled to alimony[65]; and Art. 209 of the Criminal Code.[66]

Re. (5), in the context of the subject of the study, the principle of the equal legal status of women and men[67] implies the equality of both parents in relation to their child.[68] The origin of the principle dates back to the adoption of the concept of parental authority as an institution created to equalize the legal status of the father and mother in their role as parents. The Art. 97 § 2of the FGC provides that the parents decide jointly on important matters concerning the child and, in the event of a dispute, a court may be called upon to decide on the matter. What is meant by the term "important matters" is the shaping of the children's outlook, their education, medical treatment, membership in social organizations, participation in competitive sports, place of residence, and others.

If one parent has limited or no parental authority, the other parent has full parental authority.

Re. (6), the principle of subsidiarity[69] is applied in many contexts, one of which is the parent–child relationship. It has a strong influence on the way the principle of family protection is implemented. The supportive state is not overprotective, nor is it liberal in the classical sense; it supports the family in the fulfillment of its functions—in particular in childcare and economic functions—and it cannot replace (relieve) parents in the execution of their tasks. Simultaneously, it is not indifferent to family dysfunctions (life incompetence but also culpable behavior resulting from, e.g., addictions and mismanagement) and difficult crisis situations. Its role is to support the family in overcoming its difficulties to become independent. The principle of subsidiarity is reflected in the slogan "help to self-help"—in other words, leading to the self-reliance of the beneficiary. With reference to the subject of this report, it can be expressed as an order to support the family in fulfilling its childcare, educational, and economic functions, so that it performs these tasks independently in the future.

Re. (7), the principle of the court's protection of the child in relation to their parents and guardians manifests itself, *inter alia*, in

- the prerogative of the courts to rule on cases of limitation and termination of parental rights;[70]
- the obligation to focus on the child in cases of divorce and separation (so that no decision is made against the best interests of the child[71] and so that the

64 Ct. Journal of Laws of 2021, Item 1805 as amended
65 Ct. Journal of Laws of 2021, Item 887 as amended
66 Ct. journal of Laws of 2021, Item 2345 as amended
67 Sobczyk, 2009, pp. 1277–1291; Borysiak, 2016, pp.843–867.
68 Mostowik, 2014, pp. 27–28.
69 Millon-Delsol, 1995; Dylus, 1995, pp. 52–61.
70 Art 48(2) of the Constitution RP.
71 Art. 56 § 2 FGC.

good of the child is a criterion for the decision on parental authority, contact, and maintenance);
- referring divorcing spouses to mediation;
- exercising judicial control over the implementation of child property management and decisions on the limitation of parental authority;[72]
- monitoring the exercise of the child's legal custody;[73]
- competence to support parents in the exercise of parental authority at their request.[74]

Among the numerous issues concerning the functioning of courts dealing with family cases, it should be pointed out, in particular, that the child's effective protection requires the cooperation of the judges with institutions and organizations active in the environment, which, on the one hand, signal disturbing situations threatening the child and, on the other hand, execute court decisions. This issue is underestimated by judges and neglected during judicial training.

7. Parents

7.1. The mother

The mother is the woman who has given birth to the child.[75] This regulation was adopted in 2008 to end the disputes over the operation of surrogacy services.[76] Sometimes, after the child was born, the surrogates did not intend to deliver the child to the persons who had ordered the service of carrying the baby and giving birth. Until 2008, surrogacy agreements were invalid on the grounds that they were contrary to the principles of social co-existence.[77] Statutory surrogacy agreements were banned under penalty of the law in 2015.[78] It was considered reprehensible to treat a child as an object of a contract and to objectify a surrogate, who is required by contract not to establish an emotional bond with the child, as this is not indifferent to her psyche and is also harmful to the psyche of the child to be born. Apart from the maternity of a child born by surrogacy, the question of determining the mother is not controversial. Actions for the determination of maternity may be taken if a birth certificate

72 Arts. 101–105 FGC; Art. 109 § 2 and 3 FGC.
73 Arts 165–168 FGC.
74 Art. 100 FGC.
75 Art. 61^9 FGC.
76 Mostowik, 2019.
77 Nesterowicz, 2007, pp. 257–263.
78 Article 28 (1) and (2) of June 25, 2015 Act on infertility treatment. Ct. Journal of Laws of 2020, Item 442.

has been drafted for a child born of parents who are unknown or if the maternity of a woman entered in the child's birth certificate as their mother has been denied.[79] If, on the other hand, a woman who did not give birth to the child is entered in the child's birth certificate as their mother, then the denial of the motherhood of that woman may be requested.[80]

A woman who has adopted a child is also a mother; upon adoption, the woman who previously enjoyed the status ceases to be a mother (in the formal sense).

7.2. Father

The father of a child is identified through the woman who gave birth to the child. In the still typical situation where a married woman gives birth to a child, the child's father is presumed to be her husband.[81] This presumption does not apply when a child is born by a married woman who has been separated from her husband for 300 days, and it may be rebutted in a lawsuit for the denial of paternity by "proving that the mother's husband is not the child's father".[82] The mother's husband cannot bring an action for the denial of paternity if the child was born as a result of a medically induced procreation procedure to which he consented.[83]

An action for the denial of paternity of the mother's husband may be brought by that husband, the child's mother, the child, and the public prosecutor. The child may do so after reaching the age of majority within one year from the day on which they learned that they did not descend from their mother's husband. After the child's death, the denial of paternity is not admissible, but the descendants may request it if the child dies after the action has been taken.[84]

If the child was born to an unmarried woman, then the determination of the paternity may be conducted based on an acknowledgment of paternity (when the child's parents agree on the father's person and want the child's legal situation to reflect the biological reality) or on a court's determination of paternity.

Acknowledgment of paternity is made when the man from whom the child descends declares, before the head of the registry office, that he is the child's father, and the child's mother confirms it.[85] The declaration will not be accepted if the acknowledgment is inadmissible (e.g., because the child was born to a married woman) or if doubts arise concerning the truthfulness of the declarations (e.g., owing to the different skin color of the man and the child).[86]

79 Art. 61^{10} § 1 FGC.
80 Art. 61^{12} § 1 FGC.
81 Art. 62 FGC.
82 Art. 67 FGC.
83 Art. 67 FGC.
84 Art. 70^{1} FGC.
85 Art. 73 FGC.
86 Sylwestrzak, 2020, pp. 19–28.

According to Art. 75 of the FGC paternity of a child conceived but not born may be acknowledged; however, paternity may not be acknowledged after the child has reached the age of majority.[87]

Acknowledgment of paternity may be declared invalid by the man who has acknowledged paternity, the child's mother, the child, and the public prosecutor. The court shall declare an acknowledgment of paternity invalid if the man who has acknowledged paternity is not the father; after the child's death, the determination of the ineffectiveness of such acknowledgment of paternity is admissible if the child dies after the proceedings have been initiated (Art. 83 FGC).

The acknowledgment of paternity of a child born through medically assisted procreation takes place from the day of their birth, when a man declares that he will be the father of a child conceived in that way and born within two years from the submission of that declaration. If the child is born after the mother's marriage to a man other than the one who has acknowledged paternity, the presumption of paternity of the mother's husband shall not apply.

Determination of paternity by a court may be requested by the child, the child's mother, the child's alleged father, and the public prosecutor. The plaintiff must prove that the mother and the alleged father had intercourse during the conception period.

In the case of establishing the child's filiation, the court may decide to suspend, limit, or terminate the parental authority of one or both parents.

8. The child under parental authority

8.1. General remarks

When a question about the legal definition of a person in relation to a child is asked, the thought usually turns to the end of childhood (i.e., the age of majority). This is an important threshold, but the legal significance of being a child is not limited to it being under parental authority. In the context of inheritance law, a deceased person's descendants inherit from them, in the first place, their children, who, sometimes, have already grown up. In addition, some adult children who have passed the age of majority are still economically dependent on their parents and seek their maintenance.

A child is a first-degree relative to their parents. A child's origin is defined by their birth certificate.[88] An important role in the civil status of a child is played by court decisions concerning, for example, the determination (denial) of paternity,

87 Art. 75 §2 FGC.

88 Articles 52–62 of the Act of November 28, 2014, Law on civil status certificates, i.e., Journal of Laws of 2021, Item 709.

adoption (dissolution of adoption), as well as acknowledgment of paternity and the decision declaring the acknowledgment invalid. The court decision may have the effect of changing the child's civil status by changing the person who is formally their parent. A person has a single, indivisible civil status.[89]

8.2. The competence of the parents in relation to the conceived child

The question of the beginning of childhood is connected with that about the legal status of the conceived child (*nasciturus*). According to numerous legal regulations, a child in this phase of life is a human being (the preamble to the UNCRC, Art. 2 of the Act on the Ombudsman for Children[90]; the jurisprudence of the Constitutional Tribunal of the Republic of Poland concerning Art. 38 of the Constitution RP ensuring the legal protection of life to every human being[91]). The preamble to the UNCRC states that it was enacted to protect the child "both before and after birth." The word "child" was used—in other words, a human being and not, for example, a fetus or pregnancy, which could be interpreted in any way. Article 6 of the UNCRC also consistently obliges states to protect the child's life.

Under Art. 8 of the CC a child conceived and unborn has legal capacity on the condition that they are born alive.[92] The property interests of the unborn child are protected, among others, on the grounds of inheritance law[93] and contract law.[94] Property and personal interests are protected, in particular, under family law[95] (e.g., Articles 141 and 142 FGC on the obligation of maintenance toward the mother during pregnancy as a consequence of the acknowledgment of the child or of the substantiation of the father) but also under administrative and criminal law.

The bone of contention in the doctrine is the legal nature of the parents' actions undertaken as a consequence of waiting for the child to be born: is it an exercise of parental authority? During a child's fetal life, their parents (especially if married or cohabiting) make several decisions directly affecting the child. They make various purchases, sometimes adapt the home to accommodate the needs of that child after birth, and—when necessary—they decide on medical procedures to be performed on the unborn child.[96]

The opponents of classifying these actions as the exercise of parental authority point to Art. 182 of the FGC concerning the appointment of a guardian for the

89 Kasprzyk, 2018, pp. 131–134, 136–140.
90 Ct. Journal of Laws of 2020, Item 141.
91 Judgment of the Constitutional Tribunal of October22, 2020, sig. 1/20, OTK ZU A/2021, Item 4; Judgment of the Constitutional Tribunal, sig. 26/96, OTK 1997, Item 19.
92 Bierć, 2018, pp. 379–384; Smyczyński, 2011, pp. 213–229.
93 Art. 927 § 2 CC.
94 Art. 446^1 CC.
95 Mazurkiewicz, 1985.
96 Haberko, 2010, pp. 111–182.

conceived child to represent the child's interests in court proceedings to ascertain the acquisition of inheritance. They argue that if the parents exercised parental authority over the unborn child, then the appointment of a *curator ventris* would be unnecessary because, as legal representatives, they could conduct these actions.[97] In response, supporters of describing these actions as the exercise of parental authority argue that, in many other cases where parents exercise parental authority, it is also necessary to appoint a guardian for their children,[98] and this does not undermine parental authority.

Another argument to quote in this context is that it is up to the parents—and especially the mother—to request termination of pregnancy, in other words, to end the child's life. In specific situations, this is a legal action, though the exercise of parental authority includes only those actions that are in the interest (for the good) of the child, and the deprivation of their life is not such an action. In Poland, abortion is possible if conception was a consequence of a criminal act or if the pregnancy poses a serious threat to the woman's health and life.[99] However, the rule accepted in Polish law is that punishment is inflicted upon those who perform the procedure (to a doctor, an assistant, or an instigator) but not upon the woman. The above actions in which abortion is legal are exempted from the prohibition.

De lege lata, the dispute is unresolvable. A change in the regulations should be proposed to strengthen the protection of the family, parents, and child.

8.3. Coming of age

When a child reaches the age of majority, parental authority over that child ends. The status of adult is also acquired by a woman who, after reaching the age of 16, has entered into marriage with the authorization of the guardianship court.[100] This regulation raises doubts as it is a form of pressure on a minor to get married, and it is the only way for a woman to exercise parental authority after the birth of a child until she reaches the age of majority. As such, this solution raises doubts from the point of view of the principle of freedom to marry (Art. 16 of the Universal Declaration of Human Rights).[101] It has been suggested that a court should be able to grant a pregnant minor the status of an adult based on a psychological and pedagogical opinion confirming that she is mentally and socially mature.[102]

97 Smyczyński, 2018, pp. 390–391.

98 Arts. 98–99 FGC.

99 Act 4a of January 7,1993 Act on family planning, protection of the human fetus, and the admissibility of abortion. Ct. Journal of Laws of 1993, Item 78 as amended.

100 Art. 10 § 1 FGC.

101 Cf. also Article 1, Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage opened for signatures in New York on December10, 1962. Journal of Laws of 1965, No.9, Item 53.

102 Andrzejewski, 2014, pp. 377–380.

8.4. Legal guardianship of a grown-up child

When a child reaches the age of majority, parental authority terminates. If—owing to a mental disability—an adult child cannot function independently, they may become totally or partially incapacitated. In this case, the person is placed under guardianship or wardship, and a guardian or probation officer is appointed. As a rule, the parents are designated for this function, but the final decision rests with the guardianship court.

8.5. The age of the child and the extent of their participation in the legal sphere

The scope of a child's autonomy, participation in the legal sphere, and legal accountability for their behavior increases with age. Upon reaching the age of 13, a child attains their limited capacity to perform acts in law, and upon reaching the age of 18, they are granted full capacity to perform acts in law and the status of adult, which results in the termination of their parents' parental authority. The age of 13 marks the beginning of the child's legal liability on the grounds of the Act on Juvenile Delinquency Proceedings[103] dated October 26, 1982 for every act characterized by features of a punishable act, and not only for manifestations of demoralization.[104]

At the age of 15, a minor may not only enter into an employment contract but may also incur criminal liability for the most serious crimes as an adult, if this is supported by a negative assessment of their personality.[105] After reaching the age of 17, a minor is treated by criminal law as an adult being fully liable for committing a crime.

Under Art. 10 § 1 of the FGC, when a woman reaches the age of 16, she can marry.

A minor, upon reaching the age of 16, grants their consent to the use of medical procedures on them (in addition to the consent of the parents, arguable cases are resolved by the guardianship court).[106]

103 Ct. Journal of Laws of 2018, Item 696.

104 As of July 2022, when the article was finished, an Act on Support and Resocialization of Juveniles was passed by the Polish Parliament, but it has not yet been enforced and has not appeared in the Journal of Laws.

105 Art. 10 § 2 Criminal Code.

106 Haberko, 2020, pp. 22–39.

9. Rights and obligations of parents in the exercise of parental authority and in the exercise of the duty and right of contact

9.1. Child custody

According to Art. 87 of the FGC parents and children have a duty to respect and support each other, which excludes the use of violence. Therefore, under Art. 96[1] of the FGC parents and persons having care or custody of a child are prohibited from using corporal punishment.[107] The obligation to show respect, furthermore, presupposes the upbringing of the child in dialogue with them, but this is a pedagogical issue that is impossible to regulate by law (nor is it necessary to do so). The desirable pedagogical vector of the parents' behavior foregrounds a dialogue and listening to the child's opinion before making decisions on major issues concerning their person and property. This, obviously, applies to situations where it is possible owing to the child's mental development, health, and degree of maturity. Decisions should—as far as possible—consider the child's reasonable wishes (Art. 95 §4 FGC; compare Art. 72 of the Constitution RP Art. 12 UNCRC). On the other hand, in matters in which the child can make decisions and declarations of will independently, they should listen to the opinions and recommendations of the parents formulated for the child's good (Art. 95 § 2 FGC).[108]

Nowadays, the custody of the child—including all decisions related to guidance and upbringing—also involves previously unknown situations, such as the child's access to the tools of cyberspace (social networks, e-mail, computer games, and so on), which is crucial from the point of view of upbringing. These issues are intertwined with the child's right to privacy.[109] When raising a child, parents may not infringe upon the child's rights and well-being, but they cannot be denied the possibility of restricting their access to Internet portals, social media, and so on; this is not only an educational measure but sometimes a necessary form of countering addiction.

The scope of custody of a child includes the parents' right to set the direction of their child's education. Parents can choose a school with a particular educational or curricular profile.[110] As members of the school community, they can influence the school's educational profile (through their involvement in school boards or parent councils), but they have no influence on the content of the curriculum. Failure of a child to comply with educational obligations may result in the imposition of

107 Helios and Jedlecka, 2019.
108 Zajączkowska-Burtowy, 2021, pp. 942–946; Gajda, 2020, pp. 787–791.
109 Art. 15 UNCRC.
110 Królikowski and Szczucki, 2016, pp. 1588–1591.

administrative sanctions on parents. Sometimes, in practice, this becomes the basis for restricting parental authority.

The obligation imposed on children to obey their parents[111] should be read in the context of the directive "dialogue and persuasion rather than order." This obligation refers to parental orders, which are an exercise of parental authority rather than its abuse.[112] Parental authority may only be exercised through behavior aimed at protecting the child's good.[113] This behavior should be characterized by a concern to respect the child's dignity and rights[114] and, therefore, should be an expression of concern for the child's physical and spiritual development. Its aim is to adequately prepare the child for adulthood.[115]

In the exercise of their authority, parents have autonomy, which does not preclude court interference to ensure the child's protection.[116]

The provisions of the FGC (as well as the provisions of the UNCRC) do not place the child above other members of the family but within it—the child is a member of the family group, whose feature is supposed to be mutual support (solidarity of the family group). This educationally correct approach is reflected in the child's obligation to not only show respect and obedience to their parents but also, if receiving an income from their own work while living with their parents, to contribute to the family's maintenance[117] and use the net income from their property for their maintenance and upbringing as well as for the legitimate needs of their siblings or the family.[118] Moreover, a child who is dependent on their parents and lives with them is obliged to help them in the common household (Art. 91 FGC). This regulation is sometimes treated in practice as justification for an excessive burden of work put on children in poor rural households.

When parents do not have full legal capacity and, therefore, do not exercise parental authority because they have not reached the age of majority or because they are legally incapacitated, they have the right to manage the day-to-day supervision and upbringing of the child. The aim here is to give them a chance to build a relationship with the child and—especially in the case of minors—to prepare them for the moment when they will have parental responsibility. In the latter situation, the court may, however, decide otherwise if the child's good requires a restriction or prohibition of the influence of the child's parents (Art. 96 § 2 FGC) —for example, in the case of aggressiveness of the incapacitated parent caused by a serious mental illness or immaturity of the child's minor parents.[119]

111 Art. 95 §2 FGC.
112 Art. 111 §1 FGC.
113 Art. 95 § 3FGC.
114 Art. 95 § 1 FGC.
115 Art. 95 § 2 FGC.
116 Art. 109 §1 and Art. 111 §1 and 1a FGC.
117 Art. 91 FGC.
118 Art. 103 FGC.
119 Urbańska-Łukaszewicz, 2021, pp. 177–196.

9.2. Custody of children's property

The issue of the protection of property interests of minors is becoming increasingly important owing to an increasing number of children with property. The management of the child's property is the prerogative of parents exercising parental authority, who are obliged to exercise it with due diligence.[120] Its only limitation is the necessity to obtain the court's consent to a legal transaction exceeding the scope of ordinary property management. Under Art. 101 §3 FGC Parents may not themselves consent to the performance of such an act by a child, and a legal action performed without the required court consent is invalid.[121]

Furthermore, the donor or testator may stipulate that the items transferred to the child will not be administered by the parents. If they do not appoint an administrator, the management of these objects is conducted by a guardian appointed by the guardianship court.[122]

Before parents make a decision in relation to the child's property, they should consult the idea with the child if they can understand the issue.[123] The obligation to protect the child's interests against imprudent actions by the parents in relation to the child's assets lies with the court, which may do as follows:

- order the parents to draw up an inventory of the property and to notify the court about major changes;
- determine the value of the disposition regarding the movable property, money, and securities, which the child or the parents may make each year without the permission of the guardianship court;[124]
- limit the parental authority of the parents with respect to the management of the child's property and appoint a guardian to perform these management duties.[125]

After the management ceases, "the parents are obliged to submit to the child or to his or her legal representative the property of the child which has been managed by them." In addition, if the child or their legal representative so requests within one year of the termination of the management, "the parents are obliged to submit the account from the management of the property. However, this request shall not relate to income from property received during the exercise of the parental authority".[126]

120 Art.101 §1 FGC.
121 Ignatowicz and Nazar, 2016, pp. 521–523.
122 Art.102 FGC.
123 Art. 95 FGC.
124 Art. 104 FGC.
125 Art. 109 §3 FGC.
126 Art. 105 FGC.

9.3. Statutory representation

Apart from exceptional situations indicated in the regulations, a child cannot, for natural reasons, function independently in legal transactions. The duty to act for and on behalf of the child is performed by the parents who are their statutory representatives under their parental authority.[127] If neither parent exercises parental authority, then the statutory representative of the child is the guardian. In the typical situation where both parents exercise parental authority, "each of them may act independently as the child's legal representative." There are exceptions to this rule: a parent may not represent the child in legal transactions between children under parental authority as well as in legal transactions between the child and the other parent or the other parent's spouse (with the exception of acceptance of a donation and proceedings for alimony.[128] If the parents are unable to represent the child, the court appoints a curator (Art. 99 §1 FGC).[129]

The role of a curator who represents the child may be vested with an attorney at law or a legal adviser if the person has special knowledge of child-related issues or has completed training in child representation, children's rights, or children's needs.[130] In less complex cases, the child may also be represented in the capacity of a curator by another person with higher legal education, provided that the person has knowledge of their needs. Exceptionally, except in criminal proceedings, a person without higher legal education may be appointed as the curator.

9.4. Contacts with children

A consequence of the exercise of parental authority is that parents stay with their children (i.e., they have unrestricted daily contact with them). The issue of parental contact with children is sometimes treated as separate from the exercise of parental authority. For example, it is argued that parents have a right to contact their children although they do not exercise parental authority in the case of minors or parents who have been deprived of their parental authority. On the other hand, it is impossible not to take into account at least the functional links between the exercise of parental authority and the right to contact, since the neglect of contact with the child, as well as the exercise of contact in a manner that is demoralizing (with features of violence, etc.) or threatening for the child (and their harmonious emotional development) may lead to the restriction of parental authority or even its withdrawal.[131] Similarly, obstruction of contact with the child by the other parent is ground for the restriction of parental authority.[132] It may also result in a change of the child's place of residence if the child lives with the parent who obstructs contact. Interference in the sphere of

127 Art. 98 § 1 FGC.
128 Art. 98 §2 FGC.
129 Wicherek, 2021, pp. 981–994.
130 Art. 99[1] FGC.
131 Mostowik, 2013, pp. 35–45; 2015, pp. 257–270; Zajączkowska-Burtowy, 2020, pp. 173–276.
132 Art. 109 § 1 FGC.

parental authority may also be a result of preventing contact—with the child—of the child's siblings, grandparents, relatives in a direct line (stepfather/mother) as well as other persons, if they have had custody of the child for a long time.[133]

Therefore, when discussing the issue of parental authority, one cannot ignore the issue of contact between parents and their child as both a right and a duty of the parents as well as a right and a duty of the child.[134] This regulation is a consequence of the injunction to show respect to each other. Contact includes staying with the child (visits, meetings, and taking the child away from their place of permanent residence); direct communication; and correspondence, including by electronic means.

The issue of contact becomes more important when a conflict arises between separated parents (following divorce or separation, or breakdown of cohabitation) or when the foster family makes contact with the child difficult.

If the child lives with one of the parents, it is desirable for the parents to reach an agreement on how the other parent will maintain contact with the child or, if necessary, on the modification of previous arrangements. The involvement of the court in solving such problems demonstrates a difficult emotional and educational situation for the child. Maintaining contact is a high priority; if contact is not properly maintained or not maintained at all, the guardianship court may, in particular, refer the parents to institutions or professionals providing family therapy, counseling, or other appropriate assistance to the family and indicate how the implementation of such orders should be monitored.[135] In an extreme situation, the guardianship court may completely forbid the parents to have contact with the child.[136]

As in many other family law situations, the guardianship court—in compliance with the principle of the child's good—may also change its earlier decision on contact with the child.[137]

10. Court interference in the exercise of parental authority

10.1. Introductory remarks

The legal framework of parental authority also consists of provisions on court interference in the exercise of the authority. As mentioned above, the family is autonomous in relation to the state, and parents have primacy in the upbringing of their children; however, the state may and sometimes does have an obligation to interfere

133 Art. 113[6] FGC.
134 Art. 113 FGC; cf. Art. 9(3) UNCRC.
135 Art. 113[4] FGC; cf. Art. 109 §2 point 2 FGC.
136 Arts. 113[2] and 113[3] FGC.
137 Art. 113[5] FGC.

in the family's functioning. The courts have the exclusive competence to rule on these two issues.[138] There are two forms of such interference, namely the limitation of parental authority and its withdrawal.

10.2. Limitation of parental authority

Parental authority can be restricted if the child's good is at risk. This applies both to situations in which the child's good has been violated and to situations in which this has not yet happened but is highly likely to happen and should be prevented. In such situations, it is the duty of the guardianship court to issue an appropriate order. The aim of the limitation of parental authority is to correct a family situation that is threatening for the child. It is up to the court to choose how to react.[139] This requires the judge to have the fullest possible knowledge of the case, including its non-legal aspects (psychological, pedagogical, social, medical, and other). What this implies is that the judge must not rely solely on their intuition concerning these areas of knowledge.

Remedies are listed in Art. 109 §2, 3, and 4 FGC. The catalog of remedies indicated in Art. 109 §2 FGC is not exhaustive, but it begins with the mildest, persuasive measures, such as obliging parents and the minor to work with a family assistant, directing the child to a day-care center, directing the parents to an institution or a specialist providing family therapy, counseling, or other appropriate help, or indicating the way of controlling the execution of orders. The catalog goes on to list more decisive measures (restricting parents in their role to that of guardians or establishing the supervision of the court superintendent over the exercise of parental authority). Finally, the harshest restriction of parental authority involves placing a minor in foster care (foster family, family home, or care and educational center). When placing a child in foster custody, the court appoints a particular foster family or the institution where the child is to stay[140] and notifies the organizational unit for family support and the foster care system. The latter is to provide support to the child's family and inform the court about the situation in that family. The court analyzes the situation at least once every six months and may restore parental authority to the parents, change the form of restriction, terminate it, or leave the legal *status quo* while waiting for further effects of the actions supporting the parents.

The corrective mechanism adopted in Art. 109 of the FGC can be seen as a kind of preventive measure to avoid abuse and negligence, which could lead to the termination of parental authority.

138 Art. 48(2) of the Constitution.

139 Smyczyński and Andrzejewski, 2020, p. 285; Ignatowicz and Nazar, 2016, pp. 533–536; Słyk, 2017, pp. 1288–1291; Długoszewska, 2012, pp. 175–186.

140 Resolution of the Composition of the Seven Judges of the Supreme Court of November 14, 2014, CZP 65/14, Ruling of the Supreme Court Civil Chamber 2015, Item 38. 8.

10.3. Deprivation of parental authority

This institution has two forms—an obligatory one, when a court is obliged to deprive the parents of parental authority upon the emergence of grounds specified by law, and an optional one, when the court has the option to deprive the parents of parental authority upon the emergence of grounds specified by law.

The court is obliged to deprive parents of parental authority if

- parental authority cannot be exercised because of a permanent obstacle;
- the parents abuse parental authority (what they do is not an exercise of their right, and such behavior does not deserve protection but a strong reaction from the law as it is illegal and often exhibits features of a criminal offense, such as physical, psychological, sexual, and other violence); or
- the parents are blatantly neglecting their duties toward their child.

Deprivation of parental authority is optional if

- the child has been placed in foster care on the grounds of a decision on the limitation of parental authority;
- the parents have been provided with assistance to enable the child to return to their family;
- despite the support, the reasons for imposing the limitation of parental authority on the parents in the form of placing the child in foster custody have not been eliminated (returning the child to their parents would entail a renewed threat to the child's good), in particular when the parents are permanently uninterested in the child (do not communicate with them, do not show interest in contacting persons exercising foster custody, etc.).[141]

The grounds for both forms of deprivation of parental authority place a moral burden on the parents and reflect badly on their parental competence. Unlike the restriction of parental authority, the purpose of deprivation is not to improve the situation in the child's family and return the child to their family; of course, this may happen, but the function of the termination of parental authority is mainly to protect the child from the consequences of the parents' reprehensible behavior. However, if the reasons for the termination of parental authority cease to exist, the guardianship court may restore parental authority. The court may also refuse to restore parental authority, in particular, if the child is integrated into a foster environment. The restoration of parental authority is excluded if, as a consequence of the termination of parental authority, the child is adopted.

Both forms of deprivation of parental authority may be decided with regard to one or both parents.

The good of the child may constitute grounds for reviewing the judgment on parental authority and the exercise of that authority.

141 Długoszewska, 2012, pp. 236–262; Słyk, 2017, pp. 1300–1305.

10.4. Obligation to notify the court

The court may have the right to intervene in the sphere of parental authority after it has been notified of the child's difficult situation. Any person who knows an event justifying the initiation of proceedings shall be obliged to inform the guardianship court.[142] This obligation rests primarily with "*civil registry offices, courts, prosecutors, notaries, bailiffs, local government and government administration bodies, police, educational institutions, social guardians, and organizations and establishments involved in the care of children or mentally ill persons*." Employees of the abovementioned bodies are public officials, which means that failure to comply with the said obligation may entail labor law sanctions for them.

11. Other modifications to the exercise of parental authority

11.1. Suspension of parental authority

The court may order a suspension of parental authority if there is a short-term obstacle to its exercise.[143] Since the person concerned still has the right but does not exercise it for a short period of time, the suspension should not be regarded as interference in the sphere of this right (in this case, parental authority). In addition, it should be noted that the grounds for suspension are such obstacles that are expected not to last long, and when they pass, the parents will again exercise full parental authority.

11.2. Placement of a child in foster care upon parents' request

Placement of a child in foster care on the basis of a motion filed by the parents[144] is not a form of interference in parental authority. The placement is conducted by a chief official of local government in Poland. During the stay of a child in foster care, the parents have full parental authority. The guardianship court notified of the situation may issue a decision on the child's stay in foster care based on the aforementioned Art. 100 of the FGC (without interfering in the sphere of parental authority), but it may also issue a decision on the child's stay in foster care and concomitant limitation of parental authority (from that moment on, it will be the court's interference in that sphere).[145]

142 Art. 572 CCP.
143 Art. 110 FGC.
144 Art. 100 FGC.
145 Prusinowska-Marek, 2018, pp. 189–224.

11.3. Removal of a child by a social worker

A constitutional controversy may be raised in relation to Art. 12a of the Act on Counteracting Family Violence,[146] which authorizes a social worker, "in the case of direct threat to a child's life or health," to take the child away from the family and place them with a relative who does not live with the family, in a foster family, or in a care institution. The essence of the social worker's action (taking the child away) is interference with parental authority, and Art. 48(2) of the Constitution RP provides for the exclusive competence of the court in this respect. This decision is taken by a social worker together with a police officer, a doctor, a paramedic, or a nurse; in its wake, the guardianship court is immediately notified.

11.4. Parental authority of a fully incapacitated child

If a regional court decides that a child is completely incapacitated (this is possible once the child has reached the age of 13), then the parents are subject to the same restrictions as guardians,[147] meaning that they are subject to the supervision of the guardianship court, and this solution is justified by the need to correct the parents' behavior if they have difficulties in meeting their obligations due to their child's mental illness or intellectual disability (see Section 12).

11.5. Termination of parental authority as a consequence of parent incapacitation

As a consequence of the long-term serious mental illness of a parent, which prevents them from exercising parental authority, the courts should not order a termination of parental authority. Such a judgment sends a clear message about the parents' reprehensible behavior; to ensure the legal protection of the child and, simultaneously, to make a judgment that is fair to the sick parent, it would be preferable to partially or fully incapacitate the parent. This would result in the termination of parental authority without blaming them for their reprehensible behavior and the need to establish legal custody and appointment of a guardian for the parent and the child.

146 Ct. Journal of Laws of 2021, Item 1249.
147 Art. 108 FGC.

12. Persons replacing parents (adopters, foster family, legal guardians)

Various situations require extraordinary solutions should parents not be able to exercise parental authority. The law has provisions that allow the substitution of parents in the performance of their duties toward the child—in particular, to exercise custody of the child in various forms. Such situations can arise as a result of the following:

- the necessity to provide support to parents when they fail to adequately fulfill their care and upbringing function (restriction of parental authority by placing children in foster care—Art. 109 §2 point 5 FGC);
- the need to protect the child against negative parental influence (Art. 111 §1 and §1a FGC—deprivation of parental authority)—in other words, as a consequence of long-term inability to exercise parental authority, blatant negligence, abuse of parental authority, passivity toward the child placed in foster custody; under these circumstances, it becomes necessary to establish the child's legal custody and place the child in foster care or refer them to an adoptive family;
- the parents' request for supporting them in exercising parental authority by temporary placement of a child in foster care;[148]
- short-term inability to perform parental duties (suspension of parental authority, Art. 110 FGC), which entails the necessity to establish legal custody and place the child in foster care; however, without the possibility of adoption, as suspension assumes that the parents will soon return to their duties toward the child;
- the death of both parents or their incapacitation, which entails the necessity to establish legal custody of the child; it is also possible to place the child in foster care or to adopt them;
- court decision on placing a child in foster care under the Act on Juvenile Delinquency Proceedings of October 28, 1982[149], which is caused by the child's demoralization and by the parents' failure to raise the child properly;
- the parents' consent to the adoption of their child and their placement in an adoptive family.[150]

In some cases, this substitution of parents is limited in time (a child may remain in foster care until they reach the age of majority, usually for several months to a few years); in others (adoption), it is unlimited in time.

148 Art. 100 FGC.
149 Ct. Journal of Laws of 2018, Item 696.
150 Art. 119-119[1] FGC.

When in foster care, a child establishes a formal relationship only with the persons exercising that care; however, it is not a family-legal bond. No formal relationship is established between the child and the members of the foster family. As a result of adoption, on the other hand, the child is fully integrated into the adopters' family, becoming a grandson/granddaughter to their parents' parents, a brother/sister to their other children, and so on.

The law provides procedures and criteria for the selection of suitable persons to whom custody of a child may be entrusted for the purposes of (1) adoption,[151] (2) foster care,[152] (3) legal custody,[153] and (4) performing the tasks of an educator in care and educational institutions.[154]

Re. (1),a person with full legal capacity and suitably older than the adopted person may adopt a child, provided that "*his/her personal qualifications justify the conviction that he or she will duly fulfill the duties of an adopter, and has a certificate of qualification, good reputation, and a certificate of completion of training course organized by the adoption center/…/*" (Art. 114^1 FGC).[155] The key role in finding a suitable candidate for a child to be adopted is played by the adoption center (Chapter V of the Act of June 9, 2011 on Family Support and Foster Care System).[156]

Re. (2), the function of a foster family and running a family children's home can be assigned to persons with full legal capacity to act and who can guarantee that they will fulfill this function properly. In addition, these persons must not have limited parental authority over their own children, and this authority has never been withdrawn from them. They must fulfill the obligation to pay the ordered maintenance, have adequate motivation (psychological examination), housing conditions allowing the child to satisfy their individual needs, and proper health condition (medical certificate). Moreover, a person who has been legally convicted of an intentional crime cannot be a foster family. These conditions should be fulfilled throughout the whole period of foster care.[157] The Supreme Court issued an *in abstracto* decision that, if it is in the child's best interest, it is permissible to establish a foster family with a person who does not fulfill all the conditions set out by law.[158] In specific cases, the courts apply the thought expressed by the Supreme Court too broadly.[159]

Re. (3),legal guardianship may be exercised by a person who provides grounds to assume that they will duly fulfill the duties of a guardian, has full legal capacity, has not been deprived of public rights (honorable criminal sanction) or parental

151 Art. 114 FGC.
152 Art. 42 of the Act on Family Support and the System of Foster Care.
153 Art. 148 FGC.
154 Art. 98 of the Act on Family Support and the System of Foster Care.
155 Łukasiewicz, 2019, pp. 85–14.
156 Nitecki, 2016, pp. 688–768.
157 Andrzejewski, 2021b, pp. 30–32; Nitecki, 2016, pp. 240–249.
158 Judgment of the Supreme Court of November 24, 2016, II CA 1/16, Rulings of the Civil Division of the Supreme Court of 2017, no. 7–8, Item 90.
159 Andrzejewski, 2021, pp. 29–50.

authority, nor has been convicted of an offense against sexual freedom or morality, of an intentional offense of violence against any person, or an offense committed to the detriment of or in cooperation with a minor. In addition, this person has not been prohibited from conducting activities related to the upbringing, treatment, education or care of minors, and so on. A guardian shall be appointed by the court, ant the indicated person is obliged to undertake the guardianship.[160]

Re. (4),the Act on Support for the Family and the System of Foster Care defines the conditions for employing (in in-care and educational institutions) educators, pedagogues, psychologists, therapists, child minders, social workers, and persons managing such institutions. In addition to describing the required level and field of education, it has indicated that a person who has ever been deprived of parental authority, whose authority is suspended or limited, who has maintenance debts, or who has been convicted of an intentional crime or an intentional fiscal crime is prohibited from working with children. Their ability to work in the institution must be confirmed by a medical certificate.

13. Parental authority in the case of divorce (separation, parents living apart)

In a divorce judgment, the court is obliged to decide on parental authority over a minor child of the parties, on contact between the child and the parent who will not live with the child after the divorce, and on the method of maintenance of the child by the parents.[161]

To create a situation as favorable as possible for the child despite the divorce of their parents, institutions of mediation and parental agreement have been established. Their task is to address issues related to the situation after divorce;[162] they are a sign of a shift in divorce proceedings from the adversarial principle to conciliation.

Mediation can be ordered by the court of its own motion or at the request of the parties. It is voluntary, which has the effect that the court will not find out about the parties' conduct during the mediation but only about what they jointly agreed on. When pronouncing a divorce, the court is obliged to take into account what the parties have jointly agreed (a written agreement between the spouses) concerning the exercise of parental authority, as well as contact with the child after the divorce and maintenance, if such arrangements are consistent with the child's best interests. If the court finds that the arrangements are not in the child's best interests (for

160 Kociucki, 2017, pp. 1641–1777.
161 Art. 58 §1 FGC.
162 Antoszek and Zajączkowska, 2018, pp. 233–254; Pawliczak, 2017, pp. 735–742.

example, if the parties agree on low maintenance "in exchange" for token contact), or if the parties fail to reach an agreement, it is the court that will rule on these matters.

When deciding on custody and contact, the court is obliged to ensure that "the right of the child to be brought up by both parents" is realized after divorce. In the last two decades, this directive has often been implemented by deciding on alternate custody. This is a formally acceptable way of exercising parental authority by the parents of a child to whom the court has granted full parental authority and has deemed that their relationship allows the court to assume that the two parents will jointly and loyally raise the child, who will alternate between living with one parent and then with the other parent for similar periods of time. This solution has the disadvantage that it is based on a promise to create an educational community by persons who, in a divorce case, must prove a complete and permanent breakdown of their marriage, including the termination of the emotional bond between them (Art. 56 §1 FGC)[163]; a lack of a permanent place of residence for the child; the dependence of the educational results on many factors beyond the parents' control, such as the influence of the parents' new partners; the difference in their economic status; the evolution of their views on the child's upbringing; the differences in their approach to the problems encountered; the negative consequences of the lack of joint discussions and agreements concerning the child; and many others.

The decision on alternate custody is the result of a change in men's approach to issues connected with custody. It is also, undoubtedly, a form of competition with women for equal treatment by the courts and the consequence of both spouses having lived in a toxic marriage. In such cases, alternate custody becomes more of a battlefield between adults than a sign of concern for the child's good.

However, the idea has strong supporters.[164] The law is evolving toward strengthening the tendency to award alternate custody by providing for it explicitly in Articles 582^1 §4, 598^{22}, and 756^2 of the CCP as well as in Art. 26 §2 CC, which delegates the determination of the child's place of residence to the guardianship court if the child does not reside permanently with either parent.

In addition to deciding on alternate custody, a frequently adopted formula is to give both parents full parental authority but to entrust one parent with direct custody. The latter parent is obliged to inform the other on important matters concerning the child (upbringing, education, health), in which the parents should be jointly involved.

The decision on the exercise of parental authority influences the decision on how to use the joint home of the spouses for the period during which they will live there together. The court is obliged to take into account the needs of the children and of the spouse to whom it entrusts the exercise of direct parental authority.

163 Sokołowski, 2013a, pp. 455–460.
164 Emery, 2019.

Until recently, it was the court's duty to decide on contact with the child after a divorce, but since 2015, the parties can request that the court should not rule on it. Given the numerous cases where contact with the other parent has been restricted, the court should be obliged to rule on this issue, unless the parties reach an agreement in line with the child's best interests.

Since the issue of divorce has been dominated by a conflict between adults, a suggestion has been made to provide the child with a representative to protect their interests in these proceedings. Another proposal is to increase, in the proceedings, the role of experts (psychologists, educators) who would help the court (lawyer) choose the most beneficial solution for the child. Their participation is essential in the case of a child's hearing (outside the courtroom), in which not only judges should participate.

All matters concerning the child that are settled in the divorce judgment may be modified according to the criterion that things should be done in the child's best interests. Apart from the modification of the amount of maintenance costs, this may concern the manner in which contact is maintained (e.g., as a result of the child's growing independence), the exercise of parental authority (if it is taken away or restricted), and the child's place of residence (if the circumstances determining this issue change, e.g., a serious mental disorder of the parent with whom the child lives). For the child, the best way of making the abovementioned modifications is through an agreement between the parents, of which they would inform the family court. If the parents fail to reach an agreement, in all of the abovementioned cases decided by a regional court in a divorce (separation) judgment, it is the family court that issues the modifications, acting *ex officio* or at the request of the person concerned.

14. The status of a child not subject to parental authority

The guardianship court is obliged to appoint a legal guardian for a child over whom neither parent exercises parental authority.[165] This applies when the child's parents are deceased, unknown, or have been deprived of parental authority; their parental authority has been terminated by incapacitation; or their parental authority has been suspended.[166] If at least one of the parents has even limited parental authority, it is not possible to establish legal custody.

Legal guardianship is a substitute for parental authority—in other words, the guardian appointed by the court exercises custody over the child's person and property and is also their legal representative. The most important difference between guardianship and parental authority is that the guardian is supervised by the

165 Arts. 145 et seq. FGC; see Section 12.
166 Kociucki, 2017, pp. 1641–1777.

court, which may summon the guardian to give explanations on matters concerning the child, and the guardian must also obtain the court's permission when making decisions on all important matters concerning the ward (concerning both their person and property).

15. Conclusions *de lege ferenda*

(1) In proceedings before the court in family matters, it is necessary to move away from the adversarial approach (antagonizing parties or participants) to conciliatory solutions. This is important in cases of divorce, separation, and maintenance establishment.

(2) The legitimacy of deciding on alternate custody should be considered after a period of parental cooperation following a divorce judgment (minimum 6 months). During the divorce proceedings, the parties demonstrate a complete and permanent breakdown of their relationship, *inter alia*, in the spiritual (emotional) sphere, which is incompatible with proving that they form a parental upbringing community.

(3) The court hearing of a child should always take place in the presence of a psychologist.

(4) It should be mandatory to obtain a psychological opinion when deciding on alternate custody.

(5) There are grounds to support the proposal for the child to be protected in divorce proceedings (representative) as the parents involved in a dispute fail to recognize the needs of the child and do not adequately protect them.

(6) Parents who make it difficult for a child to contact their relatives—especially those who do not live with the child—threaten the good of the child. In such circumstances, the courts should consider limiting their parental authority (participation in therapy, supervision by a probation officer) and consider the possibility of the child living with the other parent.

(7) A foster family making it difficult or impossible for the parents and other persons close to the ward to have contact with the ward provides grounds for its dissolution.

(8) Training courses for family judges should include teaching cooperation with institutions that operate in the community to support families (local government, non-governmental, and associated with churches and religious associations).

(9) The guardianship court should have the authority to grant the status of an adult to a pregnant minor if—according to a psychological and educational evaluation—she is mature enough to exercise parental authority over the child after delivery.

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