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Modern Polish family law

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The article describes the main features and elements of Polish family law in all its spheres. Firstly, the system of sources of law is presented, as well as the specifics of the methods of regulating family law are indicated. Attention is focused on the fact that every marriage should be: monogamous, equal, marital, contractual and annullable. In particular, marital equality is a cornerstone of democracy. The constitutional equality of citizens, which is the basis of democracy, is impossible and unattainable when there is any serious inequality between spouses within the family home. Any concept of combining institutional family inequality in the private domestic sphere of the home with the protection of equality of citizens in the public space would sound schizophrenic. In accordance with these legal norms, each couple can freely form their relationships in their family. For example, property relations in the family can be partially changed in accordance with the individual beliefs of the spouses, which are caused by the personal nature of family ties. The author notes that the method of regulating family law relations is somewhat different from the classical, civil law method of regulation, since the norms of family law usually do not provide for the possibility of coercing family members to a certain family behavior. However, the norms do provide for the application of certain sanctions of family law. The autonomy of the method of legal regulation of family law is also based on the fact that some family relations are not always equal — unlike civil law relations — because children are subordinate to their parents. There is an element of administrative law in family law, since parents must protect the well-being of their child, and as a result they are subject to special state control. On the other hand, relations between spouses are always, without any exceptions, based on the principle of equality of mutual rights and obligations of the wife and husband. Further, the following issues are brought to light in the article: the importance of family and marriage, marriage, rights and obligations of spouses, regulation of property relations, the issue of the origin of the child, responsibility of parents, the child protection system, adoption, support, alimony and the obligation to provide maintenance, divorce, separation, and custody of orphans. Particular attention is paid to the influence of the jurisprudence of the European Court of Human Rights on the current evolution of Polish family law.

Keywords: adoption, alimentation, child's identity, child's generic identity, custodian, divorce, private life, surrogation.

Introduction

Family law as constitutes a branch of civil law that regulates legal relations resulting from matrimony and parenthood. However the Family and Guardianship Code (hereinafter referred to as the FGC) of 1964, regulates the guardianship of an orphan, as well natural orphan as "social orphan" which is abandoned by his or her natural parents.

The content of family law relations is contained within a fixed strong framework, and legal norms of family law are absolutely binding (*iuris cogentis*). Nevertheless, within

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that framework, the persons constituting the family behave towards each other in a manner corresponding with their individual ideas and convictions, and in accordance with their private opinions on family life. Thus, each family determines its own, unique model of reference which has to be in accordance with the basic features of Family Law institutions.

First of all each marriage has to be: monogamous, equal, conjugal, contractual and dissolvable. In particular the equality of spouses is a corner stone of democracy. Constitutional equality of citizens, which is foundation of democracy is impossible and unattainable when inside family home appears any serious inequality between spouses. Any concept of combination of institutional family inequality at home's private internal sphere with the protection of equality of citizens in the public space would have sounded schizophrenic[1]. With respect to this legal rules, each couple, can shape freely their relations within their family. For example property relations in a family may be partially modified according to the individual beliefs of spouses, which are conditioned by the personal character of family bonds.

The method of regulating family law relations is somewhat different from the classic, civil law regulatory method, as family law norms usually do not provide for the possibility of forcing family members to adopt specific family behaviours, but provide for the application of certain family law sanctions. The autonomy of the family law method of legal regulations is also based on the fact that some family relations are not always equal — in contrast to civil law relations — because children are subordinated to their parents. There is also an element of administrative law in family law, since parents must protect the child's well-being, and in this respect they are subject to specific state control. On the other hand, the relations between spouses are always based, without any exceptions, on the principle of equality of mutual rights and duties of a wife and husband.

The FGC has no special part with general provisions and to a significant extent uses typical civil law regulations. But in this respect, we may find significant exceptions. Consequently, family law constitutes a branch separated from civil law contained in the Civil Code (hereinafter the CC) of 1964. Therefore, family law is autonomous to a large extent but at the same time maintains a strong, direct relationship with civil law.

Numerous general clauses are characteristic of family law, in particular the clause on "a child's well-being", which constitutes an "optimal configuration of elements of the state of affairs regarding a child, i. e. a child's interest". The protection of a child's well-being constitutes the most important principle of family law and both the well-being of a family as well as the interest of other persons (and legal persons, even the State) must give way to a child's welfare. Usually, in the typical well-functioning family, the child's well-being remains in a harmonious relationship with the interests of other persons, and the parents themselves protect the well-being of their child. A conflict of personal interests appears only in dysfunctional families.

The existence of family bonds constitutes the source of family rights. What is typical of family rights is the fact that they have separate legal family nature and are usually non-proprietary. However, some family substantive rights also aim at the protection of property interests and they have a property-related character. But even then, the aspect of the protection of a personal, non-proprietary element plays a very important role and the final analysis shows that proprietary elements serve the purpose of the protection of the person.

[1] *Sokołowski T., Mączyński A.* Ways of family life // Rapports Polonais, 20th Congress of Comparative Law, AIDC/IACL, Fukuoka, Japan, July 2018 / ed. B. Lewaszkiewicz-Petrykowska. Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2018. P. 27–56.

1. Sources of family law

1.1. Constitution

The basic source of family law is the Constitution of the Republic of Poland of 1997 (hereinafter the Constitution), which contains basic principles concerning marriage and family. The provisions of Art. 18 of the Constitution state that marriage is a union of a woman and a man, and the family, motherhood and parenthood, are to be placed under the protection and care of the State. Art. 33 expresses the principle of equality between men and women whose marriages constitute families, whereas Art. 47 regulates the right to legal protection of one's family life. On the other hand, Art. 48.1 of the Constitution regulates the right of parents to rear their children in accordance with their own convictions. This article also imposes on parents an obligation to respect the degree of maturity of a child in the course of such upbringing. Art. 53.3 gives parents the right to ensure their children a moral and religious upbringing and teaching in accordance with their convictions. However it also directs parents to respect a child's freedom of conscience and belief as well as his convictions in the case of an older child (Art. 48.1 of the Constitution). Art. 48.2 states that a limitation or deprivation of parental authority may be effected only in instances specified by statute and only on the basis of a final court judgment (not administrative decision).

Art. 71 of the Constitution states that the State, in its social and economic policy, must take into account the well-being of the family. In compliance with that provision, a mother, both before and after giving birth, has the right to special assistance from public authorities. The protection of a child's well-being as an obligation of the State has been regulated by Art. 72. Under this Article the institution of the Commissioner for Children's Rights has been established to protect children.

1.2. Family and Guardianship Code

The statute which regulates family law in detail is the FGC of 1964, amended in 1975 and subsequently 20 times between 1995 and 2018 at which time the amendments encompassed as much as approximately half of the provisions. However the interpretation of the provisions of FGC has to take into account the Constitution and the large group of different legal acts indicated below.

1.3. Other basic legal acts

Family law issues have also been regulated — apart from strict family law — in other legal acts, which sometimes do not have a civil law character, but, for instance, the character of administrative law, and they should be treated as "laws on family". These include first of all the Law on Birth, Death and Marriage Records — the Act of 28 November 2014; the Act on the Change of Names and Surnames of 15 November 1956; the Code of Civil Proceedings (hereinafter the CPC); Private international law — the Act of 4 January 2011.

1.4. Human Rights

The important source of family law are the legal acts of Human Rights. Among them the European Convention on Human Rights (hereinafter the ECHR) and the UN Convention on the Rights of the Child (hereinafter the UNCRC) are directly applied.

Recently, an intense discussion concerning the scope of the protection of family life and the interests of the parents in the sense of Art. 8 ECHR has sprung up. In that context,

it is necessary to find the proper balance between the protection of the child's welfare and the protection of the parents' right to respect for family life.

However the influence of the European Court of Human Rights (hereinafter the ECtHR) jurisprudence would be more significant only if the Court were to recognize the priority of the protection of child welfare in connection with the protection of the child's human rights over the protection of the human rights of an adult person. It is high time to recognize a child as a subject of its own human rights, benefitting from protection equal to that granted to adult persons. What is more, a child is also subject to another system of protection: the protection of child welfare. As a result, three adequate spheres of child protection can be recognized.

A child, even when very small, is entitled to full-scale protection of his or her private and family life. Most importantly, from the moment a child is born, these two spheres of the child's protection — that of privacy and that of family life — overlap in practice. Over time, as the child grows, these two areas will gradually start to differentiate. The most significant feature of today's family law institutions is that they apply to or influence the present as well as the future situation of a given child.

As a matter of fact, some judicial decisions of the ECtHR seem to be only in the early stages of a theoretical reflection, and are therefore too one-sided[2]. In family law cases, the Court is inclined to give precedence to the protection of the human rights of an adult individual, without sufficiently addressing the welfare of an affected child. But a child must be protected both as an individual subject of human rights and as a child involved in family relationships[3]. If and when all of the above factors are combined and taken into consideration by the ECtHR, its jurisprudence may turn out more beneficial for child welfare. In any deliberations in family law cases, each of three factors — the child's welfare, the child's human rights and the human rights of the adults involved — should be addressed. As it happens, it is currently the protection of the rights of adults which seems to be the only one of these three taken into account in these cases.

1.5. European Union Law

The development of family law has been very dynamic on the international arena. The results of research by problem-related teams are of vital importance in this respect, as efforts are made to develop regulations concerning family rights under the auspices of EU institutions. The proposals are first prepared by international expert groups, and they are then presented to a wider community of European lawyers for discussion. And finally, they are drafted into the form of different legal instruments, especially decrees.

Since Poland has ratified many international treaties which refer to family law matters and is a member of the European Union (hereinafter the EU), proper international agreements and other applicable statutory instruments, especially decrees creating European law currently constitute elements of the Polish legal system, and therefore are also sources of family law. Although the European integration processes first and foremost concentrates on the integration of economic legal relations the issues of family law (being especially difficult and controversial, and having widespread moral and religious consequences) are slowly and gradually recognized in practice as the subject of same

[2] S. Chloudrhry, J. Herring note that the Strasbourg jurisprudence is not developed in the careful analytical style of the common law jurisprudence (*Chloudrhry S., Herring J.* European Human Rights and Family Law. Oxford: Hart Publ., 2010. P. 39).

[3] In addition, another problem is connected with the issue of the protection of the welfare of the entire family in relation to the ECHR system and the Charter of Fundamental Rights: *Stalford H.* EU Family Law: A Human Rights Perspective // International Family Law for the European Union / eds J. Meeusen, M. Pertegás, G. Straetmans, F. Swennen. Antwerp: Intersentia, 2007. P. 103.

harmonization efforts. Consequently, from a longer perspective, (crossing treaty frames) the foundations of "European family law" are being laid "in practice"[4].

What is important there are numerous legal instruments regulating civil procedure, as it is now a priority to strive to tighten and facilitate efficient cooperation between courts and other bodies dealing with legal protection of family. But a thorough analysis of the issues included in those instruments indicates that they introduce, even now, new categories constituting direct elements of substantive law without sufficient backgrounds of empiric science research. First of all appear the ideological not scientifically definitions of the "new concept of marriage" or the new approach to the relation between child and parents. In that way they affect by way of a sort of "a side effect", but also crucially, the substantive institutions of family law. However this "circumlocutory" activity produced strictly inappropriate effects: for example the Decree 1259/2010 of 20.12.2010, relating to applicable law of divorce ("Roma III") is not binding for same UE states.

1.6. Commissioners

The protection of the family and children is done before both civil and criminal courts and in the course of international cooperation as well as via the activities of the Commissioner for the Protection of Civil Rights (*Rzecznik Praw Obywatelskich*) and the Children's Justice (*Rzecznik Praw Dziecka*) and prosecutor.

The majority of family matters are settled by the family courts of first instance, i. e. specialised family divisions of district courts (*sąd rejonowy*), assisted by: court appointed guardians and custodians, custodian training centres for teenagers, family diagnostic and consultation centres, and local administration centres of family assistance.

If the stay of a child with the natural family is not possible or is dangerous to the child's welfare, it is possible to place the child temporarily in a substitute environment e. g. with natural persons (also other child's relatives) or care facilities. If, despite the assistance rendered to the child's family, the family situation does not improve, it is possible to place the child permanently in a substitute environment (a foster family, a family orphanage, or an orphanage).

2. Private life and family life

The division between private life and family life has the crucial importance. The family life is a "social situation between spouses or relatives caused exclusively by coition interactions between spouses or partners or by adoption which eventually effected maternity, paternity and kinship between the relatives". On the other hand the private life is a "social situation caused broadly by various personal interaction which effected only personal relations". The private life have the broader range containing always the family life. The fundamental two categories of this division are the "sexual interactions" (as the broad group of personal behaviors) and the "coition interactions" (conjugal interaction) as the exclusively behavior which appears only between two adult persons of different sex. The attendance of coition interactions constitutes the different and only one kind of the social reality, which is open for maternity, paternity and kinship between the relatives.

These legal differences between private life and family life are broad. Because the family life is a special category of private life it has all features of private life and, in addition, a many of its own features.

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[4] *Sokołowski T.* Pojęcie europejskiego prawa rodzinnego // Z Zagadnień Prawa Rodzinnego i Rejestracji Stanu Cywilnego / ed. P. Kasprzyk. Lublin, Katolicki Uniwersytet Lubelski, 2007. P. 15 et seq.

Under Art. 23 FGC, the family is composed by a marriage, which is a permanent legal union of a man and a woman. The family may be also composed of a mother or a father and a child without marriage. A conjugal unions of persons who have not contracted a marriage is treated as a concubinage. The concubinage (unregistered partnership) as a unit between woman and man has only private character, but it can be transferred into family situation because of maternity and paternity connected with delivering of the common child of the partners. From this point of view it is indispensable to divide all private phenomena into two groups: the *transformable phenomena* and the *nontransferable phenomena*.

Though all conjugal (coition) interactions have sexual character however large group of sexual interactions have not conjugal character at all. In consequence unions of persons of the same sex cannot be treated as marriages because of lack of essential feature of the attendance of conjugal interactions.

As result the homosexual unit is recognized by Polish Law as situation having only private character because of impossibility of maternity and paternity of common child. It is necessary to underline that Poland have the long tradition of the legal freedom of homosexual relation, which are fully allowed without of any punishment since the year of 1932. This level of tolerance were really reached in many of other European countries on the last decades of 20th century. As a great number of various social units having only private character, the homosexual units have the protection of Civil Code by the construction of substantive personal rights.

Since 1932 we had a long time to elaborate the regulation of same detailed issues connected with this legal situation. For example in Polish Family Law the adoption can be establish only for one person, who as recognized as “adoptive mother” or “adoptive father” or for two married person recognized as “adoptive mother and father”. With regard on protection of the welfare of the child the adoption of “two adoptive mothers” or “two adoptive fathers” is not possible. It was introduced in the Legal Act of adoption of 13 of July 1939 and received in § 1 Art. 115 FGC of 1964. First of all the *protection of the child’s generic identity* and the secret of the fact of adoption (as two of crucial elements of child best interest) required the establishment of as much similar structure to the structure of natural family as possible.

3. Marriage

3.1. Conclusion

Marriages may be contracted in two forms: lay marriages and denominational marriages (concordat marriages). The following persons cannot conclude a marriage: brothers and sisters (siblings), persons related in a direct line, persons who are married, persons bound by adoption. If any of the above situations occurs, a court cannot grant permission to marry.

Other requirements are not so strict. They refer to: the age requirement, affinity, partial incapacitation, mild mental illnesses or mental deficiencies, in the case of which a court may grant permission for contracting a marriage.

3.2. Right and duties

A husband and wife have equal personal and proprietary rights and duties resulting from the bonds of matrimony. Personal (non-proprietary) rights and duties, which exist solely between the spouses include: conjugal interactions, fidelity, mutual assistance, cooperation in the interest of the family, choosing the surname of spouses, paternity of their common children.

If the spouses cannot reach consensus, each of them may seek redress from a court in order to settle a dispute — Art. 24 of FGC.

Proprietary rights and duties of the spouses may be strictly proprietary or connected with non-proprietary elements. The latter refer to the following: contributing to the fulfilment of the material needs of the family, collateral responsibility for those obligations, representing the spouse.

3.3. Equality

The fulfilment of the needs of the family may refer to gainful employment or running a household or bringing up children. Spouses are bound by the principle of "equal living standard". If one of the spouses fails to provide for the family, a court may order that his or her remuneration, in full or in part, be paid to the other spouse (Art. 28 of FGC). Persons bound by the bonds of matrimony are also entitled to use the accommodations and furnishings belonging to another spouse (Art. 28^1 of FGC).

4. Matrimonial property rights

4.1. Two systems of property regimes

The proprietary situation refers to relations with third parties and proprietary relations between the spouses, which encompass the system of matrimonial property rights, prenuptial agreements and marriage settlements, other contracts between spouses, the right to live in the premises of the other spouse (Art. 28^1 FGC). There are two systems of property rights in marriage: a system of joint property of the spouses, a system of separate property rights in marriage.

The system of joint property of spouses may, in turn, be divided into: a statutory system of joint property, contractual joint property, which may further be divided into extended joint property or restricted joint property.

The systems of separate property rights in marriage include three systems: a usual contractual system of separate property rights, a system of compulsory separation of property rights, a system of separate property rights in marriage with equalisation of the property acquired during the course of the marriage.

As far as relations with third parties are concerned, we may distinguish joint and several liability of spouses in relation to: satisfying the needs of the family, representation, temporary management of personal property of the other spouse, the liability for other obligations of the other spouse (Art. 41, § 2 Art. 47 and Art. 50 of FGC), which is regulated separately on a different plane than marital property systems.

4.2. Joint property

In the case of statutory joint property appears three properties: The joint property of spouses and two personal (individual) properties of each of spouse. Each of them keeps his or her property acquired before the conclusion of marriage as well as any property inherited during the marriage. However, property acquired after the conclusion of marriage is treated as joint property of spouses with the exception of some objects which enrich the personal property of one of the spouses. The joint property of the spouses is established the moment the marriage is contracted, and ceases to exist, at the latest, the moment the marriage ceases. The joint property of spouses also includes the all remuneration of spouses and all income generated by their personal property.

Each of the spouses is co-entitled, "indivisibly" to the whole property and not its fractional share. During the existence of the joint property of spouses, neither of the spouses may demand the division of the property or may dispose of a share in it, which in the case

of the termination of the joint property of spouses would belong to him or her. In general, at the moment of the termination of the existence of the joint property of spouses, the property is divided into two equal shares, however a court has the competence to establish unequal shares.

4.3. Management

Each of the spouses may manage the joint property of spouses on his or her own, but they are obliged to co-operate in the management and to inform each other about the state of property and its encumbrances as well as intended management-related activities. The scope of one's own management, however, does not include the activities enumerated under § 1 Art. 37 of FGC, for which the consent of one's spouse is necessary. Those activities are legal acts which include: sale, encumbering, purchase for a price, perpetual usufruct, rights *in rem* to the building or a unit, agricultural farm or enterprise, donations of greater value.

Without such consent, however, only one spouse may perform any other legal transaction entirely independently from their value, even grant a guaranty for someone else's debt of any value or one may acquire or sell shares acquired in companies from joint property of the spouses. Such large scope of management of joint marriage property is highly disputable in Polish doctrine. It may be stressed that each of the spouses, however, may object to the performance of the act before it is performed if he or she knows of the intention of other spouse. The objection deprives the other spouse of the right to do it (§ 1 Art. 36^1 FGC). The objection may refer to both the acts listed under § 1 Art. 37 of FGC, as well as other acts.

The consent to perform the legal acts listed under § 1 Art. 37 of FGC may be expressed before, in the course of, or after the performance of the act (the so-called "confirmation"). If the other spouse refuses to give consent to the performance of the act, which is justified by the interest of the family or if the communication with the other spouse encounters obstacles that are difficult to overcome, a court may, in exceptional cases, grant consent to perform such an act without the other spouse's consent (Art. 39 of FGC).

4.4. Individual management

Exceptionally, under § 3 Art. 36 of FGC, each of the spouses manages, on his or her own, with the exclusion of the other spouse, assets which constitute component parts of joint property of spouses, but only one spouse uses them to perform his or her job or to carry out an individual gainful business activity, especially if they constitute a business entity.

If the individual management of the subject matters of joint property is carried out improperly, a court may deprive a spouse of the right to manage the property on his or her own.

4.5. Personal property

Apart from joint property of spouses, each of the spouses has his or her own personal property which is formed by things acquired: before the establishment of the statutory joint property, in the course of succession or legacies, as a result of donations, as a right of a partner in a civil partnership, as items for personal use, as an inalienable right, as indemnity, via claims for remuneration, via awards for personal achievements, as intellectual property rights (Art. 33 FGC). Personal property also includes things acquired from the resources, which until that time, constituted personal property (surrogation).

The management of personal property of one spouse may be exercised by on his or her own, but in the case a temporary obstacle occurs, the other spouse has a right to

perform acts within the scope of ordinary management as a substitute (in lack of any objection of the first spouse).

4.6. Liability for obligations

If a given obligation has been assumed by both spouses, they are liable for it with all three kinds of property (joint marital property, and two personal properties each belonging to one of them). Moreover, each of the spouses is liable for his or her own obligations with all his or her personal property and in addition with all remuneration and all income generated by his or her personal property. Neither of the spouses is liable for the obligations of the other spouse with his or her personal property. However if consent of one spouse has been given for incurring the obligation of the other spouse, the first spouse bears liability with the whole joint property (but not with his or her personal property).

4.7. Modification of property regimes

The modification of the statutory system of marital property may lead to: the change of the system, the establishment of separate property rights in marriage, or a system of separate property rights in marriage with the equalisation of the acquired property of spouses as a result of a concluded prenuptial agreement or a marriage settlement, or court ordered compulsory separation of property rights in marriage. Separate property rights in marriage are also established as a result of the incapacitation of one of the spouses, decreeing separation of the spouses or bankruptcy by the court.

5. Descent of a child

5.1. Maternity and paternity

Maternity is the benchmark for determining the descent of a child. A mother, under the law, is a woman who has given birth to a child (and not, e. g. the so-called genetic mother). Maternity, in turn, determines paternity of a given man.

If a child is born of the marriage, paternity is determined in the course of the presumption that the child is of the mother's husband. This presumption, however, may be rebutted in the course of proceedings for denial of paternity. If there is no man indicated as the father of the child due to the rebuttal of the presumption or because the child has been born out of wedlock, there are two possibilities: 1) admitting paternity of a child or 2) establishing paternity before a court. The Polish legal system provides complete equality of a legal situation of both marital and extramarital children.

5.2. Child's name

If the name of the mother of the child has not been entered on the certificate of birth or if there are fictitious parents' names entered on the certificate, it is possible to establish paternity and maternity before a court. But if a woman's name has been entered on the certificate of birth as a mother, it is necessary to rebut her maternity first. If the father of the child is not known, it is possible to admit paternity voluntarily or to establish it before a court. The paternity of the man may be established if it is proven that he is the biological father.

Recently under Art. 75^1 FGC the legal consequences of agreements on artificial insemination of the wife are regulated and husband is presumed a father if he agreed on assisted procreation. However the child after his or her maturity has the access to the

medical data of the identity of the genitive parent (Art. 38.2 of the Legal Act of the medical treatment of infertility of 25 of July 2015).

6. Parental authority

6.1. Parent-child relationships

Relations between parents and children refer to unborn children, small children, teenagers and adults. The regulation on *nasciturus* is now being researched into however same partial regulations were introduced on the area of personal interests, therapy before birth[5], succession, donation, liability in tort or contractual responsibility or insurance indemnification. The situation of a small child and a teenager has been regulated under parental authority and several legal acts strictly tied to FGC. The situation of parents and adult children is regulated under Art. 87 and 91 of FGC and in the legal act of surname. The problem of personal contacts concluded by parents and relatives with child as well as the issue of the child's surname have been regulated separately.

However, parents' rights in the area of parent-child relationships are recognized as very strong natural or innate rights enjoying constitutional protection. The protection of a child's well-being as an obligation on the State has been codified in Art. 72 of the Constitution. This is also the most important rule of the entire family law system. In the past, the priority of the protection of the "child's welfare" was never questioned. Under § 3 Art. 95 FGC, parental authority is established to protect the child's welfare and the interests of society; the interests of the parents are not mentioned at all in the FGC.

6.2. Parental authority

Parental authority (*władza rodzicielska*) encompass, in particular, the duties and rights of parents to exercise care over the child and his or her property and bringing up the child who in turn is obliged to obey the parents. Parental authority may be exercised only by adults who have full capacity to enter into legal transactions. Minor parents of a child do not have parental rights. But they have a very wide scope of rights concerning exercising direct care over the child.

The civil law liberal method is not applied on a full scale to parental authority relation which appears as a multilateral legal situation (form) built by three legal bilateral relations having completely different character. The first relation is the vertical, administrative law relation between parents and the State: family courts act in name of the State as the controlling organ having support from various administrative agencies.

The second vertical relation exists between parents and their child (despite a different problem regarding the character of the horizontal "internal parental relation" between parents). Although the parents — child relation has a private law character, it has no "civil law" but "parental law" character, being based on the natural subject rights of the parties. This relation has no feature of equality, because a small child has no freedom of behaviour in the sense of the scope of free legal capacity to decide of his or her affairs. On the other hand the parental custody upon the child is controlled by the State.

The third relation is vertical and has a pure civil law character: it occurs between parents (or one of them) and third parties in connection with any matter relating to the exercising custody of the child. Because parents have autonomy in this area *vis-à-vis* their

[5] *Haberko J.* Cywilnoprawna ochrona dziecka poczętego a zastosowanie procedur medycznych. Warszawa: Wolters Kluwer Polska, 2010.

social surroundings they have the typical civil law subject right and any other person has a duty to respect the sphere of autonomy.

Parental authority as a whole cannot be contractually transferred to anybody. However, the institution of temporary vesting of a few-hours care of a small child to another person is quite common, especially if both parents work outside their family house or in other similar situations. During holiday the care of children can be vested to qualified guardians of children.

6.3. Structure of parental authority

Under § 3 Art. 95 FGC, parental authority is established to protect the child's interest. The structure of parental authority is very spacious and folder. It consists with tens part, which make up also a basic structure of "parental agreement" which is crucial in the case of divorce. The written agreement relating parental authority and contacts with the child is prepared during negotiations between parents and then it serves as a basis for the court's judgement (Art. 58 FGC)[6].

The main attributes of parental authority include: providing care for the child, taking care of the child's property, representation.

Providing care for the child is composed of five component parts: raising, guiding, taking care of the child's environment, taking care of the child, coordination of the child's development.

In order to raise the child, parents should personally shape the child's personality. Raising is, in turn, composed of six component parts: shaping emotional attitudes (emotionality, sensitivity, sense of dignity and self-respect), shaping the outlook and system of values, developing intellectual talents and practical skills, acquainting the child with the content of law and social coexistence principles (public policy), developing conscientiousness and discipline, and shaping the child's independence.

Guiding the child, in turn, means deciding about the environment in which the child should spend time, and it includes: specifying the place of the child's stay and residence, taking the child back from unauthorised persons, entrusting the child's care to other persons temporarily, regulating the child's lifestyle, supervising the child's behaviour, deciding about the child's participation in activities in extra-family environments, choosing the field of education, selecting and supervising information acquired by the child, providing holiday recreation.

The care for the material environment of the child should provide the child with proper material conditions and should include the following elements: providing proper accommodation conditions, making useful things available to the child, removing threats to life and health.

The care for the child's person in the physical aspect refers to the fulfilment of the child's current needs and is composed of: feeding and nursing the child, treating the child medically, making decisions about operating on the child.

The care of the child's property encompasses the following three elements: administering the child's property (this includes a number of legal acts and to some extent de facto acts as well), disposing of the net income from the property, accounting for the property's administration.

Finally, representation of the child includes: legal acts in the name and on behalf of the child, acts in court proceedings.

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[6] *Sokołowski T.* Ustanie małżeństwa, Komentarz do art. 58 k. r. o. // Kodeks rodzinny i opiekuńczy. Komentarz / eds H. Dolecki, T. Sokołowski. Warszawa: Wolters Kluwer, 2013. P. 457–467.

6.4. Intervention with parental authority

Matters concerning parental authority are settled by the competent guardianship court for the child's residence, but in the event of a threat to the minor's interest another type of court may react immediately or even settle the case *in camera*. All officials, not only police officers, but in particular teachers, physicians, school nurses (that is persons who meet the child in his or her typical environment) who notice any irregularities indicating that the child has been, e. g. abused, starved or severely neglected, are obliged to inform the guardianship court of that fact.

Interference with parental authority is always an exceptional measure and it should be done only when the applied measures will definitely improve the child's situation. Court intervention may, depending on the threat to the child's interest, take three forms: the limitation of parental authority, the suspension of parental authority, the deprivation of parental authority.

6.5. Limitation of parental authority

The general premise for the limitation of parental authority is the threat to the child's interest and, in particular, conduct dangerous to the child such as alcoholism, drug abuse, gross economic helplessness, reckless endangerment, neglecting the child's affairs, and finally abusing/bullying weaker members of the family.

The most frequent methods of limiting parental authority include: obliging the parents to behave in a specific manner under court supervision, subjecting parents to the supervision of a legal guardian, sending the child to the centre exercising partial care over children, placing the child with a foster family or with a care and educational facility.

In the latter case, the guardianship court notifies the local centre for family assistance conducted by local administration (*powiatowe centrum pomocy rodzinie* — PCPR, *miejskie centrum pomocy rodzinie* — MCPR), which provides proper assistance to the minor's family and reports to the guardianship court on the family's situation. Therefore, this situation may be reversible, and after the situation has improved, the child may return to his or her natural family.

6.6. Suspension

The suspension of parental authority may take place in the event that a temporary obstacle occurs in exercising parental authority. When the obstacle ceases to exist, the court reverses the suspension of parental authority.

6.7. Deprivation

The deprivation of parental authority may be obligatory or optional. It is obligatory in three strictly specified cases: the occurrence of a permanent obstacle in exercising parental authority, the abuse of parental authority, and gross negligence with respect to the parents' obligations towards the child. Optional deprivation refers to a situation in which, after the child has been removed from the family's care and placed outside the natural family, the situation of the family has not improved significantly despite the assistance provided to the family. If the reason for deprivation ceases to exist, parental authority may be restored.

6.8. Model of child's protection

It necessary to appoint that the current European model of the structure of protection of children welfare is definitely to complicated and dysfunctional. Traditional model approach of the civil law procedure recognizes only two parties having the case on face of the court. As result the number of interactions determinate by this triangular structure is only three. In the area of Family Law the presence of the child as the individual person protected on three levels of the Family Law, Human Rights and Constitution transforms this situation into the structure of 4 procedural subjects (the court, mother, father and the child) but the number of interaction is multiplied already into 6 relations. It is very difficult to deal with family cases using this structure but it is still possible.

Unfortunately, on some way as a reminder of the totalitarian systems of the beginning of 20th century, still appears in Europe the presence of the administrative body acting on the area of family cases. In addition in many cases as independent party from procedural point of view acts foster family. As result the number of possible interaction between these 6 parties is until 15, what is shown on the pattern below (Fig.).

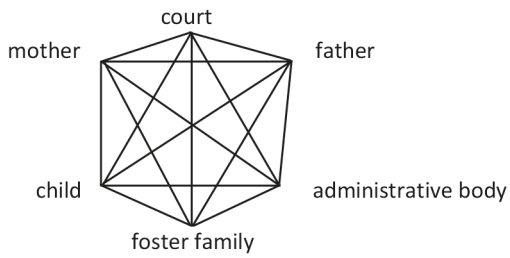

*Fig. Sc*heme of structure and maximal quantity of procedural interactions in family cases
Source: *Sokołowski T.* Ochrona praw ze stosunków prawno rodzinnych // Aksjologia prawa cywilnego i cywilnoprawna ochrona dóbr / ed. J. Pisulinski. Warszawa: C. H. Beck, 2020. P. 209.

The number of interaction is 15 what is completely incompatible with the basic procedural model. From theoretical point of view it is impossible to arrange the sufficient harmonious cooperation among these all subjects. It is really the "Mission Impossible"[7].

7. Contacts

7.1. Nature of contacts

The new institution of contacts acts since 2008. Both parents and the child are obliged to and have a right to keep in touch with each other and their relatives. Those contacts include: the contact with the child such as visits, meetings, taking the child outside the permanent residence, getting in touch directly through physical conversations with specific persons, i. e. face to face contact (and not just by phone), correspondence, keeping in touch by using other methods of distance communication, including electronic methods (telephone), radio communication or talking via the Internet.

[7] *Sokołowski T.* Ochrona praw ze stosunków prawno rodzinnych. P. 209–224 et seq.

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

7.2. Doctrinal discussion

Previously, before the amendment of 2008, a major part of the domestic jurisprudence recognized contacts as the object of parents' subjective rights. Also, nearly unanimously, the right of contact was considered separately from the institution of parental authority as protected by Art. 48 of the Constitution, which grants parents "the right to rear their children in accordance with their own convictions"[8]. The standpoint of the Polish Supreme Court (hereinafter SC) was much more diversified. First, the Polish SC shared a prevailing conception of jurisprudence[9]. This concept was subsequently supported in numerous judgments of the Polish SC, which underlined the necessity of removing parental authority before taking the more severe measure of banning contact[10]. This standpoint of the Polish SC was amended in 2006[11]. A substantial domestic discussion on the scope and legal character of contact rights had begun, and the judgments of the ECtHR, including those in the cases of *Santos Nunes v. Portugal*[12] and *Dąbrowska v. Poland*[13], were especially influential.

In the context of a long discussion, the jurisprudence of the ECtHR was taken into account on the domestic level. After two very important Strasbourg judgments — *Hoffmann v. Germany*[14] and *Schultz v. Poland*[15]— contact rights were recognized alongside a subjective right of the child existing beyond the scope of parental authority. Despite the different concept of contact rights chosen by the Polish SC, the Polish Committee for the Novelization of Civil Law recommended a draft amendment which fully separated contact from parental authority. The Polish Parliament decided to amend the regulation of this issue following this project. As a result, currently, after amendments in 2008 and 2011, contacts have been recognized as a legal institution fully separate from parental authority (Art. 58, 107, 113, 113^1–113^6 FGC). The Polish SC took the new regulation into account in its recent jurisprudence[16]. However, the jurisprudence does not approach the new regulation homogenously and remarked that the division between contact rights and parental authority is overly sophisticated and irrational from a procedural point of view[17] or recognize it as eccentric. Other suggest that the removal of parental authority should affect contact rights, just as a ban on contact should affect parental authority[18]. The majority of the relevant Polish jurisprudence has agreed with the new concept of contact rights, but has underlined the influence of the UNCRC[19] and the European Convention on Contact

[8] *Gajda J.* Kodeks rodzinny i opiekuńczy: Komentarz. Warszawa: C. H. Beck, 1999. P. 365.

[9] The resolution of the Polish SC of 18 March 1968. III CZP 70/66 // Orzecznictwo Sądu Najwyższego Izba Cywilna I Pracy. 1968. No. 5. Item 77 (known as the "Divorce Directive").

[10] Judgment (resolution) of the Polish SC of 21 October 2005. III CZP 75/05 // Orzecznictwo Sądu Najwyższego Izba Cywilna. 2006. No. 9. § 142.

[11] Resolution of the Polish SC of 8 March 2006. III CZP 98/05 // Orzecznictwo Sądu Najwyższego Izba Cywilna. 2006. No. 10. Item 15.

[12] Santos Nunes v. Portugal (61173/08). Judgment of 22 May 2012.

[13] Dąbrowska v. Poland (34568/08). Judgment of 2 February 2010.

[14] Hoffmann v. Germany (34045/96). Judgment of 11 October 2001.

[15] Schultz v. Poland (50510/99). Judgment of 8 January 2002.

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

[17] *Ignaczewski J.* Komentarz do spraw kontaktów z dzieckiem. Warszawa: LexisNexis, 2011. P. 24 et seq.

[18] *Justyński T.* Prawo do kontaktów. Warszawa: Wolters Kluwer Polska, 2011. P. 113 et seq.

[19] In 1978, the Polish State put forward the very first draft of this Convention: *Hammarberg T.* The Best interest of the child — what it means and what it demands from adults // Children's Rights and Human Development / ed. by J. C. M. Willems. Antwerp; Oxford; Portland: Intersentia, 2010. P. 582.

concerning Children[20] as the basic source of the new regulation. Other authors underline the necessity of discussing the judgments of ECtHR, for example in the influential cases of *Santos Nunes v. Portugal* and *Schneider v. Germany*[21,22].

8. Adoption

8.1. Forms of adoption

Adoption is the creation of a legal bond, the content of which is basically the same as the bond that results from natural paternity. The adopted child becomes the child of adoptive parents by operation of law.

There are three forms of adoption: complete adoption, complete anonymous adoption, incomplete adoption.

In order to optimise the activities leading to adoption, special adoption and guardianship centres have been established. They provide a child not only with a temporary foster environment but also facilitate and enable the adoption to be adjudged without unnecessary delay. Such centres co-operate with the courts and, in particular, initiate and aid the procedures leading to adoption and look for persons who want to adopt children.

8.2. Prerequisites of adoption

If the child has attained the age of thirteen, his or her consent is necessary for the adoption to take place. The court should also hear the adopted child if the child has such an understanding of the situation that he or she may grasp the idea of adoption and may accept the adoptive parent(s). The adoptive parent must be fully capable of entering into legal transactions, have proper personal qualifications and be adequately older than the adopted child. The spouse of the adoptive parent must also give consent to the adoption of the child. As far as the child is concerned, the consent of his or her parents is necessary, and six weeks must pass from the child's birth to make the consent effective.

8.3. Anonymous adoption

Complete anonymous adoption means the establishment of such a legal relationship as that which exists between parents and children. Complete anonymous adoption denotes a situation in which the parents of the child which is to be adopted (usually a single mother) do not know the adoptive parents. The adoptive parents should not know the natural parents of the child either. Consent is then given "in blanco". Finally, incomplete adoption, which is very rare nowadays, is legally limited and only establishes the bond between the adopted child and the adoptive parents and between those individuals and the descendants of the adopted child, i. e. his or her children and grandchildren.

8.4. Dissolution of adoption

Complete and incomplete adoption may be dissolved in exceptional cases due to some fundamental reasons, whereas complete anonymous adoption is undissolvable. The reasons for the dissolution of adoption include the fact that the relationship between the parents and the child is not a proper child-parent relationship.

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[20] European Convention on Contact concerning Children, Strasbourg, 15 May 2003.

[21] Schneider v. Germany (17080/07). Judgment of 15 September 2011.

[22] *Sokołowski T.* Kontakty z dzieckiem // Kodeks rodzinny i opiekuńczy. Komentarz / eds H. Dolecki, T. Sokołowski. P. 799 et seq.

8.5. Rule of continuity

The Art. 20 of UNCRC, concerning the fate of children deprived of the family, and therefore also in the case of the parents being detach. Such a child has the right to foster care. The Convention expresses the principle which states that a child has a right to continuity of the social environment. It would therefore be erroneous practice to entrust a child to care of those who cannot or do not ensure continuation of the previously implemented line of education[23]. Unfortunately, this principle has recently been much forgotten and is frequently breached in the practice of welfare law application. In consequence a child is sometimes placed in an environment with different ideological views in comparison to those of his parents[24].

9. Alimentation

9.1. Forms

Alimony, palimony and maintenance are legal relations as a result of which the obligation to provide means of support is created and the obligation may result from marriage, kinship and adoption. Maintenance of relatives refers to direct relatives and siblings. The obligations of a divorced spouse in this respect (Art. 60 of FGC) constitute a sort of continuance of the obligation to support one's family (Art. 27 of FGC). A duty to maintain may also exist between an adopted child and adoptive parents bound by incomplete adoption (in the case of a complete adoption, the adopted child becomes a child), and between stepfather and stepchild, and it burdens a father of an out of wedlock child on behalf of the child's mother (Art. 141–142 of FGC).

9.2. Grounds

The premises of alimony, palimony and maintenance claims result from the needs of the entitled person and abilities of the obliged person. In general, the entitled person must live in want, but this requirement does not refer to minor children, and what is more, a divorced spouse, despite a lack of want, may demand palimony or alimony if he or she is not at fault for the breakdown of marital life or cohabitation and the fault burdens the obliged spouse.

9.3. Alimony, Palimony and Maintenance Fund

Due to a special function of alimony, palimony and maintenance, a number of special and exceptional elements have been introduced to provide broad legal procedural protection of the rights of persons entitled to such benefits. In the case the execution of alimony, palimony and maintenance turns out to be ineffective, the benefit is paid out by the special Alimony, Palimony and Maintenance Fund[25].

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[23] *Sokołowski T.* Family forms and parenthood in Poland // Family forms and parenthood / eds A. Büchler, H. Keller. Cambridge; Antwerp; Portland: Intersentia, 2016. P. 365 et seq.

[24] *Sokołowski T.* Защита прав ребенка как прав человека в ходе судопроизводства по делам усыновления [Protection of child's rights as human rights in cases of adoption] // Polish and Russian Law: Dilemmas new and old / ed. by L. Moskwa. Poznań: Ars boni et aequi, 2011. P. 23 et seq.

[25] Dziennik Ustaw. 2019. Item 670.

10. Divorce

10.1. Permanent and irretrievable breakdown of marriage

A marriage may be dissolved by the death of a spouse, divorce, and annulment of marriage. It is also presumed that if one of the spouses is declared dead, the marriage has been dissolved at the date of his or her declared death.

There is one positive premise for a decree of divorce, i. e. permanent and irretrievable breakdown of marriage. The breakdown of marital cohabitation takes place when one of the spouses ceases to fulfil marital functions, in other words it is the breakdown of emotional, physical and economic bonds between the spouses.

There are also three negative premises for divorce and they constitute obstacles for having a decree of divorce issued. The court may not dissolve the marriage if i. e.: the divorce conflicts with the interest of the child, the divorce conflicts with social coexistence principles (public policy), and the petitioner is fully at fault for the breakdown of cohabitation (however, there are some cases in which the divorce may be decreed in this case).

10.2. Divorce decree

Because the detailed provision of Art. 58 FGC obliges the court which issues a divorce decree (or separation decision) to decide upon parental authority, each divorce (or separation) decree contains a decision of the child's housing as an obligatory element. Also the amended Art. 58 FGC in the new § 1a decides that the court can leave the whole parental authority to both parents only if they present an agreement of exercise theirs parental authority. However, even if both parents are granted the whole parental authority, only one of them has the basic right and duty of "executing the regular care upon the child". It means that the dwelling of such a parent is the place of housing of the child (*domicilium necessarium*). It is necessary to underline that the meaning and scope of the term of "executing the regular care upon the child" is an object of a very wide discussion. In addition the § 1 Art. 58 FGC states that the court has a duty to take into account the parental agreement about the method of executing parental authority and provide the contacts with the child after divorce, if it is harmonious with child's welfare".

10.3. Post divorce care of a child

Because the housing of the child is an important element of parental authority, only one of divorced parents can be granted it. However, no obstacles occur to organize a different arrangement of this same matter in a contractual way. Such contracts may remain in force as long as parents can co-operate. On the other hand, court decision always remains in force, giving same sort of handicap for the parent who has been granted "the executing of regular care". Since the change of the court's decision usually requires a real long and burdensome proceeding (with a weak perspective for a better result) the only reasonable tactic of the other parent who has no right and duty of "executing of regular care" is to arrange a reasonable compromise in a contract. Such behavior creates sufficient results as long as the "first parent" offers reasonable cooperation. It is no doubt that any real unreasonable attitude and behavior of the parent having the regular care must be recognized as inappropriate execution of parental authority. If such inappropriate behavior threatens the welfare of the child, the court can change its original decision in the matter (this, however, requires a long proceeding) and may, eventually, issue an order limiting parental authority, or, in a situation drastically harmful to the child, adjudicate deprivation of such parent's parental authority.

10.4. Symmetric care

As the very new approach appears the disputed idea of pure shared care (alternate care, symmetric care) by divorced parents. Some researchers recognize this shared care, (which shall be granted to both parents in precociously equal level), as the optimal basic solution. This idea is based on the principle of equal protection of the human and constitutional rights of both parents. Other researchers underline the priority of the principle of the child's welfare over the protection of parents' rights, and generally recognize the idea of symmetric care as conflicting with the best interests of minor children[26].

10.5. Parental agreement

The spouses can conclude an agreement on post-divorce support[27]. As well they have competence to propose the division of property and the court is practically bound to adjudicate the division in accordance of the joint proposal of the spouses. From the legal point of view, the two areas: the division of common property and the post-divorce support are clearly separate and have each a different character. However, from the economic point of view, the result of the division of property shapes the financial condition of each of the spouses, and constitutes the essential basis for the alimony claims.

The post divorce maintenance depends only on a very detailed statutory regulation of Art. 60 FGC. The former spouses have an obligation to support each other if one of them lives in want. If none of the spouses was at fault for the breakdown of marital life cohabitation, the duration of the alimony duty is limited to five years time. The spouse who was at fault for the breakdown of the marriage is not entitled to alimony from the no-fault spouse.

If both spouses have been found at fault, each of them has a claim on ground of want, but the duration of the duty is not limited. What is more, a divorced spouse, despite a lack of want, may demand palimony or alimony if he or she is not at fault for the breakdown and the fault burdens only the obliged spouse.

10.6. Procedural regulations

There are special procedural regulations which impose facultative mediation and evidentiary limitations: children under 17 of the spouses cannot be witnesses, a confession to the act or an admission of factual circumstances is inadmissible, but the hearing of evidence may be limited to the hearing of the parties if the respondent accepts the claims of the petitioner and the spouses have no minor children of the marriage.

The court, upon the motion of the parties in the course of the proceedings to secure claims, settles the most important matters concerning the family which is breaking down, i. e.: maintenance obligations, how the parental authority over the children of the parties is to be exercised and keeping contact with the children on the basis of a written settlement concluded by the parties.

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[26] *Stojanowska W.* Rozwód // System Prawa Prywatnego: in 20 vols. Vol. 11: Prawo rodzinne i opiekuńcze / ed. T. Smyczyński. Warszawa: C. H. Beck, 2009. P. 777–782; *Sokołowski T.* Ustanie małżeństwa, Komentarz do art. 58 k. r. o. // Kodeks rodzinny i opiekuńczy. P. 455.

[27] *Sokołowski T.* Contractualisation of family law // Rapports Polonais, 19th Congress of Comparative Law, Vienna 20–26 VII 2014 / ed. B. Lewaszkiewicz-Petrykowska. Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2014. P. 70 et seq.

10.7. Mediation

The court can direct spouses to professional mediation if in course of the proceeding it recognizes that there still exist a possibility that the marriage may function correctly (§ 1 Art. 436 CPC). The court has also the duty of suspending the proceeding if it takes conviction, that there still exists a possibility to maintain the conjugal life (§ 1 Art. 440 CPC). Such suspension can happen once only in the course of the entire divorce proceeding. However, a suspension of the proceeding is not allowed if marital cohabitation has already stopped. Mediation must be fully voluntary, both at the moment when it starts, and all the time throughout its process (§ 1 Art. 183^1 CPC). No penalty clause is allowed.

Out-of-court mediation is also applied. The court can direct spouses to mediation in every phase of the proceeding. The aim of the mediation is to obtain amicable settlement of all controversial issues (§ 1 Art. 445^2 CPC). The institution of mediation is generally (in the civil law mode) regulated in the CPC in Art. 183^1–183^{15} CPC, and provisions of the divorce procedure (§ 2 Art. 436 CPC) make a reference to these general provisions of mediation, accordingly. However, the different character of family matters must be preserved.

The mediation is organized out of court. Pursuant to § 3 Art. 183^2 CPC, non-governmental organizations, acting within the scope of their statutory tasks, as well as universities, can keep registers of mediators and create centers for mediation.

10.8. Scope of mediation

Family mediation concerns all matters relating to the fulfillment of the maintenance or future alimentation for child or spouse, if applicable[28]. Mediation can also concern different issues, especially housing. The basic aim of mediation is to create sufficient room for reaching an agreement, in which spouses can either achieve reconciliation or at least agree a solution of controversial post- divorce matters.

It also includes parental agreement upon parental authority and contacts as well as all property matters. The method of building this parental agreement is strictly contractual: the parts have to bargain or discuss upon each elements of exercise the parental authority. This is the same scope of issues which are decided in a divorce judgment. Usually court scrutinize the parental agreement aiming to support it if it is compatible with the best interest of the child. However, the court is never formally bound by such agreement of spouses; the only one exception concerns the division of common property.

11. Separation

11.1. Nature of separation

Separation is based on the regulation of rights and duties resulting from marriage and parental authority in a situation when the spouses become separated without the right to enter into a new marriage. The premises for separation are similar to those for divorce, but there are some significant differences. A positive premise for a decree of separation is the complete breakdown of cohabitation (but it does not have to be irrevocable § 2 Art. 61^1 of FGC). There are only two negative premises: the separation conflicts with the interest of the child, and the separation conflicts with social coexistence principles (public policy).

[28] *Sokołowski T.* Rozwód // System Prawa Prywatnego: in 20 vols. Vol. 11: Prawo rodzinne i opiekuńcze / ed. T. Smyczyński. Warszawa: C. H. Beck, 2009. P. 684 et seq.

11.2. Procedural regulations

The procedure is similar to that of divorce, but if the spouses mutually petition for separation and have no minor children of the marriage, separation may be adjudged in non-contentious proceedings, and the court limits itself to the hearing of the parties (spouses).

12. Guardianship

12.1. Nature of guardianship

Guardianship is the obligation to take care of a person and his or her property and to represent the ward, i. e. a minor child deprived of parents or a fully incapacitated adult. Guardianship is established for orphans whose parents are dead or for so-called "social orphans", i. e. children whose parents have been deprived of their parental authority.

The institution of guardianship protects the whole living situation of the ward and it is very similar to parental authority. There are, however, significant differences between parental authority and guardianship. Guardianship is regulated under Art. 145–177 of FGC, and by virtue of the reference in § 2 Art. 155 of FGC, the provisions on parental authority are to a large extent applied to guardianship.

12.2. Forms of guardianship

Guardianship is established by the courts, which also must supervise the way in which it is exercised. Taking into consideration the age of the ward, we may distinguish: guardianship of a minor, and guardianship of a fully incapacitated adult, institution of custody in the case of a partially incapacitated person (a custodian is appointed under Art. 181 of FGC). In turn, due to the criterion of the person exercising guardianship we may distinguish: one-person guardianship and joint guardianship, which may be exercised only by spouses, custody.

Conclusions

The Polish system of family law is very pragmatic and family phenomena are regulated according to empirical and sociological criteria. In consequence the crucial task is the endeavour to harmonious legal regulation of family phenomena as well the new ones as the already well-known. In addition is obligatory to establish the clear distinction between family phenomena and only private phenomena.

The family law only "assists" and helps families and society in development of proper forms of social activity (both personal and cultural as well as economic). This approach requires especially the detailed science research of the new social and family phenomena as well as the synthesis of new solutions in accordance to new achievements of jurisprudence and judicial decisions.

It is necessary to throw aside all achievements of instrumental, and sometimes even aggressive using of the family law provisions as a tools of extorting the changes of social structure in accordance to any ideological dogmas.

Such excessive ideological approach was a strong feature of the European "legal culture" in near all 20th century. It was focused especially in socialist ideology in her two versions: "socialistic nationalism" (so called "nazism") as well as "international socialism" (so called "communism"). They both contained the socialist utopias characteristic for these ideologies, especially the utopias relating to family life. These utopias are discordant with empirical, scientific approach to social reality.

Both of these "terrible siblings" strongly and deeply devastated the family law provisions and, as result, the family phenomena in social practice. It is not clear if in Europe the entire aftermaths of these ideologies are really swept out without any remainders. The creating of excessively compiled legal structures of control of family phenomena is the example of this utopist and irrational approach. Final and durable "denazification" and "decommunisation" requires consistent rejection of the all elements of both of these ideologies.

Existing families need sometimes a specialist help but never any influences created by a priori utopias.

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Современное семейное право Польши

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В статье описаны основные черты и элементы семейного права Польши во всех его сферах. Представлена система источников права, оговорена специфика методов регулирования семейного права. Акцентируется внимание на том, что каждый брак должен быть моногамным, равноправным, супружеским, договорным и расторжимым. В частности, равенство супругов — краеугольный камень демократии. Конституционное равенство граждан, являющееся основой демократии, невозможно и недостижимо, когда внутри семейного дома возникает серьезное неравенство между супругами. Любая концепция сочетания институционального семейного неравенства в частной внутренней сфере дома с защитой равенства граждан в публичном пространстве неправильна. В соответствии с установленными правовыми нормами каждая пара свободно формирует свои отношения в своей семье. Например, имущественные отношения в семье могут быть частично изменены в соответствии с индивидуальными убеждениями супругов, которые обусловлены личным характером семейных уз. Автор отмечает, что метод регулирования отношений семейного права несколько отличается от классического, гражданско-правового метода регулирования, поскольку нормы семейного права обычно не предусматривают возможности принуждения членов семьи к определенному семейному поведению, но устанавливают применение определенных санкций семейного права. Автономия метода правового регулирования семейного права также основана на том, что некоторые семейные отношения, в отличие от гражданско-правовых, не всегда равны, поскольку дети подчинены родителям. В семейном праве также присутствует элемент административного права, поскольку родители должны защищать благополучие ребенка, а потому они подлежат особому государственному контролю. Вместе с тем отношения между супругами всегда, без каких-либо исключений, основаны на принципе равенства взаимных прав и обязанностей жены и мужа. Также в статье раскрыты следующие вопросы: значение семьи и брака, заключение брака, права и обязанности супругов, регулирование имущественных отношений, проблема происхождения ребенка, ответственность родителей, система защиты детей, усыновление, содержание, алименты и обязанность обеспечивать содержание, развод, раздельное проживание, опека над сиротами. Особое внимание уделено влиянию судебной практики Европейского суда по правам человека на текущую эволюцию польского семейного права.

Ключевые слова: усыновление, алименты, самоидентификация ребенка, опека, развод, частная жизнь, суррогатное материнство.

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