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The Model Family Code and the regulation of Polish Family Law

Abstract: The paper presents the comparison between the principles of Model Family Code and the regulations Polish family Law. The main questions are connected with the sources of Family Law, the recognition of the clause on “a child’s welfare”, the scope of State’s protection of families and family life and the influence of the European Court of Human Rights’ jurisprudence. In addition, the analyse takes into account the definitions of marriage, concubinage and partnership in connection with the protection of privacy and family life. On the area of divorce regulation the main analyse are connected with the alternative dispute resolution (ADR), parental authority, joint custody and contacts with common child, and financial consequences of dissolution of marriage. At last are analysed the descent of a child, alimentation, adoption the new institution of child’s advocate.

Keywords: adoption, alimentation, alternative dispute resolution, child welfare, code, concubinage, contacts, custody, divorce, human rights, family, jurisprudence, marriage, maternity, parental authority, paternity, property.

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Sources of Polish family law

The starting point of the comparison between the Model Family Code² and Polish family Law is connected with the structure of the system of the sources of this regulation. The basic source of family law is the Constitution of the Republic of Poland of 1997.³ The Family and Guardianship Code of 1964⁴ regulates family law in detail. The FGC was amended in 1975 and subsequently more than 20 times between 1995 and 2018, at which time the amendments encompassed over half of the provisions. However, the interpretation of the provisions of the FGC has to take into account not only the Constitution but also the large group of different legal acts, such as the legal acts of Human Rights.

Since Poland has ratified many international treaties which refer to family law matters and is a member of the European Union (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 recognized as sources of family law. Although the European integration processes first and foremost concentrate 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 harmonization efforts. Consequently, from a longer perspective, (crossing treaty frames) the foundations of “European family law” are being laid “in practice.”⁵

What is important is that there are numerous legal instruments regulating mainly civil procedure, as it is now a priority to strive to tighten and facilitate efficient cooperation between courts and other bodies dealing with the legal protection of the family. But a thorough analysis of the issues included in those

2 Hereinafter: MFC. The principles of MFC was prepared on the base of research of Committee on European Family Law (CEFL). See: Ingeborg H. Schwenzer, and Mariel Dimsey, *Model Family Code: From Global Perspective*. Antwerp, Oxford, 2006.

3 Hereinafter: Constitution.

4 Hereinafter: FGC.

5 Tomasz Sokołowski, “The Concept of European Family Law” in *Selected Problem in the Area of Family Law and Civil Status Registration*, ed. P. Kasprzyk. Lublin, 2007, 13–22.

instruments indicates that they introduce, even now, new categories constituting direct elements of substantive law without sufficient backgrounds of empirical scientific research. First of all appear the ideological definitions of the “new concept of marriage”, rather than scientific ones, as well as the new approach to the relation between child and parents. In that way they have a sort of “a side effect”, but crucially they also affect 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 some EU states, including Poland.

The clause on “a child’s welfare” and State’s protection of families and family life

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 the child’s well-being constitutes the most important principle of Polish family law (similar to Article 3.1 and 3.2 MFC) and both the well-being of the family as well as the interest of other persons (and legal persons, even the State) must constantly give way to a child’s welfare. Usually, in a 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 state’s protection of families and family life is expressed in Article 18 of the Constitution, which stipulates that marriage and the family, motherhood and parenthood, are to be placed under the protection and care of the State.

Article 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 is regulated by Article 72. Under this Article the institution of the Commissioner for Children's Rights has been established to protect children.

Article 33 of the Constitution expresses the principle of equality between men and women, whereas Article 47 of the Constitution regulates the right to legal protection of one's family life or privacy.

The influence of the European Court of Human Rights' jurisprudence

However, the influence of the European Court of Human Rights⁶ jurisprudence would be more significant if only the Court would 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 his or her 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 theoretical reflection, and are therefore too one-sided.⁷ In

⁶ Hereinafter: ECtHR.

⁷ S. Chludrhry and J. Herring note that the Strasbourg jurisprudence is not developed in the careful analytical style of the common law jurisprudence (Shazia Chludrhry, and Jonathan Herring, *European Human Rights and Family Law*. Oxford, 2010, 39).

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.⁸ 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 that is taken into account in these cases.

Marriage and partnership. Marriage and Family

Article 1.1 of MFC declares: “Partnership include marriages. Partnerships include non-marital relationships if (a) they have lasted more than three years, (b) there is common child, or (c) one of each of the partners has made substantial contributions to the relationship or in the sole interests of the other partner.”

This approach is not at all consistent with the Polish legal system, because of the division between private life and family life, which has crucial importance. Family life is a social situation between spouses or relatives caused exclusively by coital (copulatory) interactions between spouses or partners, or by adoption which eventually resulted in 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. Private life has a broader range, always containing family life. The fundamental two categories of this division are the sexual interactions (as the broad group of per-

⁸ In addition, another problem is connected with the issue of the protection of the welfare of the entire family in relation to the ECtHR system and the Charter of Fundamental Rights: Helen Stalford, “EU Family Law: A Human Rights Perspective” in *International Family Law for the European Union*, eds. J. Meeusen, M. Pertegás, G. Straetmans, and F. Swennen. Antwerp, 2007, 103.

sonal behaviors) and the coital interactions (conjugal interaction) as exclusively the behavior which appears between two adult persons of different sex. The coital interactions constitutes the different and only one kind of the social unit, which is open for maternity, paternity and kinship between the relatives.

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

In consequence the Polish legal system refuses the concept expressed in Article 1.3 MFC. The provisions of Article 18 of the Constitution state that marriage is a union of a woman and a man. In consequence under Article 23 FGC, the family is based on a marriage, which is a permanent legal union of a man and a woman. Consequently each marriage has to be: monogamous, equal, conjugal, contractual⁹ and dissolvable. In particular the equality of spouses is a cornerstone of democracy. Constitutional equality of citizens, which is a foundation of democracy is impossible and unattainable when any considerable inequality appears between spouses inside the family home: both in terms of privacy and of matrimonial property relations.

Concubinage or other unions and protection of privacy and family life

The family may be also composed of a mother, a father and a child without marriage. Contrary to Article 1.1 a MFC, conjugal unions of persons who have not contracted a marriage are treated as concubinage. Concubinage (in some way similar to unregistered partnership) as a union between a woman and a man has only a private character, but it can be transferred into a family situa-

⁹ There is no doubt that Article 1.4 MFC followed this strengthened contractual nature of marriage. The age requirement of FGC is 18 years, similar to Article 1.5 MFC, however under the provision of Article 10 FGC a woman who has reached her sixteenth birthday can, in exceptional cases, be granted permission to marry by a court. The impediments which occur in Article 13, 14, 15 FGC are similar to those expressed in Article 1.6 and 1.7 MFC. The family name is regulated in Article 25 § 2 and 3 FGC, similar to Article 1.8 MFC.

tion because of maternity and paternity, connected with the arrival of the common child of the partners. From this point of view, it is indispensable to divide all the private phenomena into two groups: the **transformable phenomena** and the **nontransferable phenomena**.¹⁰

If a concubinage is transformed into a family it receives the full scale protection from the State in accordance with the model described above in points 2 and 3.

Though all conjugal (coital) interactions have a sexual character, a large group of sexual interactions have no conjugal character at all and are recognized as nontransferable private phenomena. Also other unions without any sexual bonds have nontransferable nature.

Looking at other unions than marriage and concubinage, we meet Article 1.1 MFC, which does not deliver any leading feature (*differentia specifica*) of the key category of “partnership”. The sentence: “Partnerships include marriages. Partnerships include non-marital relationships...” has mixed completely different categories: “marriage” (which is a legal institution and a social group with strengthened connotation from ages) and non-marital relationships (which is only a relation, not a group). Because of this gap it is impossible to recognize the scope of regulation of the entire MFC. One may assume that Article 1.1. MFC concerns any social units, despite its structure (dual or multilateral) and the nature of interactions between partners. In the light of the theory of law and the rules of logic, the meaning of this provision is not sufficiently clear and the MFC deserves rejection in its entirety.

However we can assume that among various possible groups, Article 1.1 MFC concerns two groups: the group of two persons connected by only sexual, not conjugal relationships, and secondly the group of two persons connected by other bonds than sexual. All these other unions of persons cannot be treated as marriages because of the lack of the essential feature of the presence of con-

¹⁰ Tomasz Sokołowski, and Andrzej Mączyński, “Ways of family life.” In *Rapports Polonais. XXth Congress of Comparative Law, AIDC/IACL, Fukuoka, Japan, July 2018*, ed. B. Lewaszkiewicz-Petrykowska. Łódź, 2018, 27–56.

jugal interactions, and have a nontransferable nature. As a result these units are recognized by the Polish legal system as having only a private character because of the impossibility of maternity and paternity of a common child.

It is necessary to underline that Poland has a very long tradition of entirely legal homosexual relations, which have been fully allowed without of any punishment since 1932. This high level of tolerance was only reached in many of other European countries in the last decades of the 20th century. As a great number of various social units having only a private character, homosexual units have the complete legal protection of the Civil Code through the construction of substantive personal rights of privacy.

Since 1932, the Polish legal system has had a long time to elaborate the regulation of some detailed issues connected with this legal situation. From this perspective, the attempt of the regulation contained in the MFC in this area seems to be rather immature.

Divorce

Divorce is granted only by a court¹¹ upon petition of one spouse, despite some procedural details quite similar to those expressed in Article 1.9 MFC. However the conception of a mandatory “period of six months” specified in Article 1.10 is definitely rejected as too old-fashioned. There is in Article 56 FGC only 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 there is a breakdown of emotional, physical and economic bonds between the spouses.

There are also three negative premises for divorce and they constitute obstacles to having a decree of divorce issued. The court may not dissolve the mar-

11 The competence of administrative body foreseen in Article 1.12 and 1.13 MFC would be recognized by Polish family law as unconstitutional.

riage if: (1) the divorce conflicts with the interest of the child, (2) the divorce conflicts with social coexistence principles (public policy), and (3) 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).

Because the detailed provision of Article 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 concerning the child's housing as an obligatory element. Also the amended Article 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 on the exercise of their 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" (similar to Article 1.19 MFC). This 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 the subject of very wide discussion. In addition, Article 58 § 1 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.

Alternative Dispute Resolution (ADR)

Very similar to Article 11.14 MFC, in Polish divorce law the court can direct spouses to professional mediation if in the course of the proceedings it recognizes that there still exist a possibility that the marriage may function correctly (Article 436 § 1 Civil Procedure Code¹²). The court also has the duty of suspending the proceedings if it is convinced that there still exists a possibility to maintain conjugal life (Article 440 § 1 CPC). Such a suspension can happen only once in the course of the entire divorce proceedings. However,

¹² Hereinafter: CPC.

a suspension of the proceedings is not allowed if marital cohabitation has already stopped. Mediation must be fully voluntary, both at the moment when it starts, and throughout its process (Article 1831 § 1 CPC). No penalty clause is allowed.

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

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

Family mediation concerns all matters relating to the fulfillment of the maintenance or future alimentation for the child or spouse, if applicable.¹³ 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 on a solution for controversial post-divorce matters.

It also includes parental agreement on parental authority and contacts, as well as all property matters. The method of building this parental agreement is strictly contractual: the parties have to bargain or discuss each element of the exercise of parental authority. This is the same scope of issues which are decided in a divorce judgment. Usually the court scrutinizes the parental agreement aiming to support it if it is compatible with the best interests of the child.

¹³ Tomasz Sokołowski in *System Prawa Prywatnego*, vol. 11, *Prawo rodzinne i opiekuńcze*, ed. T. Smoczyński. Warszawa, 2014, 730 et seq.

However, the court is never formally bound by such agreement of spouses; the only exception concerns the division of common property.

Subsequently to divorce the **annulment of marriage** is regulated in case of violation of impediments. In same situation that is indicated in Article 1.11 sentence 1 MFC, the FGC applies the institution of annulment of marriage in Article 17. For the situation indicated in Article 1.11 sentence 2 MFC, the FGC applies a similar regulation in Article 17.

Shared custody after divorce

After divorce, the court regulates the issue of the sole custody or joint custody of the common child (Article 58 FGC). Under Article 95 § 3 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. In recent times researchers have gradually begun to take the ECtHR jurisprudence of Article 8 ECHR into consideration,¹⁴ clearly documenting the disputable conception of the necessity of finding a more proper balance between the protection of the child's welfare and the protection of the parents' right to respect for family life.

As a result of this new approach, the very doubtful idea of pure shared care (alternate care, symmetric care) by divorced parents for their child has

14 Tadeusz Jasudowicz, "O potrzebie upodmiotowienia rodziny" [The Family as the Subject of Rights] in *Księga Jubileuszowa Profesora Tadeusza Smoczyńskiego* [Jubilee Book for Professor Tadeusz Smoczyński], eds. M. Andrzejewski, M. Łączkowska, L. Kociucki, and A. N. Schulz. Toruń, 2008, 204 et seq.; Piotr Mostowik, "Brak "strasburskiego" bądź "brukselskiego" obowiązku", in *Związki partnerskie: Debata na temat projektowanych zmian prawnych*, ed. M. Andrzejewski. Toruń, 2013, 221 et seq.; Tomasz Sokołowski, "Dobro dziecka wobec rzekomego prawa do adopcji" [The Welfare of the Child in Face of the Alleged Right of Adopting Persons] in *Związki partnerskie: Debata na temat projektowanych zmian prawnych*, 103 et seq.; Anna Natalia Schulz, "Ustalenie ojcostwa i utrzymywanie kontaktów z dzieckiem – niektóre prawa ojca w świetle orzecznictwa Europejskiego Trybunału Praw Człowieka" in *Księga Jubileuszowa Profesora Tadeusza Smoczyńskiego*, eds. M. Andrzejewski, M. Łączkowska, L. Kociucki, and A. N. Schulz. Toruń, 2008: 343–357; Anna Śledzińska-Simon, "Rozwód czy prawne uznanie poci? Głosa do wyroku ETPCz z 13.11.2012 r. w sprawie H. przeciwko Finlandii" [Gloss to the Judgment of the ECtHR of 13 November 2012, 37359/09, H. v. Finland], *Europejski Przegląd Sądowy*, no. 7. 2013: 40–45.

become the subject of discussion in the Polish doctrine. Some researchers recognize the idea of shared care, (which shall be granted to both parents in equal level), as the optimal basic solution.¹⁵ This idea is based on the principle of equal protection of the human and constitutional rights of both parents.¹⁶ 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.¹⁷ While critics of shared care do not directly cite the jurisprudence of the ECtHR as yet, judgments such as *Y.C. v. the United Kingdom*¹⁸ or *Johansen v. Norway*¹⁹ will undoubtedly be widely discussed in the publications in the near future.

Doubtless the quite new concept of shared custody is connected to a new conception of private way of life of divorced persons.

Financial consequences upon dissolution of marriage

The rights and duties of spouses are regulated in comparable ways: in Article 23 FGC nearly the same regulation appears as in Article 1.15 MFC. Simi-

15 Shared care is a new and very disputed idea. In practice shared care (as symmetric care) is not granted to both parents in half of all cases. Currently, as a rule in the majority of cases asymmetric care is granted by the courts.

16 Robert Kucharski, "Wspólna władza rodzicielska nad małoletnim dzieckiem w USA w świetle prawodawstwa i badań specjalistycznych" [Joint Parental Authority over a Minor Child in the USA in Light of the Legislation and Professional Research], *Rodzina i Prawo* [Family and Law], no. 23. 2012: 35 et seq.; Jacek Wierciński, "Kilka uwag o władzy rodzicielskiej nad małoletnim dzieckiem w razie rozvodu rodziców w ujęciu porównawczym" [Comparative Analysis of Parental Authority with Respect to a Minor in Divorce Cases], *Studia Prawa Prywatnego* 24, no. 1. 2012: 24, strongly supports the concept of purely shared care on the one hand, he notes the necessity of protecting the best interests of the child on the other hand.

17 Wanda Stojanowska in *System Prawa Prywatnego*, vol. 12, *Prawo rodzinne i opiekuńcze*, ed. T. Smoczyński. Warszawa 2011, 777–782; Jacek Ignaczewski in *Komentarz do spraw rodzinnych*, ed. J. Ignaczewski. Warszawa, 2012, 201 et seq.; Bronisław Czech, in *Kodeks rodzinny i opiekuńczy. Komentarz* [FGC Commentary], ed. K. Piasecki. Warszawa, 2009, 500; Tomasz Sokołowski in *Kodeks rodzinny i opiekuńczy. Komentarz* [FGC Commentary], eds. H. Dolecki, and T. Sokołowski. Warszawa, 2013, 455.

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

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

larly, Article 1.16 MFC is comparable to Article 28 FGC and Article 1.17 and 1.18 MFC to Article 281 FGC.

As was indicated above, the financial consequences upon dissolution of marriage are regulated in the FGC in connection with a definite property regime, however the consequences upon dissolution of other unions are regulated in the Civil Code.

Despite the declarations, the regulation of MFC proposes to introduce a sort of separate property rights with equalisation. The scope of separated property is regulated in Article 1.23 and the rules of this equalization are detailed described in Article 1.21–1.37. The regulation deserves criticism because, first of all, it avoids the effective protection of equality of spouses **before** the dissolution. Furthermore, on the one hand it establishes too narrow scope of effective final equalization, and on other hand, is far too complicated and imprecise precise because it “relies heavily on a wide discretion of the court”.²⁰ Generally speaking, the attempt to transfer the balance of economical relation between spouses from the “period of living union ” to the sphere of the consequences of dissolution is wholly unimpressive. Looking to the social practice we can say: “Lets deal with existing relationships”.

The Polish legal system has reasonable experience with this model of regulation because we had a similar property regime after World War II, since 1950. After this period the system of community property was introduced and works very effectively until the present time. It must be underlined that in 2000 the Committee of Novelization of Civil Law submitted the project of new matrimonial property regulation with attempt to introduce as mandatory the system of separate property rights in marriage with equalisation of the property acquired during the course of the marriage (in part similar to the method of regulation of the MFC). However the vast majority of the General Assembly of judges and jurisprudence representatives rejected this project, because of the protection of the rule of equality between spouses. In the Polish legal

²⁰ Schwenger, and Dimsey, 43.

tradition, any concept of combining mandatory family inequality in the home's private internal sphere with the protection of the equality of citizens in the public space would have sounded schizophrenic. However, each couple can freely shape their relations within their family and the system of property relations inside the family may be modified according to the individual viewpoint of the spouses, which are conditioned by the personal character of family bonds.

In consequence, the Committee of Novelization of Civil Law modernized the previous project. In 2005 the amendment of the FGC introduced the system of separate property rights in marriage with equalisation only as the additional contractual system. Even so, after 15 years of legal practice this system is recognized as definitely unpopular and it is extremely rarely chosen by spouses.²¹

Lastly, the property regulation of the FGC refers to relations with third parties and property relations between the spouses, which encompass the system of matrimonial property rights, prenuptial agreements and marriage settlements, other contracts between spouses, and the right to live in the premises of the other spouse (Article 281 FGC, just like Article 1.17 MFC). There are two systems of property rights in marriage: a statutory system of joint property of the spouses, and a contractual system of separate property rights in marriage.

In the case of statutory joint property, there are three properties: the joint property of spouses and two personal (individual, separate) 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 the 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. This scope of separate

21 Błażej Bugajski, *Rozdzielność majątkowa z wyrównaniem dorobków* [Separate property rights in marriage with equalisation]. Warszawa, 2020.

property is different than the regulation of Article 1.23 MFC, because it recognises the income and proceeds as the element of separate property.

The system of joint property of spouses may, in turn, be divided into: 1. a statutory system of joint property, 2. contractual joint property, which may be further divided into extended joint property or restricted joint property.

The systems of separate property rights in marriage include three systems: 1. a simple contractual system of fully separate property rights, 2. a system of compulsory separation of property rights, and 3. a system of separate property rights in marriage with equalisation of the property acquired during the course of the marriage. The last system may be introduced as a result of a concluded prenuptial agreement or a marriage settlement.

Lastly, it is necessary to point that the MFC omits the very important subject of the regulation of civil liability of the spouses, especially the liability for the spouse's obligations and the protection of creditors (Articles 41, 47 § 2 and Article 50 FGC), which deserves detailed regulation.

In addition, in the case of division of common property, 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 (which has in part a similar function to the regulations of 1.20, 1.21, 1.22 and 1.27 MFC). However, the court has the competence to establish unequal shares: Article 43 § 2 and 3 FGC regulates this matter in a quite similar way to Article 1.28 and 1.29 MFC. Also, Article 45 FGC regulates the legal consequence of abstained benefits and detriments in quite a similar way to Article 1.26 MFC (despite the general differences of the construction of the matrimonial property regime).

Descent of a child

Under Article 619 FGC a mother, under the law, is a woman who has given birth to a child (and not, e.g. the so-called genetic mother). This is similar to the regulation of Article 3.4 MFC.

This presumption of maternity or paternity, however, may be rebutted in the course of proceedings regarding denial of maternity or paternity: Article 6111 and 63 FGC are similar to 3.6 MFC. The child may challenge the legal parentage within three years of his or her age of majority: Article 6114 FGC is in part similar to Article 3.7 MFC. The birth mother may challenge the legal maternity of the legal mother: Article 6112 FGC is in part similar to Article 3.9 MFC.

The traditional construction of parentage by adjudication was rejected in 2008 because it was recognized as an old-fashioned institution, inharmonious with the fundamental rule of protecting a child's personal identity, expressed in Article 8.1–2, Article 11, Article 20.3 the UN Convention on the Rights of the Child²² and, as well, in Article 50.1 of Constitution. Nowadays Article 73 and Article 74 FGC express the new institution of common declaration, given by both mother of the child and the father, of his biological paternity of the child, even unborn up till now (Article 75 FGC). This regulation is only partially similar to Article 3.10 MFC.

Recently under Article 751 FGC the legal consequences of agreements on artificial insemination of the wife are regulated and the husband is presumed to be the father if he agreed to assisted procreation. However, after his or her maturity the child has the right to access the medical data concerning the identity of the genetic parent (Article 38.2 of the Legal Act of the medical treatment of infertility of 25 of July 2015). There is quite a similar regulation in Article 3.5 MFC.

Parental authority

Article 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. Article 53.3 gives parents the right to ensure their children a moral and religious upbringing and teaching in accordance with their con-

²² Hereinafter: CRC.

victions. However, it also directs parents to respect a child's freedom of conscience and belief as well as his or her convictions in the case of an older child (Article 48.1 of the Constitution). Article 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 an administrative decision). The regulation of the FGC fulfils these main directives. Generally the FGC regulates this matter to a significantly greater than the MFC.

One of the main differences is that only parents are the subjects of parental authority. What is more, instead of the parental responsibility of third parties regulated in Article 2.28 MFC, in Polish family law there is extensive and detailed regulation of "foster care" in Article 112–1128 FGC. In addition the Legal Act of foster care of 2011 regulates this matter very extensively in more than 200 articles. In the main, the legal parents and the foster parents can execute some elements of parental authority jointly.

However the regulation of Article 3.37 MFC seems to be unconvincing for the reason that the process of decision regarding important matters must be executed quickly and skillfully. It truly hard to imagine that "several holders of parental responsibility" could effectively make a decision concerning the child's serious medical treatment in the event of personal conflict between them. The FGC regulation providing that the mother and father are the only two decision-makers is more convincing.

Generally in the FGC there are several similar detailed regulations which we can find in MFC. Parental responsibility is recognized in Article as "a duty and right" of parents. The general clause of child welfare is contained in Article 95 § 1, § 3 FGC and Article 3.1, Article 3.2, Article 3.25, Article 3.26 MFC. The hearing of the child is covered in Article 96 § 4 FGC and Article 3.3 MFC. The regulations of the child's care, support, protection of integrity, property administration and representation are very similar.

Child protection

The FGC recognizes child protection as a quite large part of the regulation of parental authority. Depending on the threat to the child's welfare, court intervention may take three forms: limitation of parental authority; suspension of parental authority; or deprivation of parental authority.

The most frequent methods of limiting parental authority are in part similar to Article 3.43 MFC. Article 109 FGC includes: (1) obliging the parents to behave in a specific manner under court supervision, (2) subjecting parents to the supervision of a court-appointed guardian, (3) sending the child to a centre that exercises partial care/custody over children, (4) placing the child with a foster family or in a care and educational facility. In the last of these cases, the guardianship court notifies the local family welfare centre run by the local administration at county or municipal level, which provides appropriate support to the minor's family and reports to the guardianship court on the family's situation. Therefore, this situation may be reversible and, after it improves, the child may return to his or her natural family, similar to Article 3.44 MFC.

Deprivation of parental authority may be obligatory or optional. It is obligatory in three strictly defined cases: (1) the appearance of a permanent obstacle to exercising parental authority, (2) the abuse of parental authority, and (3) gross negligence in the obligations of the parents with respect to the child. Optional deprivation refers to a situation where the family's situation does not improve significantly after the child has been removed from the family's care and placed outside the natural family, despite the support provided to the family. Parental authority may be restored if the reason for deprivation ceases to exist.

Child's advocate

In 2021 the new institution of curator to the child's case ("child's advocate") was introduced to the FGC. In consequence, an advocate or a legal counsel can be appointed by a court as a curator to represent incidentally the minor in a child's court case if neither parent may represent the child (Article 99 § 1 FGC). The

curator can perform any and all activities relating to the case, including the appeal and execution of a ruling (Article 99 § 2 FGC). By special recommendations of Article 991 § 1 FGC, the advocate or legal counsel has to have a special knowledge of the issues relating to the child, or of the same type or topically corresponding to a case, or has completed special training. The training concerns the principles of representing a child, and the rights or needs of a child.

If the complexity of the case does not require the same, the curator may also be a person holding a degree in law and exhibiting familiarity with the child's needs. However, this does not apply during criminal proceedings.

In accordance with Article 992 § 1 FGC appears the duty of informing of the parents. A "child's advocate" shall provide the parent of the child at their request, with information necessary for the proper exercise of parental authority regarding the course of the proceedings. In addition he has the duty of acquiring the information. The curator shall obtain information on the child, their health condition, family situation and environment from that parent. He may also apply for the information referred to authorities or institutions as well as associations and social organisations to which the child belongs or which provide aid thereto (Article 992 § 2 FGC).

Child's curator has as well the duty of informing of the child. If the mental development, health condition and the degree of maturity of a child so allows, the curator shall contact them and proper inform them about the actions taken, the course of the proceeding and their legal situation (Article 992 § 3 FGC).

The last issue is the advocate's secrecy. The curator shall keep the circumstances of the case secret (Article 992 § 4 FGC). However, exceptionally the duty does not apply if there is credible information about crimes committed to the detriment of the child.

Contact

The new separated institution of contact existing beyond the scope of parental authority since 2008 concerns that between the parents and child. Differently than

in Article 3.38 MFC, pursuant to Article 113–1136 FGC both parents and the child are obliged to and have a right to keep in touch with each other and their relatives. Those contacts include: (1) the contact with the child such as visits, meetings, taking the child outside the permanent residence, (2) getting in touch directly through physical conversations with specific persons, i.e. face to face contact (and not just by phone), (3) correspondence, (4) keeping in touch by using other methods of distance communication, including electronic methods (telephone), radio communication or talking via the Internet.

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.

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 Article 48 of the Constitution, which grants parents "the right to rear their children in accordance with their own convictions".²³ The standpoint of the Polish Supreme Court²⁴ was much more diversified. First, the Polish SC shared the prevailing conception of jurisprudence.²⁵ 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.²⁶ This standpoint of the Polish SC was amended in 2006.²⁷ A substantial domestic discussion on the scope and legal character of contact rights had begun, and the judgments

23 Janusz Gajda, *Kodeks rodzinny i opiekuńczy: Komentarz* [FGC Commentary]. Warszawa, 1999, 365.

24 Hereinafter: SC.

25 The resolution of the Polish SC of 18 March 1968, III CZP 70/66, OSNCP 1968, no. 5, item 77 (known as the "SC Divorce Directive").

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

27 Resolution of the Polish SC of 8 March 2006, III CZP 98/05, OSNC 2006, no. 10, item 15.

of the ECtHR, including those in the cases of *Santos Nunes v. Portugal*²⁸ and *Dqbrowska v. Poland*, 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* and *Schultz v. Poland* – 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 the amendments in 2008 and 2011, contact has been recognized as a legal institution fully separate from parental authority (Articles 58, 107, 113, 1131–1136 FGC.). The Polish SC took the new regulation into account in its recent jurisprudence.²⁹ 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,³⁰ or recognized it as eccentric. Others suggest that the removal of parental authority should affect contact rights, just as a ban on contact should affect parental authority.³¹ The majority of the relevant Polish jurisprudence has agreed with the new concept of contact rights, but has underlined the influence of the UNCRC³² and the European Convention on Contact concerning Children³³ as the basic source of the new regulation. Other authors underline the necessity of discuss-

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

29 Judgment of the Polish SC of 23 May 2012, III CZP 21/12, LEX no. 1168215.

30 Jacek Ignaczewski, *Komentarz do spraw kontaktów z dzieckiem*. Warszawa, 2011, 24 et seq.

31 Tomasz Justyński, *Prawo do kontaktów z dzieckiem w prawie polskim i obcym*. Warszawa, 2011, 113 et seq.

32 In 1978, the Polish State put forward the very first draft of this Convention: Thomas Hammarberg. “The Best interest of the child – what it means and what it demands from adults” in *Children’s Rights and Human Development*, ed. J. C. Willems. Antferp, Oxfort, Portland, 2010, 582.

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

ing the judgments of ECtHR, for example in the influential cases of *Santos Nunes v. Portugal* and *Schneider v. Germany*.³⁴

Alimentation

Alimony 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 (Article 60 of FGC) constitute a sort of continuance of the obligation to support one's family (Article 27 of FGC). This regulation has a very similar function to Article 1.31 MFC and, secondly is quite similar to Article 1.24, 1.25 MFC and to some extent has a similar scope to Article 1.30 MFC.

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 a child born out of wedlock on behalf of the child's mother (Articles 141–142 of FGC).

In the event that the execution of alimony and maintenance turns out to be ineffective, the benefit is paid out by the special Alimony Fund (Journal of Laws of 2019, item 670).

Adoption

The Polish regulation of adoption under the FGC is certainly different from regulation of the MFC. In Polish law, 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.

³⁴ Sokołowski in *Kodeks rodzinny i opiekuńczy. Komentarz*, 799 et seq.

Upon Article 114 FGC, “adoption serves **only** to protect child welfare” but what is surprising is that the MFC regulation avoids a similarly clear declaration. Pursuant to Article 3.15 MFC, somebody could deduce that adoption protects not only the best interests of the child but as well the interest of adopter. Such an approach seems to be a reminder of former conceptions of adoption.

These differences affect all the legal constructions of adoption. According to the FGC, any reduction in the scope of the protection of child welfare to the advantage of the adopter is prohibited. This results in the rule of the protection of child identity, expressed in in Article 8.1–2, Article 11, Article 20.3 CRC (indicated above).

From this reason in Polish family law the adoption can be established only: (1) for one person, who is recognized as “adoptive mother” or “adoptive father”, or (2) for spouses recognized as “adoptive mother and father” (Article 115 § 1 FGC). With regard to the 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 on Adoption of 13 July 1939 and received in Article 115 § 1 FGC. First of all, the protection of the child’s biological, genetic identity, personal identity and the secret of the fact of adoption (as two of crucial elements of the child’s best interest) required the establishment of as similar a structure to the structure of a natural family as possible. It follows the rule: “*Adoptio naturam imitatur*”.

The MFC regulation is undoubtedly inharmonious with this fundamental rule of the protection of the child’s personal identity regulated in CRC. Probably it creates the sphere of balancing between the protection of child welfare and the interest of adopters and deserves fundamental change.

It is worth noting that Article 20 of CRC, concerns the fate of children deprived of a family, and therefore also the case of the parents being detached. Such a child has the right to foster care. The CRC expresses the principle that a child has a right to continuity of the social environment. In addition, Article 14.1 of the CRC requires state-parties to respect the child’s right to

the freedom of thought, conscience and religion. It would therefore be erroneous practice to entrust a child to the care of those who cannot or do not ensure continuation of the previously implemented line of education.³⁵ 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 to those of his parents.³⁶

However same details of adoption are regulated in the FGC in part or entirely in a similar way to MFC. The age of the adopter and age difference in Article 1141 FGC is defined as “adequate” (differently than under Article 3.12 MFC) but the functions are the same. The consent of the legal parent (3.13 MFC and Article 119 and 1191 FGC) is regulated in a very similar way. However, the consent of the child (3.14 MFC) is regulated in FGC much more broadly (Article 118 § 1, 2, 3 FGC).

Parenthood by adoption, the child’s right to know its origins, the revocation and its consequences, are regulated very similarly. However, completely anonymous adoption³⁷ is irrevocable (Article 1251 FGC).

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35 Tomasz Sokołowski, “Family Forms and Parenthood in Poland” in *Family Forms and Parenthood*, eds. A. Büchler, and H. Keller. Cambridge, Antwerp, Portland, 2016, 365 et seq.

36 Tomasz Sokołowski, “Защита прав ребенка как прав человека в ходе судопроизводства по делам усыновления” [Protection of child’s rights as human rights in cases of adoption] in *Polish and Russian Law: Dilemmas new and old*, ed. L. Moskwa. Poznań, 2011, 23 et seq.

37 Under FGC are three forms of adoption: 1. full adoption, 2. complete anonymous adoption, 3. incomplete adoption.

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