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Pojęcie rodziny a jej ochrona w procesie stanowienia i stosowania prawa

The notion of family within the procedure of enacting and applying the law

Introductory remarks

Article 18 of the Polish Constitution of April 1997 stipulates that: „Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland". This provision is treated as an element of constitutional axiology and a kind of programmatic norm. It formulates one of the fundamental and unquestionable principles of Polish law - the principle of protection of marriage and family. The fact that this principle is enshrined in the Constitution is undoubtedly an expression of the legislator's recognition of the social role of the family and an expression of the will to preserve and strengthen it[1].

It would seem that the concepts used by the legislator in the aforementioned provision of the Basic Law including, in particular, the concept of family, should not arise much controversy, at least as far as their essential content elements are concerned, however, it is on the contrary. Analysing legal acts in which the concept of family exists, one may get the impression that the legislator himself understands them in a different way. Also in doctrine and case-law, one can find extremely different views on this issue, ranging from - one would like to say - „classical", for which family is the union formed by marriage involving spouses and their children, to the statement that the concept of family in the Constitution of the Republic of Poland also includes the actual marriage life of persons (including persons of the same sex).

[1] More on this subject: cf. W. STOJANOWSKA, *Rodzina w polskim ustawodawstwie*, in: M. RYŚ (ed.), *Przyszłość ludzkości idzie przez rodzinę*, Warszawa 2013, p. 173 ff.

The aim of the article is to show changes in the concept of family in selected normative acts, with particular emphasis on the provisions of the Polish Family and Guardianship Code, and to analyse the views of doctrine and case-law in this field.

1. The concept of family in selected acts

The analysis of the concept of family in various normative acts indicates a certain established practice of the Polish legislator in its approach to the problem. It consists in defining the concept of family, depending on the subject matter of regulation and the purpose of the legal act in which it occurs. This leads to many, often very different, statutory definitions of the same concept within one legal system.

The subjective scope of the concept of family in selected legal acts is illustrated in the table below.

Table: *The concept of family in selected acts*

Title of the Act	**Concept of family**
Act of 28 November 2003 on **Family Benefits**	„Whenever the Act refers to **family**, this shall mean, respectively, the following family members: spouses, parents to children, an actual guardian of a child and dependent children up to the age of 25, as well as a child who has reached the age of 25 and has a certificate of significant degree of disability, if the family is entitled to a carer's benefit in connection with that disability; family members do not include a child in the care of a legal guardian" (Article 3 item 17 of the Act).
Act of 12 March 2004 on **Social Assistance**	„Family - related or unrelated persons in a de facto relationship, living and managing together" (Article 6 item 14 of the Act)
Act of 29 August 1997 **Tax Ordinance**	„Descendants, relatives in the ascending line, siblings, spouses in the descending line, persons in a relationship of adoption and those in actual life with the taxpayer shall be deemed to be the **members of the family** of a taxpayer". (Article 111 § 3 of the Act)
Act of 29 July 2005 **on the Prevention of Domestic Violence**	**„The term family member** shall be understood as a immediate family member within the meaning of Article 115 § 1 of the Act of 6 June 1997 - Penal Code[2] and another person who lives or manages together". (Article 2 item 1 of the Act)
Act of 25 June 1999 **on Social Insurance Cash Benefits in the event of**	**„Members of the family** referred to in paragraph 1, item 3 shall be deemed to include a spouse, parents, parent to a child, stepfather, stepmother, parents-in-law, grandparents,

[2] Pursuant to Article 115 § 11 of the Polish Penal Code: „A next of kin is a spouse, an ascendant, descendant, brother or sister, relative by marriage in the same line or degree, a person being an adopted relation, as well as his spouse, and also a person actually living in co-habitation". (cf. Dz. U. Nr 88, poz. 553).

Sickness or Maternity	grandchildren, siblings and children over 14 years of age - if they are in the common household with the insured person during the period of care" (Article 32 § 2 of the Act). „In the event of resignation by an insured person - the mother of a child, (...), from receiving maternity allowance (...), the maternity allowance shall be granted to the insured person - the father of a child or the insured person - **another immediate family member ,** who has been granted the right to maternity leave, leave on maternity or parental leave conditions" (Article 29 § 5 of the Act)
Act of 11 September 2003 **on Professional Military Service**	**„The immediate family member** to a professional soldier is their spouse, children and parents". (Article 62 item 13 of the Act)
Act of 31 January 1959 **on Cemeteries and Burials**	„The right to bury a human body is vested in the closest **remaining family** of a deceased person, namely: 1) the other spouse, 2) descendants, 3) ascendants, 4) collateral relatives up to the fourth degree of kinship, 5) affinity in a straight line up to the first degree". (Article 10 item 1 of the Act)
Act of 13 June 2003 **on Foreigners**	**„A member of the family of a foreigner** (...) shall be deemed: 1) a person married to them recognised by the law of the Republic of Poland; 2) a minor child of the foreigner and a person married to them recognised by the law of the Republic of Poland, including an adopted child; 3) a minor child of the foreigner, including an adopted one, who is his/her dependant and over whom the foreigner actually exercises parental authority; 4) a minor child of the person referred to in item 1, including an adopted one, who is their dependant and over whom they actually exercise parental authority". (Article 53 § 2 of the Act)
Act of 17 December 1998 **on Retirement and Disability Benefits from the Social Insurance Fund**	„The following **members of a family** shall be entitled to a survivor's pension (...): 1) own children, children of the second spouse and adopted children; 2) grandchildren, siblings and other children, including those in foster care; 3) spouse (widow and widower); 4) parents. Parents within the meaning of the Act are also considered to be the stepfather and stepmother and adopters." (Article 67 § 1 i 2 of the Act)

The above table includes family concepts taken from several legal acts belonging to different branches of law. The first and basic conclusion that emerges as a result of even a cursory analysis of the family terms quoted in the table is the legislator's far-reaching freedom to define the concept under consideration. The criteria which it uses to define the subjective scope of the concept of family are so different that it is difficult to find a reasonable common denominator. Apart from the classic criteria, such as marriage, kinship and adoption, there are also other criteria, such as, for example, affinity, foster care, shared living together, cohabitation and even simply shared management. The legislator's freedom to define the family is probably best reflected in the Act on the Prevention of Domestic Violence, which

under the term family member shall be understood as – according to Article 2 item 1 - „also another person who lives or manages together". It can be concluded from the term quoted that the mere fact of cohabitation of a group of persons, even without cohabitation, is sufficient for a family to exist.

It is also worth noting the two wordings used by the legislator in order, it seems, to tighten up the circle of entities constituting the family: „The closest family member" (as e.g. in the Act on the Professional Military Service) and „the immediate family member" (as e.g. in the Act on Social Insurance Cash Benefits in the event of Sickness or Maternity). Contrary to appearances, these wordings are not the same. The former allows the subjective (emotional) aspect to be taken into account to a wider extent - who is the immediate family member for a specific individual (which does not have to coincide with the degree of kinship). The second of the quoted phrases, in turn, seems to emphasise the formal ties existing between specific family members. These issues will be further considered when analysing the case law on this concept.

Of course, the legislator can, within the framework of a particular piece of legislation and for its use, freely define concepts it uses. He is not bound, at least formally, by the understanding of this concept adopted on the basis of another legal act. However, the principle of the legislator's reasonableness and the coherence of the legal system should, it seems, lead to a different solution, namely the adoption of a single (permanent) definition of a given basic concept, in this case the family, with the possibility, by analogy, of applying, where necessary, certain provisions concerning the family to other communities or associations as well. This approach avoids the need to define one and the same concept each time, depending on the subject matter of the regulation[3].

The practice, which is commonly used by the Polish legislator with regard to the concept of family, of modifying this concept depending on the subject of regulation, raises the following questions: Does the legislator's freedom in defining this concept have limits? Does the notion of the family contain some unchanging substrate, some scope of content, beyond which the legislator should not go? Or, on the contrary, should this concept be shaped freely?

Reading the various family terms used by the Polish legislator leads to one more conclusion. In the vast majority of the above mentioned terms, the legislator does not take into account what the Constitution of the Republic of Poland of 2 April 1997 and the basic legal

[3] More on this subject: cf. M. KOSEK, *Pojęcie rodziny w kodeksie rodzinnym i opiekuńczym i negatywne skutki jej redefinicji w wybranych aktach prawnych*, in: M. KOSEK, J. SŁYK (ed.), *W trosce o rodzinę. Księga pamiątkowa ku czci Profesor Wandy Stojanowskiej*, Warszawa 2008, p. 242.

act in the discussed matter - the Polish Family and Guardianship Code - say about the family. This is all the more incomprehensible because it is these very normative acts that should be the point of reference for all other regulations concerning the family, including in the conceptual field. It leads to regulations of the Polish Constitution and the Polish Family and Guardianship Code in the matter under consideration.

2. The concept of family in the Constitution of the Republic of Poland and in the Polish Family and Guardianship Code

Neither the Polish Constitution of 1997 nor the Polish Family and Guardianship Code define the concept of family. The content of this concept can therefore only be determined by way of interpretation[4].

The term in question was interpreted within the framework of constitutional provisions by the Constitutional Tribunal in its judgment of 12 April 2011[5]. The Court's statement on the concept of family in the Constitution was based on a constitutional complaint, in which the author alleged, among other things, that the content of Article 6 § 4 and 5 of the Act on Personal Income Tax, violates Articles 2, 32 and 48 of the Constitution of the Republic of Poland. Apart from the merits of the decision in the case in question, it is worth quoting important fragments of the justification, in which the Court referred to the concept of family. „Although, as the Court noted, the provisions of the Constitution do not define the family, the status of this basic and natural social unit is determined by a number of provisions of the Basic Law"[6]. In the Court's view, the principle of subsidiarity, which stems from the preamble to the Constitution, should be pointed out first and foremost. This principle strengthens the rights of citizens' communities and thus also determines the role of the family in society. The Court also points to Article 18 declaring the granting of protection and care to marriage, family, motherhood and parenthood, The Court also points to: Article 33 § 1 of the Constitution (principle of equal rights for women and men in family life), Article 47 of the Constitution (legal protection of family life), Article 48 § 2 of the Constitution (protection

[4] More on this subject: cf. incl**.** T. SMYCZYŃSKI, *Rodzina i prawo rodzinne w świetle nowej Konstytucji*, PiP (11-12) 1997, p. 185 ff.; M. DOBROWOLSKI, *Status prawny rodziny w świetle nowej Konstytucji Rzeczypospolitej Polskiej*, Przegląd Sejmowy (49330) 1999, p. 21 ff.; cf. also A. MĄCZYŃSKI, *Konstytucyjne i międzynarodowe uwarunkowania instytucjonalizacji związków homoseksualnych*, in: M. ANDRZEJEWSKI (ed.), *Związki partnerskie, debata na temat projektowanych zmian prawnych*, Toruń 2013, s. 83-nn.

[5] Sentence of the Constitutional Tribunal of 12.4.2011 r., SK 62/08, OTK ZU n. 3A/2011, item 22.

[6] Cf. justification of the sentence of the Constitutional Tribunal of 12.4.2011 r.

of parental rights), Article 48 § 1 first sentence and Article 53 § 3 of the Constitution (right of parents to bring up their children in accordance with their own convictions, including the provision of moral and religious education), Article 71 of the Constitution (protection of the welfare of the family and the right of the family and the mother to assistance from public authorities), Article 48 § 1 second sentence, Article 65 § 3, Article 68 § 3, Article 72 of the Constitution (protection of children's rights), Article 64 and Article 21 of the Constitution (guarantee of the right of inheritance) and Article 23 of the Constitution (emphasis on the role of a family homestead)[7].

According to the Court, the lack of the definition of family in the Constitution, „even in the light of the social changes taking place, does not result in the impossibility of reconstructing this concept"[8]. Firstly, in the Court's view, the interpretation of this concept must refer to its linguistic meaning. „The family" - in the strict sense of the word - as it appears from the Dictionary of the Polish Language - is a community of parents, usually married couples and children. On the other hand, a „single-parent family" is a family in which one of the parents is not present. On the basis of constitutional provisions - as the Court stressed - there are no grounds for departing from the common meaning of terms that have developed in the Polish language. In the light of constitutional provisions, as the Court further points out, the term „family" should therefore be understood as „any lasting relationship of two or more persons, consisting of at least one adult and one child, based on emotional and legal ties, and usually also on blood ties"[9]. Furthermore, the Court noted that „the protection of family by the public authorities must take into account the Constitution's vision of the family as a stable relationship between a man and a woman aimed at motherhood and responsible parenthood"[10]. Two statements of the Court cited above are of key importance when interpreting this concept. One thing seems to be clear: a de facto relationship between two people does not constitute a family in the constitutional sense of the term.

Turning to the discussion over the concept of family under the provisions of the Polish Family and Guardianship Code, it should first be emphasised that the concept under consideration is undoubtedly one of the key concepts of family law. The legislator uses it in

[7] IBID.
[8] IBID.
[9] IBID.
[10] IBID. According to the Court, it is more difficult to define, on the basis of the Constitution, the factual relationships within which children are raised. On the one hand, they are not covered by the concept of marriage, while on the other hand, the protection afforded to them by Article 71 § 1 of the Constitution is not excluded. The Tribunal, however, recognised that „against the background of this case, there is no need to resolve this issue".

the Polish Family and Guardianship Code a total of 21 times, in various contexts[11]. The term „family" is most often used in the Polish Family and Guardianship Code in two wordings: „family welfare" (Articles 10 § 1, 23, 39, 45 § 2) and „family needs" (Articles 27, 28 § 1, 29, 30, 45 § 1, 103). Occasionally - only in individual cases - it appears in other expressions, such as: „family matters", „family environment", „family assistance". Analysing the context in which the term is used, it should be stated that it is basically the whole Code, with the most frequent use of the term by the legislator in Section 2 of Title 1, entitled „rights and obligations of spouses". There is no coincidence that in this very section of the Code, the term „family" has been used most often and, just as importantly, in connection with another key term of family law, namely: marriage. An analysis of the provisions of this section of the Code containing the two aforementioned terms shows that they are closely linked[12].

Article 23 of the Polish Family and Guardianship Code lists the so-called non-pecuniary rights and obligations of spouses. One of these obligations - imposed on spouses - is the obligation to cooperate for the benefit of the family, which, as the legislator emphasises, „the spouses have established by their union". The same wording is reiterated in Article 27 of the Polish Family and Guardianship Code, which defines the so-called rights and obligations of spouses of a financial nature. The basic duty of the spouses in this area is the duty to contribute to the needs of the family, which - as again emphasised by the legislator - the spouses have established through their union. In the light of the provisions of the Polish Family and Guardianship Code, there can be no doubt that a family is formed by marriage. Nor can there be any doubt that it is the intention of the legislator to understand the family as an institution created as a result of a marriage. The Code does not provide for any other possibility of starting a family than getting married[13].

The interdependence between getting married and starting a family is also underlined, although in a different context, by Article 10 § 1 of the Polish Family and Guardianship Code. This provision regulates the issue of age as one of the prerequisites limiting the possibility of getting married. As a rule, according to the aforementioned provision, persons wishing to enter into a marriage should be at least 18 years old. However, for important reasons, the guardianship court may authorise the marriage of a woman who is over 16 years old „and the circumstances suggest that the marriage will be in the best interests of the established

[11] Cf. M. KOSEK, *Pojęcie rodziny w kodeksie rodzinnym i opiekuńczym i negatywne skutki jej redefinicji w wybranych aktach prawnych*, op. cit., p. 229 ff. with called literature
[12] IBID., p. 230.
[13] IBID.

family". A contrario, the following conclusion is legitimate: if the circumstances show that the marriage is not in the best interests of the family, the court should not agree to it. The welfare of the family is therefore treated by the legislator in this provision as the basic prerequisite for the possibility of getting married[14].

The relationship between marriage and the formation of a family described above is consistently adopted by the legislator in other provisions of the Code where the term „family" appears. There is a fundamental consensus in the doctrine on the issue under consideration[15]. The position of the doctrine seems to be reflected well by the view of Z. Radwański, according to whom: „Polish family law does not construct and organise wider family groups than a full small family" [16].

Reflections over the concept of family in the Polish Family and Guardianship Code allows some important conclusions to be drawn. Although the Code does not define the term family, the context in which it is used, particularly the link between the concept of family and marriage, allows us to reasonably conclude on its understanding by the legislator. Therefore, it should be stated that, first of all, the family is the result of marriage (Articles 23 and 27), understood - according to Article 1 of the Polish Family and Guardianship Code - as a relationship between a man and a woman. The Code does not mention any other method of family formation. Secondly, the family is formed by the spouses themselves - as can be inferred from the interpretation of Article 23 of the Polish Family and Guardianship Code - or by the spouses and their children. The elements indicated make up the concept of family in the strict sense. It is in this sense that the term family appears in the Polish Family and Guardianship Code.

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[14] IBID.

[15] Discussions in the doctrine are triggered by the phrase „immediate family" in Article 134 of the Polish Code of Family and Guardianship. According to the majority of authors, this phrase includes not only spouses and their children (which results from Articles 23 and 27 of the Polish Code of Family and Guardianship), but also parents obliged to alimony their siblings. Critically, on this subject, cf. M. KOSEK, *Pojęcie rodziny w kodeksie rodzinnym i opiekuńczym i negatywne skutki jej redefinicji w wybranych aktach prawnych*, op. cit., p. 234 ff.

[16] Cf. Z RADWAŃSKI, *Pojęcie i funkcja „dobra dziecka" w polskim prawie rodzinnym i opiekuńczym,* Studia Cywilistyczne, t. XXXI, Warszawa 1981, p. 26. It is worth quoting at this point a broader statement by this author: „Polish family law does not construct or organise wider family groups than a full small family. The legal doctrine, according to which only such families are covered by general principles and specific provisions concerning families. The law also takes into account broader family relationships between persons who do not belong to a small family - in particular with regard to maintenance obligations or inheritance rights - but it is difficult to share the view that in these cases the concept of the family has been extended. The existence of individual legal ties of a family type does not yet justify the construction of a legally distinct group with specific functions and its own structure (...). All of this requires that only a small family and even narrower family groups should be organised in an institutionalised form, leaving the question of the composition and structure of larger families to the decision of the persons concerned".

The reflections made to this moment lead one to ask a basic question that seems to arise when comparing the concept of family in the Polish Family and Guardianship Code with the concept used in the legal acts cited in the table above. The question is as follows: why is there such a far-reaching change in the understanding of the family as seen in the legal acts under consideration compared with the Polish Family and Guardianship Code?

There is undoubtedly a certain change in the social sphere today in the perception of the role of marriage and the family. The growing number of divorces, the falling number of marriages and the growing popularity of so-called alternative forms of marital and family life seem to be the hallmarks of this phenomenon[17]. This state of affairs leads either to a move away from a strict definition of the family and to the construction of at most the so-called family map (a list of family members, which is constructed by the person concerned himself), or to the construction of a concept of family that includes as many „family forms" as possible that function today[18]. An example of this is the definition of the family as a *diad* system. This term is understood to mean a group that is dissolved if one of its members leaves (or dies)[19]. In this respect, a specific group can be considered a family if it consists of one of the following *diad*: parent-child and/or partner-partner. Sociological literature points to the advantages of this. First of all, the considering family as a *diad* system allows us to take into account the dynamic structure of the family that characterises contemporary Western societies, i.e. the passage of an individual through various forms of interpersonal life (cohabitation, marriage, divorce, reunion, etc.). Secondly, this approach combines, as has been pointed out, three traditions of describing the family: the modernist cellular model, which emphasises having and socialising children, the evolutionary family model, in which the mother-child couple is genetically certain and at the same time fundamental to family life, and the post-modern *diad* system[20]. However, even such a broad concept of family does not guarantee that it covers all possible forms of family life. That is why some authors postulate a move away from the definition of the family and the sociology of the family to the sociology of families. This proposal also expresses the conviction that „the concept of

[17] More on this subject: cf. A. KWAK, *Rodzina w dobie przemian. Małżeństwo i kohabitacja*, Warszawa 2005, p. 70 ff.; K. Slany, *Alternatywne formy życia małżeńsko-rodzinnego w ponowoczesnym świecie*, Kraków 2002, p. 134 ff. Cf. also: M. MARODY, A. GIZA-POLESZCZUK, *Przemiany więzi społecznych. Zarys teorii zmiany społecznej*, Warszawa 2004, p. 184-209; W. HRYNIEWICZ, *Przeobrażenia we współczesnej rodzinie polskiej*, in: M. PLOPY (ed.), *Człowiek u progu trzeciego tysiąclecia. Zagrożenia i wyzwania*, t. 1, Elbląg 2005, p. 245-251.

[18] More on this subject: cf. T. SZLENDAK, *Socjologia rodziny. Ewolucja, historia, zróżnicowanie*, Warszawa 2011, p. 106 ff.

[19] IBID., p. 111.

[20] IBID., p. 113.

the nuclear family as the only true one is, at the present time, when people organise their intimate lives in dozens of different ways, a relic, which only fits some of them"[21].

Certainly, the changes taking place in the social sphere, as evidenced, for example, by the sociological description of reality cited above, cannot be ignored in the law-making process. The legislator's sensitivity to this process, which is undoubtedly taking place to some extent, must not, however, boil down to a simple equation with marriage and the family that has resulted from it, in terms of their legal status and scope of protection, of the various forms of interpersonal life we encounter today. From a purely legislative point of view, this is the simplest possible procedure and, as it would seem, the solution to the problem. The simplest thing is, colloquially speaking, „put everything in one bag". That seems to be how the legislator treats the problem in the legislation cited. In fact, this is an action that violates the legal norm resulting from Articles 18 and 71 of the Constitution of the Republic of Poland - the principle of protection of marriage and family. Leaving aside substantive considerations, even from a purely formal point of view - the so-called principles of correct legislation - it is more appropriate to use in the system of law, and especially within a given branch of law, concepts with a fixed content than to modify their content each time, depending on the subject of regulation, to such a fundamental extent as is the case with the concept of family, which has already been pointed out in the doctrine[22]. The legitimacy of such an approach to the law-making process results, for example, from § 9 of the so-called principles of legislative technique of 20 June 2002[23]. In the act - in accordance with mentioned provision - „terms which have been used in the basic law for a given field of affairs, in particular in a law referred to as a *code* or *law* shall be applied". This provision introduces an obligation to adopt as conceptual and terminological models for other legal acts basic acts in a given branch of law[24]. It seems that this requirement was not fully taken into account when many laws were passed.

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[21] IBID., p. 108.

[22] Cf. M. KOSEK, Pojęcie rodziny w kodeksie rodzinnym i opiekuńczym i negatywne skutki jej redefinicji w wybranych aktach prawnych, op. cit., p. 242.

[23] The principles of legislative technique are defined in Poland as the official sets of directives used in the drafting of legal acts. The first such collection dates back to 1939. This collection, like the next one developed in 1961, took the form of an order by the Prime Minister. In November 1991, new principles of legislative technique were developed, giving them the form of a resolution of the Council of Ministers. Quoted in the article binding principles of legislative technique of 20 June 2002 (including the latest changes introduced by the regulation of 5 November 2015, Dz. U. 2015, poz. 181) have the form of a regulation of the Prime Minister issued pursuant to Article 14 Section 4 point 1 of the Act of 8 August 1996 on the Council of Ministers. More on this subject: cf. S. WRONKOWSKA, M. ZIELIŃSKI, *Komentarz do zasad techniki prawodawczej z dnia 20 czerwca 2002 r.*, Warszawa 2004, p. 15 ff.

[24] IBID., p. 47.

3. Interpretation of the notion of family in jurisprudence based on the judgment of the Supreme Court of 13 April 2005 [25]

The tendency to broaden the concept of the family, described above in legislation, also applies to case-law. An example of this is the judgment of the Supreme Court of 13 April 2005[26]. The decision in question was taken against the background of a case for damages pursuant to Article 446 § 3 of the Polish Civil Code. Under that provision, the court may grant appropriate compensation to the deceased's immediate family members if the deceased's death resulted in a significant deterioration in their life situation[27].

In the justification of the decision, the Supreme Court interpreted the term „immediate family memberimmediate family member" appearing in the abovementioned provision of Article 446 § 3 of the Polish Civil Code. In the context of the main subject matter of reflection, this fragment of the reasons of the judgment should be exposed. In the opinion of the Supreme Court, in the state of law in force there is no legal definition of the concept of family. It can be assumed, however, that the vast majority of legal acts include the spouses, their joint children, children of the other spouse, children adopted for upbringing within a foster family, children in legal custody and sometimes even foreign children adopted for upbringing and upbringing if parents passed away or are unable to provide maintenance for

[25] Sentence of 13.04.2005 r., IV CK 648/04, OSN IC 2006/3/54.

[26] The facts were as follows: In the contested judgment, the Regional Court dismissed the appeal of the Defendant Motor Insurance Office, citing findings that Jerzy K., who was in a relationship with the claimant Wiesław F., died on 29 September 1996 as a result of injuries sustained during a car accident. In the same accident, the applicant's mother and her niece died. The plaintiff had a relationship with Jerzy K. since 1980, and in 1985 she gave birth to a son, Michał F. He was accepted by Jerzy K. and was raised by him. The contact and emotional bond that was established was shaped as between father and son. Since 1995 Jerzy K., being unemployed, helped the claimant Wiesław F. in running a furniture shop. His death caused psychological shock to the claimant. For 9 months she was under the care of psychiatrists in S. and then in November 1998 she stayed in a psychiatric sanatorium. The complainant, Michał F., was 11 years old when Jerzy K. died. In the opinion of the Courts of both instances, he survived that death, suffered from insomnia and became a closed child. The conditions under Article 446 § 3 of the Polish Civil Code for accepting the claim submitted by claimants up to PLN 30,000 for the benefit of Michał F. and PLN 15,000 for the benefit of Wiesława F. were fulfilled. - both amounts with statutory interest. In favour of an extended interpretation of the term „closest member of the family",the Regional Court indicated that the persons referred to in Article 446 § 3 of the Polish Civil Code include - apart from the spouse - also relatives, relatives by affinity and adoption, the cohabiting party and its relatives, including children of only one or the other of them, as well as common children. The cassation was filed by the sued Polish Motor Insurers' Bureau, accusing misinterpretation of Article 446 § 3 of the Polish Civil Code with regard to the subjective scope of the term „closest family member" and incorrect application of that provision. It requested that the judgment under appeal be amended and the claim be dismissed.

[27] More about this institution, also in terms of its origins, cf. Z. MASŁOWSKI, *Komentarz do art. 446 k.c.*, in: Z RESICH (ed.), *Kodeks cywilny. Komentarz*, t. 2, Warszawa 1972, p. 1110 ff.

them, or have been deprived or restricted in their parental authority. According to the Supreme Court, the cassation presents an interpretation of the notion of „immediate family member" with an argument that „does not fully take into account the importance that - as a result of the imbalance in the basic form of a family based on affinity - plays on the criterion of economic community, defined as being in the common household, cohabitation, actual life, etc. The development of a cohabitation, which has found a permanent place in the system of moral evaluations and norms of modern society, has its origin in systemic and economic, as well as cultural transformations, especially in the awareness of society"[28]. In the current state of law - according to the Supreme Court - the following criteria can be used to define the concept of a family: kinship, marriage, adoption, affinity, foster family and remaining in the common household. It is therefore possible, in the assessment of the composition of the court in this case, to approve the definition of the family as „the smallest social group, linked by a sense of closeness and commonality, personal and economic, resulting not only from affinity"[29].

It is impossible to agree with the position of the Supreme Court presented in this judgment of 13 April 2005. This judgment has aptly met with criticism of part of the doctrine [30]. The choice of criteria which the panel in Case IV CK 648/04 took as a basis for defining the family as the smallest group in society is particularly questionable. As the doctrine rightly points out, „such a definition cannot be accepted because the scope of the *definiens* (countless types of human relationships) takes precedence over the *definiendum*, besides the adjudicating panel has undertaken a task that exceeds the need and the possibilities, after all, the development of civilisation and culture in the modern world was based on the family"[31]. It was also rightly pointed out that „building an ad-hoc definition that is too broad and does not clarify the relationship between the various elements of the definition opens up a field for claims in any case of tort liability for death"[32].

The position of the Supreme Court presented in the judgment under discussion - which is also worth emphasising - is a departure from the existing line of jurisprudence, which has

[28] Cf. the reasons for the judgment of the Supreme Court of 13.04.2005 r., IV CK 648/04, OSN IC 2006/3/54.

[29] IBID. The term refers to the definition of the family formulated by S. Grzybowskiego, cf. ID., *Prawo rodzinne. Zarys wykładu*, Warszawa 1980, p. 11. The author of this definition, when speaking of a sense of closeness not necessarily justified by the family relationship, had in mind - as it follows from his further deliberations - not so much a de facto relationship (cohabitation) as its basis, but an adoption relationship.

[30] Cf. Z. STRUS, *Uwagi o odszkodowaniu w razie śmierci najbliższego członka rodziny*, Medycyna i Prawo 3 (2010), p. 86 ff. Cf. also: T. MRÓZ, *Zgoda małżonka na dokonanie czynności prawnej w ustroju majątkowej wspólności ustawowej*, Warszawa 2011, p. 101.

[31] Cf. Z. STRUS, *Uwagi o odszkodowaniu w razie śmierci najbliższego członka rodziny*, op. cit., s. 92.

[32] IBID.

been formed under the Polish Code of Obligations (Article 166 of the Polish Code of Obligations), the equivalent of which - as far as its substance is concerned - is Article 446 § 3 of the Polish Civil Code in force[33]. The original position of the Supreme Court was that the concept of family under Article 166 of the Polish Code of Obligations was used in a broader sense, „accentuating rather (...) the actual family relationships than just the formal order of kinship"[34]. This view seems to be valid also in the current legal status shaped on the basis of Article 446 § 3 of the Polish Civil Code. During the first period of the aforementioned provision's validity, the prevailing position in the doctrine was that the provision allowed to include among the persons entitled to compensation also such relatives or affinities who, although not formally belonging to the „immediate family members" of the deceased, remained with him in such personal relations that they could be considered as such[35].

Nowadays, various positions are represented in the doctrine in the interpretation of the term „immediate family member" in Article 446 § 3 and § 4 of the Polish Civil Code, the differentiating criterion being the possibility of including among the immediate family members people whose relationship with the deceased - apart from emotional dimension - has only factual dimension. Apart from the traditional approach, according to which the immediate family members should be sought in the circle of his relatives or affinities, taking into account the actual arrangement of relations, and not only the formal order of kinship[36], the doctrine also states that the circle of immediate family members includes „persons not connected with formal family relationships (e.g. a cohabiting partner, his or her child), if the deceased had a family relationship with them, in fact remaining in a particular proximity caused by a very strong emotional bond"[37]. In the justification of his position, A. Olejniczak refers to the view of the Supreme Court expressed in the judgment of 3 June 2011 [38]. However, the author's position seems to be a certain over-interpretation of this view of the

[33] More on this subject: cf. Z. MASŁOWSKI, *Komentarz do art. 446 k.c*., op. cit., s. 1123.

[34] Cf. rule of the Supreme Court of 18.11.1961 r., II CR 325/61, OSPiKA 1962, poz. 291 (Lex nr 105715).

[35] Cf. Z. MASŁOWSKI, *Komentarz do art. 446 k.c*., op. cit., p.1123. According to rule of the Supreme Court of 5.8.1970 r., II CR 313/70, (OSNthe Supreme Court of CP 1971, poz. 56), „if a non-marital child was raised and maintained by grandparents, the fact that the mother is alive and capable of supporting the child shall not prevent the death of the grandfather from recognising that the death of the grandfather has significantly worsened the child's life situation and awarding the child the compensation provided for in Article. 446 § 3 of the Polish Civil Code".

[36] Cf. e.g. M. SAFJAN, *Komentarz do art. 446 k.c.*, in: K. PIETRZYKOWSKI (red.), *Kodeks cywilny*, t. I: *Komentarz do art. 1 – 449[11]*, Warszawa 2005, p. 1298; cf. also: G. KARASZEWSKI, *Komentarz do art. 446 k.c.*, in: J. CISZEWSKI (ed.), *Kodeks cywilny. Komentarz*, Warszawa 2014.

[37] Cf. A. OLEJNICZAK, *Komentarz do art. 446 k.c.* in: A. KIDYBA (ed.), *Kodeks cywilny. Komentarz*, t. 3, Warszawa 2014.

[38] Sentence of the Supreme Court of 3 czerwca 2011 roku, III CSK 279/10.

Supreme Court. Although the thesis of the judgment of the Supreme Court of 3 June 2011 contained a statement according to which „the immediate family member is determined by the actual relationship between certain persons, and not by the formal order of kinship",reading the justification of this judgment indicates that the Supreme Court has in mind a group of persons linked by a kinship or affinity.[39]

In the context of the analysed problem of interpretation of the concept of immediate family member appearing in Article 446 § 3 and § 4 of the Polish Civil Code, it is also worthwhile to present the view expressed by A. Śmieja. Discussing the problem of claims under Article 446 of the Polish Civil Code, the author states that *de lege lata* „there are no grounds for granting the claim in question to persons in a stable factual relationship, even if they share children"[40]. The author refers to the works on a new Civil Code to consider the merits of a wider range of subjects by also covering permanent de facto unions, at least of persons of different sexes[41]. Apart from the postulate to consider the legitimacy of changes in relation to the issue under consideration - which is always possible - the view presented may confirm the position prevailing in the doctrine concerning the inadmissibility *de lege lata* of such an interpretation of Article 446 § 3 and § 4 of the Polish Civil Code, as a result of which entities entitled to claim under the said provisions would be persons in an informal relationship. This, in turn, indicates that the view of the Supreme Court expressed in its judgment of 13 April 2005, according to which the circle of entities referred to by the term „immediate family member" also includes persons who are in a cohabitation - if they have a deep emotional bond - should be assessed as isolated and without any basis in the current legal situation. This decision of the Supreme Court can be described as a result of exceeding

[39] It is appropriate to cite the part of the explanatory memorandum to the Supreme Court judgment under consideration which relates to this issue: „The legislator, in order to define the circle of entitled persons, used the expression of the closest member of the family, i.e. the one that already existed under Article 446 § 3 of the Polish Civil Code. This concept is relatively broadly understood in the literature and judicature, and includes not only parents and children, but also other persons related to the deceased, such as siblings. Who is the closest member of the family is determined by the actual relationship between the persons concerned, and not by the formal order of kinship resulting, in particular, from the provisions of the Polish Code of Family and Guardianship, or possibly from the affinity of, for example, the deceased's granddaughter, who was an extramarital child raised by her grandmother, despithe fact that the mother was alive and able to support her daughter, cf. Judgment of the Supreme Court of 5 August 1970, II CR 313/70, OSN 1971, n. 3, poz. 56. In order to determine whether the claimant is the closest member of the family of the deceased, the court should therefore determine whether there was a strong and positive emotional bond between the claimant and the deceased, cf. Judgments of the Supreme Court of 31 May 1938, II C 3142/37, Zb. Orz 1939, poz. 100 i z dnia 10 grudnia 1969 r., III PRN 77/69, OSN 1970, n. 9, poz. 160.

[40] Cf. A. ŚMIEJA, in: A. OLEJNICZAK, *System Prawa Prywatnego*, t. 6: *Prawo zobowiązań – część ogólna*, Warszawa 2009, p. 736.

[41] IBID. p. 737.

the limits of interpretation. However, it must here be stated that it was compliant with the principles of social coexistence and the protection of the welfare of the child.[42] When awarding compensation to a child emotionally linked to the deceased, the court could refer to the construction adopted by the legislator, in § 2 of Article 446 of the Polish Civil Code, without the need to broaden the concept of „immediate family member". In the aforementioned provision, the legislator allows for the granting of a specific benefit (pension) to other close persons „if the circumstances show that the rules of social coexistence so require". On the basis of the judgment under discussion, it should be postulated that the provision of Article 446 § 3 and 4 of the Polish Civil Code should be amended so that the benefit regulated therein (in the form of compensation) - apart from the closest relatives - should also cover other relatives, as is the case in § 2 of the same provision, in order to avoid the dilemma faced by the court adjudicating in the judgment of 13 April 2005.

Summary and conclusions

There is no doubt that the social reality we are seeing is changing dynamically, including with regard to forms of interpersonal living. The number of marriages being concluded is falling, but the number of so-called „informal unions" is increasing. The law-making process cannot fail to take heed of the changes that are taking place. It should, however, be stressed in the strongest possible terms that the legislator's sensitivity to these social changes should not be based on a simple equation with marriage and the family in terms of their rights and scope of protection, the various forms of interpersonal life encountered today. Such an attitude is contrary to the provision of Article 18 of the Polish Constitution, which formulates the principle of protection of marriage and family.

Similarly, attempts to broaden the interpretation of the concept of family by the case-law should be assessed. The interpretation of the concept of family proposed in the judgment of the Supreme Court of 13 April 2005, which takes only the economic and emotional bond and the actual shared life of the parties as the basic criterion for the family, should be assessed as erroneous and even socially dangerous.

On the other hand, the dominant line of case-law should be assessed positively, according to which, in assessing whether a particular entity should be counted among the

[42] In the case in question, which is pending before the Supreme Court (cf. footnote 26), the claimant Michał F. would be treated as stepson (Article 144 § 1 of the Polish Code of Family and Guardianship) if the deceased Jerzy K. was the husband of his mother Wiesława F.

immediate family members, the actual arrangement of family relationships should also be taken into account, but within the framework of the criteria of kinship or affinity.

The reflections described in this Article lead to another general conclusion. It seems that both the legislator and the entities applying the law, in the description and definition of family, do not take due account of the understanding of the discussed concept stipulated in the Constitution of the Republic of Poland and in the provisions of the Polish Family and Guardianship Code. They also pay too little attention to the principle of protecting the welfare of the child, which is also fundamental for the discussed issue. This principle should be borne in mind, above all, when taking up any solutions concerning the family. The best interests of the child should be a universal and basic criterion for assessing the admissibility of certain normative solutions and the judicial interpretation of a particular legal norm.

There is also a proposal, both in terms of legislative technique and substance. We could get rid of the doubts about extending the concept of family for the purposes of various legal acts which do not belong to family law, if this concept remained unchanged, as the Family and Guardianship Code puts it, and served the legislator only as a point of reference and comparison to the situation of people who, although they are not a family, for various reasons within the scope of their respective powers, should be treated in a similar way. The legislator has the right to extend the rights that family members have, and to grant them to others. This is usually a positive effect on those who are family members. Instead of artificially, even „mechanical", or even fictitiously, equating different people, linked by ties of a different nature (e.g. emotional or economic) with family members, and thus extending the concept of family, a better legislative procedure would be to list these people in the law and grant them certain powers, with the point being that they are similar to those enjoyed by family members. This solution seems particularly useful with regard to legal acts regulating various types of benefits, where the circle of entitled entities should be precisely defined. A different solution - also worth considering - would be to use the clause on the principles of social coexistence, which, if a specific criterion is met (e.g. a lasting emotional and economic bond), would become the basis for granting specific persons specific rights, on an equal footing with family members. Term „other person" or „other close person" could be used here. Unlike in the first case, where the granting of a specific entitlement is decided by the legislator, the granting of a specific entitlement to „other person" on an equal footing with the family member would be of a facultative nature. Such a solution was used, as already mentioned, by the legislator in Article 446 § 2 of the Polish Civil Code. When regulating the issue of granting the deceased person's pension, the legislator introduced an exception to the

rule adopted in this provision. Well, in the second sentence of the mentioned provision, the legislator decides that the envisaged benefit may also be claimed by another close person, after fulfilling a certain criterion, „if the circumstances show that the principles of social coexistence so require". In the case in question, the legislator does not artificially enter the concept of family, but pursues the intended purpose in a different and more appropriate legislative manner. It is this approach of the legislator that should be adopted as a principle with regard to the issues discussed in this Article.

It should also be stressed that the proposed solution would also make it possible to regulate the scope of the powers granted, which may not necessarily be the same as that of family members.

The use of a single concept of family within the system, in accordance with the provisions of the Polish Family and Guardianship Code, with the possibility for the legislator to define a circle of entities which do not, however, constitute a family but to which it grants similar powers, would prevent courts from interpreting the concept of family „on their own". This would hamper any interpretation of the concept of „family" and the concept of „immediate family members", leading to the de facto treatment as a family of additional persons who have nothing to do with this notion.