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Pozbawienie władzy rodzicielskiej w polskim porządku prawnym

Deprivation of parental authority in Polish legal order

Introduction

Deprivation of parental authority is among the most severe forms of interference in family life under the Family and Guardianship Code (hereinafter: FGC)[1], the most stringent measure that a guardianship court can apply pertaining to a parent who is unable, unwilling or incapable of exercising his or her parental rights properly. However, it is essential to realise that such a measure is not of a penal nature[2], as it is not intended to penalise parents for incapacity or inability to perform their duties. When deciding on parental right, the court examines first and foremost whether the child's best interests are at risk and, consequently, the purpose of a possible judgment depriving parents (or one of them) of parental right is solely to protect the child while guaranteeing the proper exercise of that right by the parent who can and wants to do so.

Therefore, in exceptional situations defined by the law, the child's best interest and safety requires the court to intervene, either ex officio or on request, in incorrect family relationship by depriving parents (or one of them) of the opportunity to decide on important matters in the life of their child. Considering the above, the legislator has provided for situations in which the court is obliged to deprive the parent of parental authority and for situations in which it may but is not obliged to do so.

[1] Cf. H. HAAK, *Władza rodzicielska. Komentarz*, Toruń 1995, p. 143-144; T. SMYCZYŃSKI, *Prawo rodzinne i opiekuńcze*, Warszawa 2012, p. 240.

[2] Cf. M. LECH-CHEŁMIŃSKA, V. PRZYBYŁA, *Kodeks rodzinny i opiekuńczy. Praktyczny komentarz z orzecznictwem*, Warszawa 2006, p. 257

1. Prerequisites for mandatory deprivation of parental authority

Pursuant to Article 111 § 1 of the FGC, „if the parental authority cannot be exercised because of a permanent obstacle or if the parents abuse their parental authority or grossly neglect their duties towards the child, the guardianship court will deprive the parents of parental authority". The categorical nature of this statement is reflected in the legislator's use of the phrase „will deprive", which does not provide the court with any other alternative than to deprive the parents (or one of them) of parental authority in the event of any of the circumstances listed in the Article.

1.1. Permanent obstacle to exercising parental authority

In the FGC, the legislator has defined little more than that primarily there is a mandatory deprivation of parental authority when it is impossible to exercise it because of a permanent obstacle. However, the Supreme Court attempted to define this permanent obstacle in its decision of 2 June 2000, clarifying that it constitutes such an arrangement of relationships that excludes the exercise of parental authority by parents on a permanent basis, meaning that the duration of such an arrangement cannot reasonably be determined, or at least it is known that it will exist for a prolonged period[3]. At the same time, it does not matter whether this permanent obstacle is due to the fault of the parent[4], or whether it has arisen and continues regardless of his or her will. Applying this prerequisite only means that the obstacle has been proven to exist and to be permanent[5], but the question of why it occurred is of secondary importance. Nevertheless, considering the analysis of various factual circumstances, among the reasons that prevent the exercise of parental authority on a permanent basis the doctrine includes above all the disappearance of the parent, his or her long term imprisonment, a serious illness linked to being in or even out of a secure medical facility, yet preventing the exercise of parental authority[6]. In contrast, by analysing the comments made by various authors, a certain discrepancy can be observed as to whether the

[3] Order of the Supreme Court of 2 June 2000 (sygn. akt II CKN 960/00), LEX n. 51976.
[4] J. IGNACZEWSKI, *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2010, p. 631.
[5] It is worth adding that „in the event of a temporary obstacle to the exercise of parental authority, the guardianship court may order its suspension" – art. 110 § 1 of the FGC.
[6] Cf. *Komentarz do art. 111 KRO,* in: K. PIETRZYKOWSKI (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Wyd. 4, Warszawa 2015, p. 677.

mere fact that a parent has gone abroad, either permanently or indefinitely, is already a sufficient argument for taking away his or her parental authority over a child who remains in the home country. There can be no doubt that such a situation can both endanger the best interests of the child and lead to a violation of that well-being[7]. It is extremely difficult to fulfil the duty of guardianship over a child, its assets and representing it (statutory power of attorney) in a situation where a parent may sometimes live thousands kilometres from the child's place of residence[8]. This is probably the reason why certain authors - e.g. Tadeusz Smyczyński - argue that it should be possible to deprive a parent of parental authority because of the very fact that he or she has left the country permanently[9]. However, most of the doctrine supports the approach that it is not just the fact of going away, but rather the accompanying severance of contact with the child that forms the basis for a positive decision in this regard[10]. Meanwhile, based on statistical study carried out and published by Jerzy Słyk, it is important to point out that the deprivation of parental authority in a situation of economic emigration of parents was declared in 21.7% of the cases surveyed, and among them, 47.8% of the cases involved court interference in parental authority based on the fact of economic emigration alone[11].

1.2. Abuse of parental authority

Since parental authority concerns the entirety of a child's affairs relating to guardianship, care for his or her assets and representation, as well as the upbringing while respecting the child's dignity and rights, then any abuse of parental authority in this respect constitutes a rationale for the deprivation of parental authority. It would be difficult to compile a closed catalogue of facts in this regard, and each specific incident is dealt with on an individual basis, taking into account the specifics of each individual case. Nevertheless, drawing upon years of experience and the case-law, legal academics and commentators give examples of the most common and most distinctive circumstances, which include the use of

[7] Cf. J. SŁYK, *Emigracja zarobkowa rodziców i jej wpływ na wykonywanie władzy rodzicielskiej w praktyce polskich sądów* rodzinnych, Warszawa 2014, p. 13
[8] Cf. IBID, p. 10-11.
[9] Cf. T. SMYCZYŃSKI, *Prawo rodzinne*, op. cit., p. 240.
[10] Cf. A. K. BIELIŃSKI, M. PANNERT, *Prawo rodzinne*, Warszawa 2011, p. 208; H. HAAK, *Władza rodzicielska ...*, op. cit., p. 168-169; *Komentarz do art. 111 KRO*, in: K. Pietrzykowski (ed.), *Kodeks rodzinny*, op. cit., p. 677; A. KILIŃSKA-PĘKACZ, *Ograniczenie, zawieszenie i pozbawienie władzy rodzicielskiej jako instytucje prawa rodzinnego służące ochronie dzieci*, Studia z zakresu prawa, administracji i zarządzania UKW, t. 4/2013, p. 263.
[11] Cf. J. SŁYK, *Emigracja zarobkowa rodziców ...*, op. cit., p. 25-26.

physical and psychological violence against a child, excessive punishment, forcing a child to commit theft and other criminal acts, as well as any action, which expose a child to loss of life or health, both physical and mental, forcing a child to work beyond his or her capacity (whether for profit or in the household), encouraging begging, gross indecency, sexual harassment, inducing a child to drink alcohol, raising a child according to antisocial values, in contempt and hostility towards the other parent[12]. All of these circumstances undermine the best interests of the child directly and are directed against it. What should be pointed out, however, is that it is not only behaviour taken directly against the child that can provide an argument for depriving the parent of parental authority. The problem of one parent's alcoholism and his or her use of violence against the other is particularly relevant. Although there is no direct reference to such a situation in the context of the issue of deprivation of parental authority in the FGC, yet the decision of the Supreme Court of 7 September 2000 (ref. I CKN 931/00) is known and commonly quoted as it states: „the abuse of parental authority also occurs when a parent's conduct objectively has a destructive effect on the child's upbringing and mental development, even if it is not related to the parent's subjective, negative attitude towards the child". It is obvious that the father's aggression towards the child's mother has such a destructive influence on the child (also vice versa, although such situations are undoubtedly rather infrequent), threatening her, disturbing domestic peace, being intoxicated. It is not possible for such acts to have no impact on the child. Even if they are not directed at it, simply demonstrating such behaviour in its presence - as the Supreme Court has emphasised - can be considered a failure to show concern for the child's feelings and a deliberate exposure to inevitable negative experiences, which constitute a serious threat to the child's proper development.

Therefore, the catalogue of circumstances justifying the initiation of proceedings for the deprivation of parental authority is extensive, but one cannot ignore the cases that cannot be included here, although they frequently present the basis for motions to the court. These include situations in which the father, motivated by affection for his child, refuses to allow his current mother's husband to adopt it, even if the child has been properly brought up in this new family and feels close to the stepfather[13]. It would be difficult to acknowledge that the father's attitude thus threatens the child's best interests if he wants to, is able and can properly

[12] H. HAAK, *Władza rodzicielska …*, op. cit., p. 169; J. IGNACZEWSKI, *Pochodzenie dziecka i władza rodzicielska po nowelizacji. Art. 61-113 KRO. Komentarz*, Warszawa 2009, p. 238; *Komentarz do art. 111 KRO*, in: K. PIETRZYKOWSKI (ed.), *Kodeks rodzinny*, op. cit., p. 678.

[13] Order of the Supreme Court of 8 February 1974, (sygn. akt III CRN 346/73), OSNC 1975/6/92, LEX n. 1802.

exercise parental authority as the father. The situation is similar when a parent refuses to allow the child to leave the country permanently, wanting it to remain at home, so that he or she can participate in the upbringing process[14].

1.3. Gross negligence of a child

Although, in both legal and moral terms, any negligence of a child whose parents are responsible for its upbringing and care is reprehensible, not every such deficiency gives grounds for the deprivation of parental authority. Unlike the previous rationale, which was not described by any adjective, the legislator clearly states „gross" negligence in the present case, and the case-law specifies that it must be serious or minor negligence, but characterised by increased malice, stubbornness and incompetence[15].

Jacek Ignaczewski identified two types of cases in which gross negligence of parents' obligations towards their child will be verified. The first group consists of situations that belong to the category of social pathologies, i.e. alcohol abuse, drug addiction and other addictions, which result in deficiencies and irregularities regarding the care of the child, its basic hygienic, nutritional or educational needs[16]. There is no excuse for such negligence, yet it seems to be a direct consequence of the parent being stuck in this abnormal situation, and it seems that this state of affairs can only be rectified by dealing with their own problems first. The second group includes the attitudes of a parent who does not show any interest in his or her child and its fate, does not communicate with the child and evades the obligation to provide maintenance[17]. By its very nature, this will be the case when the child's parents do not live together and the full responsibility for raising the child rests with only one of them.

2. Optional deprivation of parental authority

Apart from the mandatory deprivation of parental authority, in relation to which the legislator used a categorical statement which does not allow for acting otherwise, the Article

[14] Order of the Supreme Court of 1 October 1998 (sygn. akt I CKN 834/98), LEX n. 35068.
[15] Order of the Supreme Court of 19 June 1997 (sygn. akt III CKN 122/97), in: J. GUDOWSKI, *Kodeks rodzinny i opiekuńczy. Orzecznictwo*, Kraków 1998, p. 379.
[16] H. CIEPŁA, J. IGNACZEWSKI, J. SKIBIŃSKA-ADAMOWICZ, *Komentarz do spraw rodzinnych*, Warszawa 2012, p. 321-324.
[17] Cf. IBID.

111 § 1a of the FGC provided also that „The Court may deprive parents of parental authority if, despite the assistance provided, the reasons for the application of Article 109 § 2 pt 5 have not ceased to exist, especially when the parents have no ongoing interest in the child". As a consequence, this means that the legislator gives the judge the possibility to deprive parents of their parental authority also when an order had been previously issued under which the child had been placed in a foster family or in any other institutional form of care for the child (family orphanage, institutional foster care, health care and curative institution, nursing home or therapeutic rehabilitation centre). Such an order is often issued as a means of controlling the parents' ability to exercise parental authority, but if its implementation proves pointless, the court has the right to deprive them of that authority. Nevertheless, this does not mean that the possibility of depriving parents of their parental authority depends on a prior restriction of parental authority. Indeed, if it has been declared, it is taken into account, but it is not a necessary step in proceedings to deprive parents of their parental authority.

3. The consequences resulting from the deprivation of parental authority

The institution of deprivation of parental authority is often mistakenly identified in the public consciousness with a path leading to a complete disintegration of the relationship, as if the child ceased to be the child of its parent upon the court ruling - and vice versa, the father/mother ceased to be the parents of its child. Nothing could be further from the truth, although both the parent subject to the court's decision and the one filing relevant motion to the court are often anxious about the consequences of the legal steps taken. What do they worry about? As far as a parent who is deprived of authority is concerned, most often it is the fear that he or she will no longer be able to contact the child; whereas, as far as the other side is concerned, the anxiety usually concerns the issue of maintenance.

Such doubts, although natural, have not been substantiated by any legal grounds. It is not true that deprivation of parental authority means the loss of all rights and obligations towards the child. A parent who has been deprived of parental authority is not entitled to participate in any sphere of the child's functioning, i.e. does not partake in the child's upbringing, does not act on his or her behalf and does not manage his or her wealth. Therefore, he/she has no control over the child's place of residence, possible trip abroad, choice of school, treatment, etc. However, in principle, this does not imply that the child cannot be approached or contacted. Possible doubts in this respect were resolved with the

FGC revision of 6 November 2008[18], which clearly indicates that parents also have defined rights and obligations towards their children that do not fall within parental authority, and one of the most important rights in this respect is the right to have personal contact with children[19]. Article 113 § 1 of the FGC explicitly states that „regardless of parental authority, parents and their child have the right and duty to maintain contact"; personal contact with the child is not an attribute of parental authority[20].

„Contacts with the child - in accordance with § 2 of Article 113 of the FGC - include, in particular, contact with the child (visiting, meeting, taking the child away from his or her usual place of residence) and communicating directly, maintaining correspondence, using other means of distance communication, including electronic communication". Of course, this catalogue is open. The form and timing of such interactions should be agreed upon by both parents, who should be mindful of the child's best interests and take into account the child's reasonable wishes[21]. However, if the parents are unable to reach such an agreement, the question is decided by the guardianship court [22].

Also, the court may sometimes prohibit or restrict contact between a parent and a child when deciding on the deprivation of parental authority. In accordance with Article 113 § 2, this restriction may consist in prohibiting a parent from taking the child away from its usual place of residence, in permitting the child to be seen only in the presence of the other parent or guardian, court-appointed guardian or other person designated by the court, in restricting or even prohibiting contact to certain means of distance communication. However, it ought to be noted that a decision in this respect is never the automatic result of deprivation of parental authority, but can be made in each individual case „if the child's best interests so require", in particular where possible contact endangers the life, health, safety of the child or has a demoralising effect[23].

A parent deprived of parental authority continues to be obliged to support his or her child, who also retains the right to inherit from such a parent. This issue does not give rise to any doubts. However, the reversed situation, i.e. the right to claim maintenance and inheritance by a parent who has no parental authority, raises controversy. The law does not

[18] Dz. U. z 2008 r., No. 220, item 1431.
[19] A. KLANK, *Kontakty z dzieckiem*, in: H. BZDAK (ed.), *Zbiór orzeczeń z zakresu prawa rodzinnego i opiekuńczego wraz z komentarzami Wybrane zagadnienia*, Kraków 2015, p. 378.
[20] Order of the Supreme Court of 5 May 2002, (sygn. akt IV CK 615/03, LEX n. 51982; Sentence of the Supreme Court of 8 September 2014 r., (sygn. akt IV CK 615/03), LEX n. 122840.
[21] Art. 113[1] FGC.
[22] IBID.
[23] Cf. E. KAWALA, *Kodeks rodzinny i opiekuńczy. Tekst, orzecznictwo*, Toruń 2003, p. 191.

regulate such a situation directly, i.e. it does not rule out the possibility of seeking maintenance from a child by a parent who would suffer from privation in the future. Nor does the maintenance obligation depend on whether and how the parent has fulfilled his or her parental responsibilities towards the child. Nevertheless, it seems that a possible conflict in this area should be resolved with due regard for the principles of social coexistence, and therefore when applying Article 144 § 1 of the FGC, especially if the deprivation of parental authority was the result of a parent's wilful negligence towards the child. It will be different for a parent who has lost the right to exercise parental authority through no fault of his or her own, and different for a parent who has been deprived of these rights because of, for instance, violence or a complete lack of interest in the child. It seems that similar criteria may also be taken into account in the situation of inheritance, which, after all, recognises the institution of inheritance unworthiness[24].

4. Proceedings in the case of the deprivation of parental authority

Decisions in cases involving deprivation of parental authority (like in other cases concerning relations between parents and children) can only be made after the hearing, under non-contentious mode and their effectiveness depends on them becoming final[25]. The proceedings commence upon request or ex officio. The study conducted by Elżbieta Holewińska-Łapińska on the basis of data obtained from 21 randomly selected district courts (cases completed in the first half of 2012) shows that in the vast majority of cases (62.5%) proceedings were initiated ex officio, usually after obtaining information from a municipal (or communal) social welfare centre. 25% of cases involved mothers' motions filed against fathers, in 6.3% of cases such motions were filed by fathers against mothers, while in the remaining cases by other persons (especially grandparents) or the public prosecutor[26].

The participants in the proceedings for the deprivation of parental authority are the child's parents, as well as the applicant (when it is not one of the parents). However, the child itself is not a participant, pursuant to the Supreme Court's resolution of 23 January 1973[27],

[24] Cf. art. 928 KC.
[25] Cf. art. 579 KPC.
[26] Cf. E. HOLEWIŃSKA-ŁAPIŃSKA, *Orzecznictwo w sprawach o pozbawienie władzy rodzicielskiej*, Prawo w działaniu. Sprawy cywilne 14/2013, p. 40-41.
[27] Sygn. akt III CZP 101/71, OSNCP 1973, No. 7-8, item 118: „In cases involving deprivation of parental authority and in cases involving taking away a child, the child is not a participant in the proceedings within the meaning of Article 510 of the Code of Civil Procedure."

and the Supreme Court's decision of 16 December 1997[28]. On the other hand, this does not mean that the child has no opportunity to express opinion in the relevant case. Pursuant to Article 576 § 2 of the Code of Civil Procedure, „in cases concerning the person or property of a child, the court shall hear the child if its mental development, state of health and degree of maturity allow for it, taking into account its reasonable wishes as far as possible. The hearing shall take place outside the courtroom".

The family court competent in cases involving deprivation of parental authority is the district court in the place of residence of the person who will be subject to the proceedings (i.e. the child), and if the child has no residence, then the court of the child's place of stay, and if there is no such basis, then the district court for the Capital City of Warsaw[29]. In the motion, apart from the indication of the court and the type of document, the names, surnames, addresses and the PESEL (Personal identity number) of the applicant and the participants in the proceedings should be given, and the request should be properly motivated[30], accompanied by the required attachments (including the child's birth certificate - abridged if it comes from a marriage, complete if it was born in a cohabitation) and the confirmation of the court fee in the amount of PLN 40[31].

In the course of the proceedings, the court shall interview the parents of the underage child, as well as possible witnesses if they are indicated in the motion. The family is also frequently referred to the Family Diagnostic and Consultation Centre, where expert court psychologists, educators, and sometimes doctors and psychiatrists express their opinion on family relations, the parents' capacity and possible disorders and pathologies[32]. The FGC and CCP amendment of 25 June 2015[33] also changed Article 509 of CCP, as a result of which cases for deprivation of parental authority under the current legal situation are considered by a single judge[34]. An important consequence of such a provision is the possibility, which has

[28] Sygn. akt III CZP 63/97, OSNCP 1998, No. 6, item 108: „The obligation laid down in Article 12(2) of the Convention on the Rights of the Child (Dz. U. z 1991 r., Nr 120, poz. 526) to ensure that a child has the opportunity to form his or her views in all proceedings which concern him or her does not mean that a child is granted the status of a participant in the proceedings in the case of the deprivation of parental authority".

[29] See Art. 569 CCP.

[30] E. MARSZAŁKOWSKA-KRZEŚ, *Postępowanie nieprocesowe w sprawach osobowych oraz rodzinnych*, Wrocław 2012, p. 53-54.

[31] Article 23 § 1 of the Act of 28 July 2005 on court fees in civil matters, Dz. U. z 2005 r., No. 167, poz. 1398.

[32] K. MIŁEK-GIERTUGA, *Formy ingerencji sądu w wykonywanie władzy rodzicielskiej*, Studia Lubuskie 1 (2005), p. 175.

[33] Dz. U. z 2015 r., poz. 1062.

[34] Until now, there was a rule that in cases of adoption, deprivation or limitation of parental authority, the court of first instance is composed of one judge and two jurors. Currently, only adoption cases are considered by the court in the first instance in the above mentioned composition in the first instance, while cases involving

not existed so far, to consider cases concerning parental authority and cases concerning contacts between parents and children together[35].

5. Reinstatement of parental authority

Pursuant to Article 111 § 2 of the FGC, „where the cause which gave rise to the deprivation of parental authority ceases to exist, the guardianship court may reinstate parental authority". This provision contains some important information. Firstly, that the deprivation of parental authority is not an irreversible decision, but depends on the duration or disappearance of the cause. However, the reinstatement is not automatic, solely on the basis that the cause of the deprivation has been eliminated. Above all, it is always the responsibility of the court to assess this state of affairs and a number of circumstances must be taken into account. The doctrine goes so far as to emphasise that the mere disappearance of the reason for the deprivation of parental authority is not binding on the court[36]. The guarantee that if the court takes a positive decision, it will not result in a violation of the child's best interest is of key significance here[37]. To this end, the procedure is carried out, often relying on the opinion of the FDCC, assessing whether and what positive changes have appeared in parent's attitude and the relationship with the child. Even this does not guarantee a positive decision, as the law states that the court „may" and not „must" reinstate parental authority. It all depends on the best interests of the child, the assessment of which must also take into account child's emotional ties with the people it is currently staying with.

Conclusion

The point of reference for any such considerations are the best interests of the underage child. It is an overriding value because of which the legislator has also provided for the institution of deprivation of parental authority in family and guardianship law. After all, it is intended to protect the child, its life, health, safety and proper development. This value should be seen by a judge who decides on matters that interfere greatly with family relations.

deprivation or limitation of parental authority, such as cases involving the determination of contacts, are considered by a single judge. – Cf. A. KLANK, *Kontakty z dzieckiem*…, op. cit., p. 376.

[35] Cf. IBID.

[36] Cf. J. STRZEBIŃCZYK, *Prawo rodzinne*, Warszawa 2013, p. 286.

[37] Cf. A. KILIŃSKA-PĘKACZ, *Ograniczenie, zawieszenie i pozbawienie …*, op. cit., p. 259.

However, a parent who decides to file a motion with the court to deprive the other parent of parental authority should also be motivated by this value. Unfortunately, there are cases where such requests are made to the courts with motives that are completely alien to the essence of the institution in question, when a parent turns to the court with a desire for revenge or annoyance. It is therefore important to urge and remind everyone that the most important issue in family relationships are the best interests of the child, and it is to guide all those involved in the judicial regulation of relations between parents and children regardless of circumstances.