

Elżbieta Holewińska-Łapińska*

Adjudicating a ban on contacts with a child in the practice of Polish courts

The Family and Guardianship Code¹ provides in Art. 113(1) for the right of the parents and the child to maintain contact, making it simultaneously their obligation². The right to maintain regular, personal relations and direct contact with both parents unless (in exceptional cases) contrary to the child's interests, is guaranteed in Art. 9 and 10 of the UN Convention on the Rights of the Child of 20 November 1989³. The right to contact between relatives is treated as an element of the right to family life referred to in Art. 8 of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms⁴. These conventions were ratified and promulgated in the Polish Journal of Laws. Pursuant to Art. 91 in connection with Art. 87(1) of the Constitution, they are a source of law universally in force in the Republic of Poland, constituting part of the Polish legal order⁵.

In case *Wielgosz vs. Poland*, the European Court of Human Rights (hereinafter 'ECtHR') stated, among others, that 'respect for family life under Article 8 of the Convention thus implies that this contact should not be denied unless there are strong reasons which justify such an interference'.

Art. 113⁶ orders the court to forbid parents to maintain contact with a child in case maintaining them 'seriously threatens or infringes on the child's good', which is accordingly applicable to situations of other persons entitled to maintain contact with the child pursuant to Art. 113⁶ FGC⁷.

The Institute of Justice carried out a survey of case law of ordinary courts (Family and Minors Departments of District Courts⁸), covering the files of 181 cases in which

* The author is a Professor at the Institute of Justice, Poland, E-Mail: iws@iws.gov.pl

¹ Law of 25 February 1964 Family and Guardianship Code (consolidated text: Journal of Laws of the Republic of Poland Dziennik Ustaw 2017, Item 682 as amended), hereinafter 'FGC'.

² J. Zajączkowska, *Legal aspects of parent-child contact problems in Poland*, "Prawo w Działaniu" (Law in Action) 2017, No. 32, p. 98.

³ Journal of Laws of the Republic of Poland Dziennik Ustaw 1991, No. 120, Item 526 with amendments.

⁴ Journal of Laws 1993, No. 61, Item 284 with amendments.

⁵ W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Kraków 1999, pp. 83–88.

⁶ ECtHR decision of 11 May 1999, LEX No. 41089.

⁷ E. Holewińska-Łapińska, *Establishment of contacts between grandparents and minor grandchildren in the practice of Polish courts*, "Prawo w Działaniu" (Law in Action) 2018, No. 34, pp. 225–240.

⁸ A ban on contact can be adjudicated also in a judgment establishing parenthood, in a divorce judgment, in a separation judgment, in a judgment declaring a given child's parents' marriage null and void. Cases of this kind were not included in the file examination discussed in this paper.

a ban on contact with a child was adjudicated and the judgment became legally binding by the end of 2017⁹. This paper contains the most important findings of the survey¹⁰.

I. GENERAL CHARACTERISTICS OF THE BAN ON CONTACT WITH A CHILD

1. Evolution of the regulation of the ban on contact in Polish law (1946–2009)

What had long prevailed in Poland was a conviction that where a minor child's parents live in separation, the good of the child requires coherent upbringing provided in a consistent and firm way by one of the parents, the one the child was 'entrusted to'¹¹. This position affected the concept of the maintenance of contact with a child by the second parent.

The normative acts codifying family law after the end of World War II¹² treated maintenance of contact narrowly, as a possibility of visitation. For instance, speaking about extramarital children of established parenthood Art. 74(1) of the Decree *Prawo rodzinne* (Family Law) declared that 'the fact that parental authority is entrusted to one of the parents does not deprive the other parent of the right to visit the child'¹³. Where divorce was adjudicated, Art. 31(1) Point 3 of the Decree *Prawo małżeńskie* (Marriage Law) stipulated that the court would ensure to a parent to whom a child was not entrusted, but who was not deprived of parental authority, 'supervision' over the upbringing and education of the child as well as the possibility of maintaining personal contact with the child. Point 4 stipulated that the court could grant 'a visitation right' to see the child also to the parent deprived of parental authority. Art. 44(2) of the Decree *Prawo rodzinne* (Family Law) stipulated that the guardianship authority could grant to parents deprived of parental authority 'the visitation right' to see the child. Thus, deprivation of parental authority covered also loss of the right to visit the child.

The Family Code (Law of 27 June 1950¹⁴) in force since 1 October 1950, represented a different concept. Apart from the fact that instead of the 'visitation right' it

⁹ 111 randomly chosen district courts were asked to provide records of the last 10 cases closed in a given court. In 50 courts there were no cases meeting the survey criteria. Records that satisfied the criteria came from 61 courts, the number of the cases in the majority of the courts being lower than 10, even when a several-year period of adjudication was taken into account.

¹⁰ The report (in the Polish language "Orzeczenie zakazu kontaktów z dzieckiem") is available on <https://www.iws.org.pl/pliki/files/IWS%20Holewi%C5%84ska%C5%81api%C5%84ska%20E.Orzeczenie%20zakazu%20kontakt%C3%B3w%20z%20dzieckiem%281%29.pdf>

¹¹ On the legal situation of the child not entrusted to any parent by the court, see: A. Łapiński, *Ograniczenia władzy rodzicielskiej*, Warszawa 1975, pp. 147–174. The author refers (*Ograniczenia...*, p. 150) to the significant statement made by Bronisław Dobrzański that the parent to whom the continuation of parental authority was not entrusted 'maintains solely *nudum nomen* of this authority'.

¹² This refers in particular to the Decree of 25 September 1945 'Marriage Law', Journal of Laws 1945, No. 48, Item 270, as well as the Decree of 22 January 1946 'Family Law', Journal of Laws 1946, No. 6, Item 52 with the rectification in Journal of Laws 1946, No. 16, Item 113. On the subject of amendments to family legislation see: P. Fiedorczyk, *Unification and codification of family law in Poland (1945–1964)*, Białystok 2014.

¹³ The reasons for this empowering provision result from the fact that 'entrusting a child to one parent is a consequence of the existence of certain life-related necessities and thus cannot in any way restrict the right of the other parent to maintain personal contact with their child', as provided for in Art. 74(1) of the draft following Art. 326 of the Swiss Civil Code (of 1907). I quote after *Prawo Rodzinne. Dekret z 22 stycznia 1946. Tekst dekretu z objaśnieniami, motywami ustawodawczymi i tezami społeczno-politycznymi – Przepisy wprowadzające – Przepisy związkowe*, M. Kamiński (ed.), Kraków (no publication date), p. 65.

¹⁴ Journal of Laws 1950, No. 34, Item 308, hereinafter 'FC'.

provided for ‘personal contact’, it did not stipulate automatic ban on personal contact as a consequence of loss of parental authority. This resulted from the reading of Art. 63 of FC: ‘Where the good of the child so requires, guardianship authority will forbid personal contact with the child to parents deprived of parental authority’.

It was commented that what followed from this provision was that: ‘in principle each of the parents, and thus even the parent deprived of parental authority, has the right to the visitation of the child unless the guardianship authority overtly deprives this parent of parental authority’¹⁵. This position was confirmed by the Supreme Court in its judgment of 28 August 1951, C 154/51¹⁶, where the Court held that the good of the child will require adjudication of a ban on personal contact where there is a justified fear that it might be harmful to the child to see the parents (or one of them). The adjudicating panel of the Supreme Court treated ‘visitation of the child’ as a synonym of ‘personal contact’. However, B. Dobrzański explained in the commentary on Art. 63 FC that the scope of ‘personal contact’ was broader and included, apart from ‘child visitation’, also correspondence¹⁷.

What was then indicated as causes of harmful influence on the child that might justify a ban on personal contact were, for instance, ‘negative influence on the child’s upbringing’, ‘instilling asocial views in the child’, ‘making the child resistant to the authority of the other parent exercising parental or guardianship authority’, as well as ‘demoralizing the child (...) by behaviour or actions’¹⁸.

The contents of Art. 63 FC were repeated in Art. 113 of the Family and Guardianship Code¹⁹ (in its initial version), the only difference being that the notion of ‘guardianship authority’²⁰ was replaced with the term ‘guardianship court’, which performed the function of the ‘guardianship authority’ also before this code took effect. Commentaries on this provision repeated the most important conclusions made on the interpretation of Art. 63 FC²¹. The majority of research studies point out that

¹⁵ And thus B. Dobrzański in the comment to Art. 63 FC (*Komentarz do art. 63 k.r.*) [in:] *Kodeks rodzinny. Komentarz*, M. Grudziński, J. Ignatowicz (eds.), Warszawa 1959, p. 65.

¹⁶ Reference in B. Dobrzański, *Kodeks...*, p. 564.

¹⁷ B. Dobrzański, *Kodeks...*, p. 565. Later other authors accepted the above and expanded the scope of the notion (covering with it, for instance, telephone calls).

¹⁸ B. Dobrzański, *Kodeks...*, p. 564.

¹⁹ *Journal of Laws* 1950, No. 9, Item 59.

²⁰ The bill regulating relations resulting from kinship or guardianship, prepared by the Codification Committee, which worked in Poland in the 1930s, provided for state courts adjudicating in cases relating to deprivation or restoration of parental authority. The remaining cases which the draft concerned were to fall within the competence ‘state guardianship authority’, state office of a character close to a relevant court. The bill prepared by the Codification Committee did not become law. In the post-World War II period discussion ensued in Polish science on the concept of ‘guardianship authority’. In the codified law, the term ‘guardianship authority’ was maintained and identified as the court. As maintained by Adam Zieliński (A. Zieliński, *Sądownictwo opiekuńcze w sprawach małoletnich*, Warszawa 1975, p. 41), this was aimed at avoiding the restructuring of the whole system of substantive law in case the structure of state authorities performing guardianship functions were to change. (A synthetic survey of organisational regulations of ‘guardianship authority’ in the legislations of other countries see: A. Łapiński, *Ograniczenia władzy rodzicielskiej*, Warszawa 1975, pp. 26–51 and A. Zieliński, *Kodeks...*, pp. 34–40). Such a change did not follow (a guardianship office was not established). However, yet in the late 1960s, Andrzej Stelmachowski postulated the establishment of an office for youth cases modeled on the solutions of German *Jugendamts*, ‘with a reservation that their style of action would have to take into account the role of the civil, social factor to a much greater extent’ (A. Stelmachowski, *O koncepcję opieki nad małoletnim*, „*Studia Cywilistyczne*” 1969, Vol. XIII–XIV, p. 339).

²¹ For instance, B. Dobrzański in the commentary on Art. 113 FGC [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, M. Grudziński, J. Ignatowicz (eds.), Warszawa 1966, p. 626, the same author in the commentary on Art. 113 FGC [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, B. Dobrzański, J. Ignatowicz (eds.), Warszawa 1975, p. 692 (adding that ‘personal contact with the child does not constitute an element of parental authority’), similarly, J. Ignatowicz [in:] *Kodeks rodzinny i opiekuńczy z komentarzem*, J. Pietrzykowski (ed.), Warszawa 1990, p. 470.

the right of the parent to personal contact with the child does not belong to parental authority while the ban 'is not *a priori* reduced as to its duration'²².

The ban on 'personal contact' with the child, foreseen in Art. 113 FGC (since 1 March 1976, Art. 113(1) FGC²³) has not been given particular attention in literature. The earlier remarks of the commentators (referred to above) were supplemented by the statement that contact with the parent can threaten the good of the child in case of 'a demoralizing influence of the mother or father deprived of parental authority might appear (...) exerted not only through directly teaching the child immoral principles or dislike towards the other parent but also through blameworthy conduct of the parent concerned which might provide a bad model for the minor'²⁴. It was pointed out, in general terms, that the ban should constitute a reaction of the court to a threat to the mental or physical condition of the child, resulting, for instance, from excessive chastening, teaching of asocial behaviour models, demoralisation, instilling hatred towards the other parent, because in situations of this kind any form of contact may prove undesirable²⁵.

It was emphasised that application of Art. 113(1) FGC is likely to be very rare due to the fact that although it concerns parents, yet 'this adjudication works both ways' while the child has 'the right not to be separated from the parents' unless it is necessary for the best interest of the child' (Art. 9(1) of the Convention on the Rights of the Child). Consequently, a ban on direct contact 'should in practice be used only where any form of contact with the child might objectively be contrary to the good of the child'²⁶.

The exceptional character of the situation justifying a ban on a parent's personal contact with the child was confirmed by the position adopted by the Supreme Court in its decision of 7 November 2000, I CKN 1115/00²⁷. The justification for banning the contact pointed out in the decision included a threat to life, health, security of the child or a demoralizing influence of the parent on the child.

The regulation of contact with the child changed dramatically²⁸ from 13 June 2009²⁹. The fact that from that date the Code has contained examples of the forms of contact (Art. 113(2) FGC³⁰) and ways of limiting contact (Art. 113² FGC³¹), creates a new perspective for the interpretation of the provision on the ban on contact.

²² J. Ignatowicz [in:] *System prawa rodzinnego i opiekuńczego*, J. St. Piątkowski (ed.), Wrocław-Warszawa-Kraków-Gdańsk-Łódź 1985, pp. 872, 873.

²³ Amendment to the Code was made by the law of 19 December 1975, Journal of Laws 1975, No. 45, Item 234, in force since 1 March 1976.

²⁴ J. Sauk, *Granice obowiązków i praw rodziców wobec dzieci i społeczeństwa. Studium prawnoporównawcze*, Toruń 1967, p. 112. Similarly, J. Winiarz, *Prawo rodzinne*, Warszawa 1993, p. 225, who also mentions 'coaxing into attitudes inconsistent with the principles of social coexistence, etc.'

²⁵ M. Goettel, *Ingerencja sądu opiekuńczego w sprawowanie władzy rodzicielskiej a prawo rodziców do osobistej styczności z dzieckiem*, „Nowe Prawo” 1983, Nos. 9–10.

²⁶ Thus J. Strzebińczyk [in:] *System Prawa Prywatnego*, Vol. 12, *Prawo rodzinne i opiekuńcze*, T. Smoczyński (ed.), Warszawa 2003, p. 352.

²⁷ OSNC 2001, No. 3, Item 50.

²⁸ On the subject of draft amendments and the course of the legislative proces, see: W. Stojanowska [in:] *Nowelizacja prawa rodzinnego na podstawie ustaw z 6 listopada 2008 i 10 czerwca 2010. Analiza – Wykładnia – Komentarz*, W. Stojanowska, M. Kosek (eds.), Warszawa 2011, pp. 284–285.

²⁹ Journal of Laws No. 220, Item 1431.

³⁰ Art. 113 § 2. Contact with the child covers in particular staying with the child (visits, meetings, taking the child away from the place of the child's permanent residence) and direct communication, maintenance of correspondence, use of other means of long-distance communication, including means of electronic communication'.

³¹ Art. 113² § 1. Where the good of the child so requires, the guardianship court shall limit the maintenance of the parents' contact with the child. § 2 The guardianship court can, in particular: 1) forbid child visitation; 2) forbid taking the child away from the place of the child's permanent residence; 3) allow for meetings with the child only in the presence of the other parent or a guardian, court curator or another person indicated by the court; 4) limit contact to specific forms of long-distance communication; 5) forbid long-distance communication'.

It should be pointed out that apart from the change of terminology (Art. 113(1) FGC regulates the ban on ‘personal contact’, Art. 113³ FGC concerns the ban on ‘maintaining contact’) other legislative amendments were also made.

Pursuant to Art. 113 § 1 FGC in the old reading, the ban could be adjudicated for two reasons: first, where a given parent has been deprived of parental authority and secondly, where the child’s good so requires. The legislator did not specify the second assumption leaving the court full discretion in this respect. The reprehensibility of the behaviour of the parent abusing his/her rights and/or exhibiting stark neglect of his/her duties, justifying depriving him/her of parental authority, could indirectly point to the scale of the threat to the child’s good which required that in a given case personal contact be banned.

2. Reasons for adjudicating a ban on contact with a child

The chapter ‘Contact with the Child’ does not contain a statutory definition of the notion of ‘contact’. Neither can a relevant definition be found in other regulations of the Polish law system. A definition of contact is given in Art. 2 of the European Convention on Contact concerning Children open for signature in Strasburg on 15 May 2003. The law allowing for the ratification of this Convention was passed on 23 April 2009 and promulgated in the Journal of Laws³², but Poland has not yet deposited the ratification documents³³. Thus, the Convention did not obtain the position of a source of law in force in the Republic of Poland³⁴. The Convention gives a very broad definition of contact as all and any forms of communication as well as gaining information about ‘the other party’ to the contact³⁵.

Determining the meaning of the notion of ‘contact’ is further facilitated by examples of forms of contact listed in Art. 113(2) FGC³⁶. The examples do not exhaust all possibilities, because since the law was passed numerous changes in both morality and technology have taken place. For instance, long-distance ways of communication have improved, communication equipment has become more easily accessible, etc.

What seems crucial from the point of view of the subject of these remarks is to emphasise that it is also possible to adjust the form of contact to the individual situation of the parties which are to contact each other and to shape the contact so as to make

³² Journal of Laws 2009, No. 68, Item 576.

³³ On this subject, see: A. Bodnar, M. Kopczyński, *Konwencja w sprawie kontaktów z dziećmi z 2003 roku – ratyfikacyjne błędne koło*, „Helsińska Fundacja Praw Człowieka. Analizy i Rekomendacje” 2005, No. 9, and P. Mostowik, *Komentarz do art. 113 k.r.o., V. Kwestia potrzeby dostosowania prawa polskiego do konwencji Rady Europy z 2003 r. – wzmianka* [in:] *Komentarze Prawa Prywatnego*, tom V, *Kodeks rodzinny i opiekuńczy. Komentarz. Przepisy wprowadzające KRO*, K. Osajda (ed.), Warszawa 2017, p. 1332 (List of the countries which ratified the convention, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/192>).

³⁴ Arguments in favour of the desirability of the ratification of the Convention was presented by Robert Zegadło (R. Zegadło, *Czy Polska powinna przystąpić do Konwencji w sprawie kontaktów z dziećmi?*, „Rodzina i Prawo” 2008, Nos. 7–8, pp. 102–107).

³⁵ Art. 2(a) of the Convention provides that ‘contact’ means the child staying for a limited period of time with or meeting a person mentioned in Articles 4 or 5 with whom he or she is not usually living; any form of communication between the child and such person; as well as the provision of information to such a person about the child or to the child about such a person.

³⁶ The reasons for the bill (Print of the Sejm of the 6th term No. 888) which was passed on 6 November 2008 and is now the law in force emphasise that ‘The catalogue is open in character but contains the most important components of contact with the child and should make it easier to formulate court adjudications in this subject matter’.

the likelihood of a threat to the good of the child as low as possible. Where the person entitled to contact and the ‘primary carer’ of the child are not able to negotiate the rules of keeping in touch with the child which would be safe for the latter (including the protection of the child’s emotional sphere) or where the contact maintained threatens the child for whatever reason, the court can limit it. Examples of forms of contact limitation can be found in Art. 113² FGC. Contact can be seriously limited, it is even possible to eliminate contact and direct long-distance communication (via telephone calls or Internet communicators, such as Skype). In extreme cases, the only form of contact can be limited to mutual provision of information about the other person or to just informing the parent about the child.

The ban on contact adjudicated pursuant to Art. 113³ FGC means that any forms of contact are eliminated, even in the form of remote provision to the parent of information about the current state of the child’s health, development, education at specified intervals. The ban on contact is thus an extremely acute measure for the person concerned. The court can change such a decision only where the child’s good so requires (Art. 113³ FGC), which requires a detailed, multi-aspect analysis of the circumstances affecting this good, also from the point of view of how the child will function in the future after reaching majority, as an adult expected to perform a variety of social functions (including parenthood).

The ban on contact must be adjudicated where the court believes that maintaining contact, even in a very limited form (with the elimination of all direct forms), is contrary to the child’s good or even creates a threat classified as ‘serious’.

Poland is bound by the legal requirement contained in Art. 3 of the UN Convention on the Rights of the Child of 20 November 1989³⁷, which stipulates that ‘the best interests of the child shall be a primary consideration’ in ‘all actions concerning children’, including those taken by courts. The obligation to protect the ‘rights of the child’ is enshrined in Art. 71(1) of the Constitution of the Republic of Poland of 2 April 1997³⁸.

The good of the child has been and still is considered one of the leading principles of Family Law³⁹. It should always be taken into account, even if not expressly mentioned in laws regulating questions directly or indirectly related to children’s situation. If the child’s good is referred to in a provision of law, it can be deemed to have been given much greater ‘force’ than in the case when it is taken into account as an ‘ordinary’ instrument of interpretation⁴⁰.

The Supreme Court declared, in resolution III CZP 48/92⁴¹, passed by seven judges on 12 June 1992, that the notion of the child’s good: ‘[...] corresponds in its general outline to the notion of the superior interest of the child reconstructed on the basis of the provisions of the Convention [on the Rights of the Child]. At the same time, the provisions of the Convention can be used to further specify the notion of the good of the child [...], in particular, those provisions of the Convention which point out that

³⁷ The Convention has been applicable in the Republic of Poland since 7 July 1991. It was promulgated on 23 December 1991, *Journal of Laws* 1991, No. 120, Item 526, and subsequently amended.

³⁸ *Journal of Laws*, Item 483 as amended.

³⁹ Thus, J. Winiarz [in:] *System prawa...*, pp. 69–73.

⁴⁰ W. Stojanowska, *Dobro dziecka jako instrument wykładni norm konwencji o prawach dziecka oraz prawa polskiego i jako dyrektywa jego stosowania* [in:] *Konwencja o prawach dziecka. Analiza i wykładnia*, T. Smoczyński (ed.), Poznań 1999, p. 81 et seq.

⁴¹ OSN 1992, No. 10, Item 179.

full and harmonious development of the child requires him/her to grow up in a family environment, in an “atmosphere of happiness, love, and understanding” and that the child should be fully prepared for life in the society as an individual “brought up in the spirit of [...] peace, dignity, tolerance, freedom, equality, solidarity” (...).

If these goals are to be achieved, it is necessary to protect the child, among others, against maltreatment⁴², and thus all and any forms of physical and psychological violence, harm, neglect, abuse, including sexual abuse (Art. 19 of the Convention on the Rights of the Child) and all and any other forms of abuse (Art. 36 of the Convention).

It is difficult to develop a precise regulatory model of the child's good for the needs of applying Art. 113³ FGC. The starting point is the assumption that its role, in a situation when the parents are separated, is for the child to maintain bonds with both of them, also through regular contact. There are certain child's welfare levels that can be indicated as potentially threatened by contact. These include, for instance, physical security (hence protection of life, health, freedoms covered by the notion of the child's good), feeling of security as well as self-esteem, dignity, uninterrupted education, development of body and mind fitness, spiritual development (including religious development where such a model of education results from the values and family traditions cultivated), etc.

It seems that particular importance should be attached to the child's sense of security and elimination of any influence of a parent's violence on the child's psyche⁴³, even if the child itself did not experience physical aggression⁴⁴ but only witnessed it. In this context, it is necessary to consider the delayed consequences of spending childhood in a family in which violence was used as a way of solving problems. Research into the phenomenon of violence carried out for decades in different countries revealed intergenerational transmission of violence, both in the form of reproducing in the adult life of the violence-imbued parental model of solving conflicts in the family and in the form of the learned role of being a victim of violence⁴⁵.

Polish research shows that children were witnesses of violence towards their mothers in family conflicts as often as in 60% of cases⁴⁶. Violence on the part of the father of a common child tends to be a frequent cause of the parents' separation. Violence on the part of the former husband/partner often takes place after the separation⁴⁷, when it is the mother who has direct custody over their common minor children. The

⁴² L. Kociucki, *Ochrona dziecka przed złym traktowaniem* [in:] *Konwencja...*; B. Banaszak, Ł. Żukowski, *Prawo dziecka do ochrony przed przemocą, okrucieństwem, wyzyskiem i demoralizacją – rozwiązania polskie na tle standardów Konwencji o Prawach Dziecka* [in:] *Konwencja o prawach dziecka. Wybór zagadnień (artykuły i komentarze)*, S.L. Stadniczeńko (ed.), Warszawa 2015.

⁴³ Definitions of violence and a survey of Polish and foreign studies on the subject of violence in the family were presented in a synthetic form by Tomasz Szlendak (T. Szlendak, *Socjologia rodziny. Ewolucja, historia, zróżnicowanie*, Warszawa 2012, pp. 274–283).

⁴⁴ See: S. Wójcik, *Przemoc fizyczna wobec dzieci*, „Dziecko krzywdzone” 2012, No. 2(39) and the cited literature.

⁴⁵ B. Gruszczyńska, *Przemoc wobec kobiet w Polsce. Aspekty prawnokrymologiczne*, Warszawa 2007, pp. 26–27. According to the studies referred to by the author, children witnesses of violence are three times as likely to use violence towards partners in adult life than children without such experience. Polish studies, the results of which were presented in the monograph referred to, showed, for instance, that women who experienced violence on the part of their father in childhood, experienced it twice more frequently from their partner, while those whose mothers resorted to violence, were beaten and injured by partners two and a half times more frequently than women who did not experience such violence (B. Gruszczyńska, *Przemoc...*, pp. 89, 90).

⁴⁶ B. Gruszczyńska, *Przemoc...*, p. 66.

⁴⁷ B. Gruszczyńska, *Przemoc...*, p. 63, Table 13.

influence of such events on the child's situation and the likelihood of their recurrence when the parent being the perpetrator of acts of violence maintains contact with the child should be taken into account when Art. 113³ FGC is applied, also when the child is (was) 'only' a witness of an act of violence.

Studies confirm that when a child is sexually abused by a parent the consequences may be delayed and remote. Children victims of incest show symptoms of post-traumatic stress, sexualisation of behaviours, depression, feeling of guilt, low self-esteem, etc.⁴⁸ Sexual abuse of a child by a parent has much more serious consequences than a similar act by another person. It creates the risk of transferring incestuous behaviours outside of the system of one family and making it an element of a transgenerational transfer⁴⁹.

The degree of the potential threat to the child's good depends on the form, frequency, conditions in which contact takes place, and a host of other circumstances. A considerable part of the threats can be eliminated or significantly reduced by forbidding personal contact and certain ways of long-distance communication. A contact ban means that any form of contact would be disadvantageous for the child and the degree of the adverse influence of the contact on the child is significant.

The application of the ban to settle a particular case requires that the court take into account all the individual features of the child and all aspects of the state of affairs on the day when the contact ban is adjudicated.

As mentioned earlier, from the moment Art. 63 of the Family Code took effect, i.e. from 1 October 1950, until the amendment of Art. 113 of the Family and Guardianship Code, in force since 13 June 2009, it was possible to apply the ban on contact only towards the parent deprived of parental authority. There is then no doubt that the parent who has no parental authority (in particular an incapacitated person or a minor, a father established by the court who was not granted parental authority) can maintain contact with the child and that it was impossible to forbid contact to a parent who did not have parental authority over the child.

Since 13 June 2009, the changed statutory provision allows to presume and argue that the ban on maintaining contact with the child can be adjudicated without first depriving the parent of parental authority which seems not to arouse doubts among commentators⁵⁰.

What the provision in question signifies beyond any doubt, as I see it, is solely that deprivation of parental authority (preceding or adjudicated together with a contact ban) does not constitute a *sine qua non* condition for adjudicating a contact ban. In consequence, the parent who does not have parental authority (for instance a minor or an incapacitated person) cannot be prohibited from contacting the child.

I believe it is impossible to defend the thesis that parental authority and contact with the child can be treated as 'legal phenomena' not being part of any relation, developing automatically, and thus that it would be justified to forbid contact with the child

⁴⁸ In a synthetic form on this subject, see: M. Budyn-Kulik, *Psychologiczne i wiktymologiczne aspekty kazirodztwa* [in:] *Kazirodztwo*, M. Mozgawa (ed.), Warszawa 2016, p. 198 et seq., in particular p. 206. About the causes and effects of incest, where the perpetrator is a parent (usually father) see: M. Bisert, *Kazirodztwo. Rodzice w roli sprawców*, Warszawa 2008 and the literature referred to.

⁴⁹ See: M. Bisert, *Kazirodztwo...*, p. 194.

⁵⁰ Thus, for example: W. Stojanowska [in:] *Nowelizacja...*, p. 285, rightly drew attention to the fact that a ban on maintaining contact is: 'a higher degree of the child's separation from a parent (parents); G. Jędrejek, *Komentarz do art. 113³ FGC* [in:] *Kodeks rodzinny i opiekuńczy. Komentarz aktualizowany*, LEX/el. 2018.

to a parent who has full parental authority. (Yet, in some cases, extreme limitation of contact for a parent having parental authority with a ban on using any elements of personal contact might be rationally justified).

Given the fact that a contact ban means inadmissibility of any form of contact (information about the child included) what seems to be excluded is a possibility of implementing any attributes of parental authority over the child for the child's good. In consequence, I entirely share the thesis put forward by Wanda Stojanowska that substantiation of the presumptions from Art. 113³ where the parent has the right to parental authority and there are no proceedings pending against the parent should cause such proceedings to be instituted *ex officio*⁵¹.

II. BASIC FINDINGS OF THE SURVEY OF COURT FILES

1. General information on survey findings

Children

The proceedings concerned contact with 264 children, 114 (43.2%) girls and 150 (56.8%) boys, aged from 4 months to 17 years. The average age of the children was 8.4 years, the median 8 years.

On the day when the case were brought to court, it was known that mothers had full parental authority over 150 children and direct care of four of them was to be provided, pursuant to a court ruling, by fathers. Fathers had full parental authority over 44 children, with the mother being indicated as performing direct care over 26 children.

In relation to 36 children, fathers' parental authority was limited to specified duties and rights in relation to the child and in relation to 25 children, the parents' parental authority was limited in accordance with Art. 109 FGC.

On the day when the case was brought to court, fathers were deprived of parental authority over 117 children while mothers over 53 children. The parental authority of fathers was suspended in 3 cases, and in one case the mother's parental authority was suspended.

Most frequently, in relation to 164 (62%) children, it was mothers who provided direct care. Thirteen children (4.9%) were under the care of their fathers, while nine (3.4%) were cared for by their relatives (in eight cases by grandparents). A considerable group of children (26.5%) remained in foster care: 33 children were in unrelated foster families, while 37 in care centers.

Persons who were prohibited contact

Contact was expected to be banned for 204 persons, including 54 women (26.5%) and 150 men (74.5%). The people in question were aged from two years (a younger step sister of the child, contact with whom was to be banned) to 79 years (grandfather).

Their right to maintain contact with children resulted in 199 (97.6%) of cases from kinship and in the remaining cases from prior care of the children.

⁵¹ W. Stojanowska [in:] *Nowelizacja...*, s. 285.

The surveyed court files showed that 49 of the persons concerned were married, 68 divorced, 51 had never contracted marriage. There was one widow and one widower. There was no information about the marital status of the remaining persons.

Almost every third person had primary education, 38% vocational education. Only 12 of the 113 people of whose education information was available, had higher education (master's degree).

In some of the persons banned from contacting children, various manifestations of the so-called 'social pathologies' were observed (in many cases more than one).

The most frequent pathologies were alcohol abuse (26.7%), criminal activity or misdemeanours (25.8%), serving a prison sentence (11.8%). 31 persons (9.6%) were found to be suffering from drug addiction. Avoidance of employment, the so-called 'parasitic lifestyle', was manifest in 30 persons (9.3%).

'Parasitic lifestyle'	30	9.3
Regular alcohol abuse	86	26.7
Alcohol addiction	17	5.3
Drug addiction	31	9.6
Gambling	3	0.9
Criminality, misdemeanours	83	25.8
Serving prison sentences	38	11.8
Threat of joblessness	19	5.9
Joblessness	4	1.3
Other	11	3.4
Total	322	100.0

Source: Author's own study.

Proceedings before court

In four-fifths of the cases, proceedings for the ban on contact resulted from the presentation of such a request by a person concerned about the child's welfare and in one-fifth (20.5%) the court instituted the proceedings *ex officio* having received information indicating that the child's good might be threatened due to contact with a particular person entitled to such contact.

In 138 (80.2%) of the cases, the main substantive request was that specific persons be banned from contact with the child (children), in 27 (15.7%) of the cases the request concerned both a contact ban and a ruling on parental authority (in particular deprivation of parental authority and banning the parent deprived of this authority from contact with the child). In the remaining cases, the request of the ban on contact constituted a modification of an earlier request or appeared as a reaction of a participant in the proceedings to another request concerning contact.

Applicants	Frequency	Percentage
Mother	111	61.3
Father	12	6.6
The child's grandparents (also when they perform the function of a foster family)	4	2.2
Grandmother (also when she performs the function of a foster family)	3	1.7
Foster parent (other than the relatives specified above)	10	5.5
The child's guardian, other than a foster parent	4	2.2
Non applicable – the court initiated the proceedings <i>ex officio</i>	37	20.5
Total	181	100.0

Source: Author's own study.

In compliance with the study assumptions, in all examined cases studied a ban on contact with a child was adjudicated in respect of a person entitled to such contact (Art. 113(1) FGC, Art. 113⁶ FGC). Instance control covered 25 adjudications. In 15 cases appeals were dismissed. In the cases in which a change of the adjudication took place it did not concern the ban on the maintenance of contact adjudicated by the court of the first instance.

The fastest and shortest of the proceedings lasted one month from the registration of the application to the date of the first instance court's judgment, while the longest lasted five years and two months.

The average duration of proceedings (from the date the case was brought to court to the date the judgment was issued) was ten months, with a median of seven months. In the case of appeals, the period from the issue of the judgment on the merits by the court of first instance to the date of the second instance court's judgment ranged from three to ten months. On average, the period in question amounted to 5.6 months (median – 5 months).

2. Verification of research hypotheses

Before the survey several hypotheses were formulated. The survey confirmed some of them.

Hypothesis 1. An assumption was made that the request that a ban on contact be ordered concerns most frequently fathers of children after the breakdown of marriage or non-formalised relationship with their mothers. The survey confirmed this hypothesis. In 144 of the analyzed proceedings, the father was indicated as the person which should be forbidden contact, though in 15 cases there was a concurrent request concerning the mother. In 69.6% of the cases, the proceedings focused on examining the advisability of preventing fathers from contacting children. Only in 13 cases the children's parents remained in marriage. In 42% of the cases they were divorced, while in 37.4% of the cases they used to be in a consensual union, which later broke down. In the remaining known cases, the parents had never been in any relationship for any, even short, time.

Hypothesis 2. The person whom the request of a ban on contact with the child concerns provides a bad role model for the child, due to the person's features (including personality disturbances) as well as way of life. In 75 of the cases studied (41.7%), the reasons given in the request for banning contact with the child to a specific person pointed out that the person concerned was a bad role model. Evidence-taking proceedings confirmed the correctness of the statement in 74 cases, that is, close to 100%. This assessment was substantiated by a number of confirmed circumstances, among them those listed below.

- Frequent violations of law (crimes and misdemeanours), confirmed in the majority of cases by legally binding convictions (also in conditions of repeat offending, in one case as many as 11 times), imprisonment as well as reliable information on preparatory proceedings in progress.
- Regular alcohol abuse, which led to alcohol disease in part of the cases. Consumption of excessive quantities of alcohol was accompanied by numerous negative consequences: breach of peace and principles of family and neighbourhood coexistence, improper behaviour in common spaces, aggression, violation of the physical dignity of other people (including the closest family living in the same household), damage to objects, threats.
- Inability to solve conflicts and personal problems, resorting to violence in conflict situations.

The proceedings revealed that some manifestations of social pathology occurred even more frequently than it was indicated in the substantiation of the applications for banning contact. To give an example, regular abuse of alcohol by the person concerned in the proceedings was confirmed in 86 cases, while the fact of having committed offences and misdemeanours law in 83. The files also revealed that eight fathers, eight mothers and one grandfather were diagnosed with mental illnesses, while six other fathers exhibited problems referred to in the files as 'mental disorders'. In one case, personality disturbances were mentioned, while in another depression and inability to control emotions. The above seems to substantiate the conclusion that the survey positively verified the hypothesis in question.

Hypothesis 3. The fact that a parent used violence towards the child or another person (especially towards the other parent in whose direct care the child remains at the given time) in the presence of the child creates a serious threat to the child's good if the child has contact with such a parent. The reasons substantiating 63 applications (35% of the cases studied) indicated that the person referred to in the application had used violence mainly towards the child's mother, also in the child's presence. The substantiations included also statements that the child was afraid of the person in question or bad memories connected with said person. Evidence-taking proceedings confirmed the use of violence in 55 cases, i.e. in every third case studied. The fact that in 40 cases the child's fear of the person whom the request for the ban on contact concerned was established provided further confirmation for the hypothesis. Most frequently, also in such cases, the children whose position was established, refused any contact with the perpetrator of violence.

Hypothesis 4. In the majority of cases, the request for the contact ban concerns the child's parent who was deprived of parental authority or against whom proceedings concerning deprivation of parental authority are pending.

This statement was only partially confirmed. On the date of the commencement of the proceedings in the case studied, fathers were deprived of parental authority in relation to 51.6% of the children, while mothers in relation to 24.5% of children with whom contact was to be banned. In 33 (18.2%) of the proceedings studied, some form of interference with parental authority was requested together with a ban on contact.

Hypothesis 5. Court proceedings are probing and searching in nature. People directly interested in the result of the proceedings present their positions. What is also common practice in cases relating to the ban on contact with the child is establishing the child's position, though the child is hardly ever heard directly by the court.

It was revealed that the extent of the court's probing in individual cases varied. Unfortunately, not all courts satisfied the above standards according to the aforementioned criterion, if one considers the complexity of the decision in its psychological aspect as well as the advisability of attempting to foresee the impact of a possible contact ban on the child's functioning in the future.

What also needs to be emphasised as positive was the practice of carrying out psychological and pedagogical examinations. In 38 cases evidence was obtained from opinions of members of consultative teams of court experts (family diagnostic and consultation centres)⁵². Twenty-five of them contained a conclusion that the ban on contact with the child was fully justified in the particular case. In 36 cases, opinions prepared by psychologists or pedagogues were requested and considered.

What is also worth mentioning is the fact that in 133 cases the files of the examined proceedings included files concerning some interference with parental authority (these files were not sent to be studied), which probably provided courts with essential knowledge necessary to assess the validity of the application. It can also be assumed that other guardianship-related proceedings with the participation of the persons concerned must have also been conducted prior to or concurrently with the proceedings studied and the court acting *ex officio* must have been familiar with information on the persons concerned, which affected the outcome of the cases.

Community interviews conducted by court curators (in the place of the child's residence in 101 cases – 55.8%, in the place of residence of the person to be banned from contact in 61 cases – 34.1%) provided another valuable source of information in the case.

The expectation that the persons directly interested in the result of the proceedings would present their positions on a possible ban on the maintenance of contact by specific persons was not fully confirmed. 45 fathers who were forbidden

⁵² J. Włodarczyk-Madejska, *Efficiency of consultative teams of court experts*, „Prawo w Działaniu” (Law in Action) 2017, No. 32, p. 113.

from contacting the children did not express any position in the case. In part of the cases, this resulted from the fact that they did not attend the hearings, in spite of having been duly summoned. Children were not treated as participants in the proceedings, though the effect of the proceedings always affected the child directly⁵³. The establishment of the child's position was as a rule indirect (hence not always reliable) in 36% of the cases. Direct hearing of the children took place only in 17 cases (9.5%). Thus the hypothesis that direct hearing of children would not be frequent was fully confirmed

3. Conditions justifying ordering a contact ban

The actual circumstances of the cases in which the ban on maintaining contact with the child was issued to a specific person (usually the father) can be classified into three groups of cases.

The first group included factual conditions in which the person entitled to contact had harmed the child in the past by one (or several) behaviours harmful to the child, such as an offence against the child, in particular sexual abuse; used violence with at least indirect impact on the child; created a state of danger to the child while being the child's carer, because the person in question exhibited risky behaviours due to mental disturbances or while under the influence of psychoactive agents (mainly alcohol); exerted harmful influence on the child's upbringing, by stimulating the latter's disobedience or asocial behaviours.

The second group covered cases of long-term abandonment of contacts making the child's 'first-plan guardian' fear that resumption of contacts might disturb the already stabilized (in the guardian's opinion) situation of the child. In some cases, the factual state belonged also to the first of the groups listed (where the absence of contacts was due to a prison sentence served or psychiatric treatment, hospitalization included).

The third group of cases were those in which the child was placed in foster care due to neglect (usually culpable) of the person entitled to contact and contact with such a person interfered with the upbringing process or decreased the likelihood of the child's adoption.

As a rule, the ban seemed fully justified with respect to cases belonging to the first group. The assessment of the situation in other groups was definitely more diversified.

Among the facts of the examined cases that can be deemed indicative of a serious threat or even contrary to the child's good, with the highest intensity of this threat, we should mention sexual abuse of the child involved in the proceedings or sexual abuse of another child by the person who was forbidden contact; stark earlier neglect or an act posing a serious threat to the child's life where a possibility of a dangerous situation repeating itself cannot be excluded (the above concerns a case in which a drug addict, acting under the influence of drugs, attempted to kill the child and this person continued to take drugs).

⁵³ On the subject of the minor's position in guardianship proceedings, see: P. Rylski, *Uczestnik postępowania nieprocesowego – zagadnienie konstrukcyjne*, Warszawa 2017, pp. 248–252.

From the point of view of the frequency of occurrence, the following conditions seemed to have been of particular importance: negative features of the person who was forbidden contact and/or criminality and behaviour inconsistent with social standards, making them a bad role model for the child; the person concerned resorting to violence as a universal means of solving family conflicts; threat to the child's chances of being adopted or adaptation in the present upbringing environment, where there is a positive forecast for the provision of proper care to the child.

What was of essential importance were also the circumstances pertaining to the child, which included in the first place: bad memories of the behaviour of the person covered by the ban on contact (most frequently use of violence towards the child's mother); fear of the person covered by the ban; adverse physiological reactions in to unaccepted contact; conscious, determined position of the child that they do not wish to have contact with the person entitled to contact in any form. (As regards the latter circumstance, certain doubts may arise whether children have always been able to consciously understand that contact as understood by law is not limited to direct meetings, but includes also conversations via telephone, Internet communicators and correspondence. They must have rejected these forms of contact in a conscious and determined way. It is hard to be entirely sure that children excluded also the admissibility of informing the person entitled to contact about their health, progress in education, plans for further education, etc. and possible receipt of positive information about the person who was forbidden contact, for instance, that said person has completed anti-addiction treatment, remains clean/sober, has undertaken employment, practises sports, helps others, has success in any field, etc.).

In individual cases, the court took into account the specific circumstances generated by the facts. For instance, in one of the cases, the court must have shared the fear that contact could contribute to the transmission to the son by the father of another – non-Polish – nationality a social model based on discrimination of women and permitting the use of violence towards them.

Another essential circumstance was the attitude of the person whom the ban concerned (usually a parent) manifested by acceptance of the ban or absence of any activity constituting an expression of lack of consent for the ban – for instance, where a given person was duly informed about the date and time of a hearing but did not present at it, nor did it present its position as regards the request in any way thus creating a factual presumption that the person shows no interest in the child or contact with the child.

It can be presumed that as a rule courts took into account more than one circumstance justifying the ban on contact. They included the 'personality profile' of the person who was to be forbidden contact, the degree of the likelihood of a negative influence of contact on the child, the position of the child itself.

Where the child remained in foster care and the likelihood of ensuring the child's proper upbringing by the parents (return of the child to the family which would be fully and properly functional – at least until the child was able to maintain him/herself) was not high, good preparation for adoption or good functioning in family or institutional foster care were seen as more favourable for the child than maintaining bonds with the biological family. The circumstances of crucial importance for adjudicating a contact ban are provided in Table 3.

Arguments in support of the thesis that contact ban is needed	Frequency	Percentage
The person entitled to contact is a bad role model	74	40.9
The person whom the request concerns applied violence towards the child or another person (including the child's mother)	55	30.4
The child is determined to refuse contact	47	26.0
The child fears the person, has bad memories associated with them	40	22.1
Contact disturbs (would disturb) adaptation of the child in a new upbringing environment	35	19.3
The child does not know or does not remember the person to be affected by the ban on contact (including when the child believes the person to be dead)	33	18.2
Experts diagnosed an incorrect parental attitude	25	13.8
Conflict with the primary carer has a negative impact on the message conveyed to the child by the person to be banned from contact	23	12.7
The person who was forbidden contact is serving a custodial sentence	20	11.0
The person who was forbidden contact was grossly neglectful during earlier contact with child	16	8.8
The child was diagnosed with adverse physiological reactions in connection with unaccepted contact	12	6.6
The person to be covered by the ban is guilty of sexual harassment (of this or another child)	11	6.1
The person who was forbidden contact had used contact contrary to its purpose in the past, not taking care of the child, provoking tension and rows	8	4.4
No 'upbringing coalition' with the child's primary carer	7	3.9
Attempt at committing another offence against the child	5	2.8
The person to be covered by the ban kidnapped the child before	3	1.7
Contact disturbs the child's mental welfare for other reasons	23	12.7
Other (very individualised, related to facts of the case)	44	24.3
181=100% The percentages do not add up to 100, because the reasons contain several arguments		

Source: Author's own study.

4. Summary

The survey confirmed the position which can be found in literature that the ban on contact with the child should be imposed rarely. Many courts have not issued a single judgment of this kind in the past few years and in the majority of the courts asked to send files, decisions forbidding contact were very few.

It has not been observed that the ban was, in principle (always or in the majority of cases) another decision following a prior limitation of contact. Information about earlier adjudications concerning the child's contact with the person affected by the ban on contact was not found in the files of any cases studied. The files studied showed that only in 11.6% of the cases contact had been limited in a legally binding way earlier or their forms were specified in the decision (settlement) determining the forms and frequency of the contact so that they already included such limitation due to their very

nature (for instance, only indirect contact, contact supervised by a curator or contact in the presence of a psychologist in a clearly specified place). There might have been some earlier limitations of contact also in other cases, but this could not be verified in the present analysis.

In at least one-third of cases, the form and frequency of contact was never formally determined in the parents' agreement, in the court judgment or in the amicable settlement. The proceedings relating to the ban on contact were thus the first court proceedings concerning contact. Sometimes it was justified – for instance, where a given person had committed a crime against the child and it was impossible to exclude that the person might reoffend or where it was established that any contact (even the child's awareness of information concerning the child being passed to the person) could constitute a source of suffering for the child.

The majority of the judgments did not contain a statement of reasons and thus it can only be presumed what underpinned the decision, taking into account the evidence in the case files.

It seems that occasionally the ban on contact might have been understood as solely a ban on direct contact (in form of direct meetings and distance communication) – which would no doubt be justified – without it being considered a 'total' ban, covering even access to information about the child's life. In consequence it cannot be excluded that it would be enough to radically limit contact instead of banning it. In this context it is, however, necessary to draw attention to the fact that the degree of the legal awareness of the participants in the proceedings was in most cases rather low. On the other hand, the order imposing the ban gave the 'direct carer' and the child a considerably greater sense of security than the order limiting contact. It must have also sent a clear message to the person who was forbidden contact.

In almost every fifth case, a 'preventive' ban was observed in relation to contact which have long (relative to the child's age) been neglected by the entitled person. The aim of such a ban, which the applicants pointed to, was to protect the child against the 'shock' that could be generated by the appearance in his/her stable life (without the participation of the person concerned) of the person entitled to contact or a possible fear that once contact is resumed the entitled person will not be interested in maintaining regular contact. In most cases, these considerations related to contact between children and fathers. It is worth emphasizing that such a position was substantiated by lack of interest in the proceedings on the part of the person entitled to contact, who failed to appear at the court hearing in spite of having been duly summoned (in the court's opinion), failed to present his/her position in the form of a written statement of defence, and failed to take any action after a ruling was made by the court.

There seems to be no doubt that direct contact without prior preparation could prove unfavourable for both the child and the entitled person. Yet, it also seems that in individual cases it might also prove unfavourable to order the ban, in particular, when the child was small and the likelihood that the child's situation, assessed as stable, would change was either not verified or was not high in the light of life experience. The decision concerning contact can be changed (Art. 113⁵ FGC), which applies also to a contact ban. Nevertheless, in the described group of cases, the likelihood that personal relations between the child and the person who was forbidden contact, would be established or resumed seemed definitely lower than the likelihood that the ban

would constitute an additional, powerful barrier to a change of the actual condition. In the long run this may prove unfavourable for the child.

The group of cases studied included cases concerning contact between relatives (mainly parents) and children being in foster care. There was no doubt that in the majority of the cases failure to stick to the meeting schedule and the parents' incorrect behaviour during meetings with children gave rise to serious concerns. The way in which the obligation (and not only the right) of the parents to maintain contact with children was performed tended to disorganise the upbringing efforts of entities responsible for foster care as well as actions intended to prepare the children for possible adoption.

The way in which contact with children remaining in foster care is effected by people other than the parents (in particular by the children's grandparents) did not arouse concerns. The decisive factor why measures which ultimately led to the ban on contact were undertaken was the conviction that adoption would provide the best development opportunities for the children, while being the most favourable option for sustaining bonds with the extended family. This attitude was probably a consequence of what other children remaining in foster care experienced, where their parents did not achieve long-term ability to take over direct care over children and to perform their parental obligations appropriately.

Where the potential possibility of adoption is treated as a justification of the thesis that the contact of a child remaining in foster care with the biological family always constitutes a serious threat to the child's good, this should be approached with utmost caution. What seems to support this approach is the trend of not keeping adoption secret from the child, recognition of the adopted child's right to retain his/her identity as well as the conviction, having ever more adherents, that the mutual right of parents and children to maintain contact has its source in the 'law of nature'⁵⁴ and in consequence that it also continues after a legally binding adoption judgment. Although the latter position can arouse doubts viewed against the background of Polish law⁵⁵, it is hard to say how it will be perceived when the children adopted today will reach maturity⁵⁶.

The general assessment of case law is positive. Yet, there are things that should be recommended to make it better and namely:

- change of the practice; the child should be treated as a participant in the proceedings;
- more frequent use of indirect hearing of the child;
- admission of a psychological-pedagogical opinion as a rule;
- adoption of effective actions to determine the position in the case of the person who is to be banned from contacting the child;
- considering of the child's good in a longer time perspective and distinguishing between the protection of the child's interest and the protection of the interest (and sometimes only convenience) of the 'primary carer';

⁵⁴ T. Justyński, *Prawo do kontaktów z dzieckiem w prawie polskim i obcym*, Warszawa 2011, pp. 27–28; T. Sokołowski, commentary on Art.113 FGC [in:] *Kodeks rodzinny i opiekuńczy. Komentarz LEX*, H. Dolecki, T. Sokołowski (eds.), Warszawa 2013, p. 796; J. Zajączkowska, *Aspekty prawne kontaktów z dzieckiem*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2018, No. 1, pp. 275–277.

⁵⁵ On this subject in particular J. Gajda, *Tajemnica przysposobienia i jej ochrona w polskim prawie cywilnym*, Przemysł–Rzeszów 2012.

⁵⁶ In his commentary on Art. 119¹(1), second sentence FGC Tomasz Sokołowski (T. Sokołowski, *Kodeks...*, p. 801) argues that this regulation 'constitutes an expression of the already fairly outdated approach, being the dogma in the 1970s [...] Today [...] such bonds are treated as the child's personal good and are subject to strong protection, also on the basis of fundamental instruments of international law [...]'].

- considering whether in a given case it might not be more favourable to seriously reduce contact rather than ban it, in particular by prohibiting staying with the child and direct communication with the child as well as adopting a rule that the ban on contact must be preceded by limitation of contact;
- considering the advisability of instituting parental authority-related proceedings *ex officio* where the circumstances revealed in the proceedings concerning the ban on contact with the child demonstrate a threat to its good and the parent has unlimited parental authority.

Abstract

Elżbieta Holewińska-Łapińska, *Adjudicating a ban on contact with a child in the practice of Polish courts*

The article presents the main findings of the survey of files of 181 cases in which a ban on contact with children was adjudicated and became legally binding by the end of 2017. The survey was carried out by the Institute of Justice. The survey showed that ban on contact with a child is adjudicated relatively rarely. The general assessment of the case law is positive, nevertheless the author presents a number of suggestions of how it can be improved. She suggests, among others, a change in the practice of treating the child as a participant in the proceedings; more frequent use of direct hearing of the child; treating the admission of psychological and pedagogical opinions as a rule; effective actions in order to establish the position in respect of the person who is to be banned from contacting the child. The author points to the validity of the long-term assessment of the child's good and distinction between the protection of the child's interest and the interest of the 'primary carer'.

Keywords: *contact, ban on contact (contact ban), child's good, threat to the child's good, thing contrary to the child's good, family life, family law*

Streszczenie

Elżbieta Holewińska-Łapińska, *Orzeczenie zakazu kontaktów z dzieckiem w świetle polskiej praktyki sądowej*

W artykule zostały przedstawione główne ustalenia badania 181 akt spraw, w których zapadły orzeczenia o zakazie kontaktów z dziećmi i uprawomocniły się do końca 2017 r., przeprowadzonego w Instytucie Wymiaru Sprawiedliwości. Badanie wykazało, że zakaz kontaktów z dzieckiem jest orzekany stosunkowo rzadko. Generalna ocena orzecznictwa jest pozytywna, niemniej autorka przedstawiła szereg postulatów w celu jego udoskonalenia. Między innymi sugeruje zmianę praktyki przez traktowanie dziecka jako uczestnika postępowania, częstsze stosowanie bezpośredniego wysłuchania dziecka, traktowanie dopuszczenia opinii psychologiczno-pedagogicznej, jako reguły, podejmowanie efektywnych działań w celu ustalenia stanowiska w sprawie osoby, której kontakty mają być zakazane. Wskazała na celowość oceny dobra dziecka w dłuższej perspektywie czasowej i rozgraniczanie ochrony jego interesu od ochrony interesu (a niekiedy tylko wygody) „pierwszoplanowego opiekuna”.

Słowa kluczowe: *kontakty, zakaz kontaktów, dobro dziecka, zagrożenie dobra dziecka, naruszenie dobra dziecka, życie rodzinne, prawo rodzinne*

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