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Legal Guardianship of Minors. Selected Issues

Opieka nad małoletnim. Wybrane zagadnienia

SUMMARY

The article addresses selected issues concerning legal guardianship of minors in Poland. The study points to the specific nature of legal guardianship and the purpose for which it is established. Legal guardianship results from the legal obligation and involves the exercise of custody of the person for whom it was established. Therefore, it covers the custody over the person, property management and representation of the ward. The appointment of a guardian, i.e. a specific person designated to exercise the custody, should be distinguished from the establishment of guardianship itself. In the process of selection of the guardian by the guardian court, the welfare of the child is the decisive factor. This is the overriding criterion and it comes to the fore of the proceedings. The principle of the child's welfare also applies to other decisions made by the guardianship court during the guardianship. The article specifically discusses issues whose resolution may raise interpretative doubts. These include, i.a., the guardianship exercised jointly by spouses, the catalogue of negative preconditions excluding the possibility of exercising the guardianship of minors, and the obligation for the guardian to obtain authorisation in all important matters relating to the ward.

Keywords: legal guardianship; guardian; minor; child

I.

The issues concerning the institution of legal guardianship have not been comprehensively regulated in the Polish legal system by the Act of 25 February 1964 – Family and Guardianship Code[1]. The substantive law provisions governing that institution are contained in Articles 145–177 FGC, while the procedural issues concerning the proceedings in guardianship matters are contained in the

[1] Consolidated text Journal of Laws 2017, item 682, hereinafter: FGC.

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Act of 17 November 1964 – Code of Civil Procedure[2] in its Articles 568–578[1] and 590–598. According to the regulations, the legal guardianship is based on a legal title obligating to exercise it and consists in the exercise of custody of the person for whom it has been established and assets of this person[3]. It occurs in two forms, i.e. the guardianship for the minor and the guardianship for the totally incapacitated person. This study discusses selected issues in the field of the guardianship of minors, including in particular those the resolution of which may face interpretative doubts. Such issues include the problems concerning the joint guardianship of minors by the spouses who are separated. The lack of code regulations and the inconsistent position of scholars in the field justify an attempt to confront different views. In addition, an assessment of the criteria for exclusion from the group of candidates for the guardian and the consequences of differing indications as to the candidacy for the guardian formulated by the mother and father of the child are presented. The subsequent part of the study addresses the reasons for the guardian's dismissal after the establishment of the guardianship, but before the guardian has assumed the duties. The final part of the study is devoted to the concept of "major matters" the settlement of which requires permission from the guardian. The issues in question are presented in reference to similar regulations resulting from exercising parental responsibility by parents.

The guardianship of the minor is a category of family law and operates as a surrogate of parental responsibility. In this form, primarily the educational function is carried out in relation to the persons under guardianship[4]. Therefore, the provisions on parental responsibility (Article 155 § 2 FGC) apply to the matters of guardianship. There is a dispute among legal scholars as to the legal nature of parental responsibility. For most of them, it is considered a kind of subjective rights[5]. The guardianship, unlike parental responsibility, does not constitute a guardian's subjective right. The person exercising the custody acts solely in the interest of the ward, and not in their own interest[6]. The activities as part of the guardianship are the object of duties of the guardian and his powers are merely a tool for fulfilling those duties. However, the guardianship may be a source of the subjective rights of the minor. The guardian is obliged to take certain actions in the interest of the child. Where the guardian's failure to perform or improper performance of the

[2] Consolidated text Journal of Laws 2018, item 1360 as amended, hereinafter: CCP.

[3] H. Ciepła, [in:] H. Ciepła, J. Ignaczewski, J. Skibińska-Adamowicz, *Komentarz do spraw rodzinnych*, Warszawa 2014, p. 768.

[4] J. Gajda, [in:] *Kodeks rodzinny i opiekuńczy*, red. K. Pietrzykowski, Warszawa 2018, p. 1051; M. Andrzejewski, *Prawo rodzinne i opiekuńcze*, Warszawa 2014, p. 240; T. Smyczyński, *Prawo rodzinne i opiekuńcze*, Warszawa 2018, p. 363.

[5] G. Jędrejek, *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2017, p. 708; J. Gajda, *op. cit*., p. 1052; J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warszawa 2016, p. 509.

[6] J. Gajda, *op. cit*., p. 1052; J. Ignatowicz, M. Nazar, *op. cit.*, p. 631.

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obligations resting on him, the minor shall be entitled to claim damages[7]. Since a legal relationship is formed between the guardian and the minor, one must apply to it the rules and provisions on the protection of subjective rights[8].

The Family and Guardianship Code does not provide for guardianship established *ex lege*. It follows from the regulations that each time it arises under a decision on its establishment issued by the guardianship court[9]. The proceeding to establish the guardianship for a minor child are initiated by the court *ex officio*. This results from the content of Article 145 § 2 FGC and Article 570 CCP. The first of these provisions stipulates that the guardianship is to be established by a guardianship court as soon as the court learns that there is a legal ground for doing so. On the other hand, Article 570 CCP authorises the guardianship court to initiate proceedings *ex officio*. This concerns the cases provided for in Title II of this Code (Article 145 § 1 FGC). Pursuant to Article 94 § 3 FGC, the guardianship is established if none of the parents exercise parental responsibility or if the parents are unknown. Neither parent is entitled to parental responsibility if both parents are dead or deprived of full capacity to perform acts in law. Moreover, if a ruling on suspension of parental responsibility (Article 110 § 1 FGC) or on depriving them of that responsibility (Article 111 §§ 1 and 1a, Article 112 FGC), as well as when in a judgement determining the child's origin, the court has ordered the suspension or deprivation of parental responsibility for both parents or one of them when that responsibility is not vested in the other one either (Article 93 § 2 FGC).

It is being assumed in the case law that the phrase formulated in Article 570 CCP that the guardianship court "may" initiate proceedings *ex officio* should not be understood as meaning that the initiation of proceedings depends on the court's discretion. In view of the applicable provisions of substantive law and the essence of the tasks of the guardianship court, whenever a given court becomes aware of the grounds that justify its interference *ex officio*, it should, not only "may", institute appropriate proceedings[10]. The literature stresses that the principle of judicial operation *ex officio* results from the aim of guardianship proceedings, namely the comprehensive protection of persons requiring legal guardianship over their person and property[11]. The guardianship court's right to act *ex officio* resulting from Article 570 CCP ensures the possibility of quick and effective intervention – it is a guarantee of fulfilment of the tasks that have been set before it[12].

[7] L. Kociucki, *Opieka nad małoletnim*, Warszawa 1993, pp. 43–44.
[8] J. Gajda, *op. cit*., p. 1052; J. Ignatowicz, M. Nazar, *op. cit.*, p. 631.
[9] J. Gajda*, op. cit*., p. 1056.
[10] Resolution of the Supreme Court of 22 November 1977, III CZP 91/77, Legalis No. 20516.
[11] H. Ciepła, *op. cit.*, p. 774.
[12] A. Zieliński, G. Jędrejek, *Prawo rodzinne i opiekuńcze w zarysie*, Warszawa 2011, p. 274.

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Article 572 CCP corresponds to the principle expressed in Article 570 CCP. It provides for the obligation to notify the guardianship court of an event justifying the initiation of proceedings *ex officio*. The notification obligation is incumbent on "everyone", i.e. both natural persons and governing bodies of legal persons. This means that it is of a general nature[13]. The provision of Article 572 § 2 CCP stipulates that this obligation is incumbent primarily on civil registry offices, courts, prosecutors, notaries, bailiffs, local and central government administration bodies, police authorities, educational institutions, social guardians and organizations, and institutions exercising guardianship of children or mentally ill persons. The list from §2 of Article 572 CCP is not complete. The provision lists only central and local government authorities, social and other institutions which "first of all" are obliged since due to their responsibilities they often have opportunities to learn about events important for the intervention of the guardianship court[14].

The provision of Article 572 CCP does not specify the time limit within which the guardianship court should be notified and does not provide for sanctions for failure to comply with this obligation[15]. However, the prevailing scholarly opinion is that, in some cases, a failure to notify by a person who is aware of events justifying the initiation of proceedings may result in holding that person financially liable for a tort. This occurs when, as a result of the lack of notification, the guardianship court does not initiate proceedings in due time, which results in material damage. Furthermore, the disciplinary liability may also arise, especially with regard to employees of central and local government authorities[16].

II.

The guardianship is established on the basis of a judicial decision on its establishment. The establishment of guardianship is a decision introducing a child custody system instead of parental responsibility. The appointment of a guardian, which consists of the appointment of a designated person to exercise custody over a minor, should be distinguished from the establishment of guardianship itself[17].

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[13] J. Bodio, [in:] *Kodeks postępowania cywilnego*, t. 1: *Komentarz do art. 1–729*, red. A. Jakubecki, Warszawa 2017, pp. 948–949; A. Zieliński, *Kodeks postępowania cywilnego. Komentarz*, Warszawa 2017, p. 1097.

[14] B. Dobrzański, [in:] *Kodeks postępowania cywilnego. Komentarz*, red. Z. Resich, W. Siedlecki, t. 1, Warszawa 1969, p. 852; M. Grudziński, [in]: *Kodeks rodzinny i opiekuńczy. Komentarz*, red. B. Dobrzański, J. Ignatowicz, Warszawa 1975, p. 828.

[15] J. Bodio, *op. cit*., p. 949.

[16] B. Dobrzański, *op. cit.*, p. 853; M. Grudziński, *op. cit*., p. 828.

[17] J. Gajda, *op. cit*., p. 1056. In the period between the initiation of the procedure for the establishment of guardianship and the assuming of the function by the guardian, it may be necessary

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In accordance with the Family and Guardianship Code, the guardianship may only be entrusted to natural persons[18]. Until 12 June 2009, regulations allowed also institutional guardianship. Pursuant to Article 150 FGC, the Minister of Justice, in consultation with the ministers concerned, was authorised to issue an regulation specifying the principles and procedure for entrusting guardianship to educational institutions or other social institutions and organizations, and the manner in which they would exercise the guardianship. However, this regulation has never been issued. In the amendment of 2008[19], the legislature repealed Article 150 FGC, pointing to the anachronism of the concept of institutional guardianship, which does not meet the requirements and postulates of modern pedagogy, and adopted the concept of exclusively personal guardianship, exercised by natural persons – either individually or jointly[20].

The principle of individual guardianship should be concluded from the content of Article 146 FGC. In the case of a child, the court may entrust joint custody only to spouses. However, this is disputable when both spouses are separated. The literal wording of the provision does not make it clear whether they may be jointly appointed the guardians or not[21]. There is a breakdown of cohabitation between spouses who are separated. The spiritual, physical and economic ties expire, although the marriage still formally exists. The spouses usually cease to provide mutual assistance, cooperate for the benefit of the family or to run their common household[22]. In such a situation, it seems right to refer to the good of the child who needs care, and to the social interest[23]. Where the spouses are in separation, the above-mentioned circumstances will predominantly be a contraindication to entrusting them with guardianship. However, for the sake of the ward, this possibility should not be definitely ruled out. Such a situation may occur if a legal separation has been judicially declared and the spouses, despite this ruling, do not live in actual separation and live together[24]. However, the scholars in the field point out that if there

to adopt appropriate orders, including the appointment of a court-appointed custodian pursuant to Article 147 FGC.

[18] J. Ignatowicz, M. Nazar, *op. cit.*, p. 635.

[19] Act of 6 November 2008 amending the Act – Family and Guardianship Code and certain other acts (Journal of Laws No. 220, item 1431).

[20] K. Gromek, *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2018, p. 1076; L. Kociucki, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz. Przepisy wprowadzające KRO*, red. K. Osajda, Warszawa 2017, p. 1665; J. Ignatowicz, M. Nazar, *op. cit.*, p. 635.

[21] G. Jędrejek, *op. cit.*, p. 981.

[22] J. Ignatowicz, M. Nazar, *op. cit.*, p. 234.

[23] J. Gajda, *op. cit.*, p. 1058; S. Kalus, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, red. K. Piasecki, Warszawa 2011, p. 1017; H. Haak, A. Haak-Trzuskawska, *Opieka i kuratela. Komentarz do art. 145–184 KRO oraz związanych z nimi regulacji KPC (art. 516, 518, 520, 573–574, 590–598, 599–602, 604–605)*, Warszawa 2017, p. 12.

[24] J. Gajda, *op. cit.*, p. 1058.

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is a separation decision during the joint exercise of guardianship by the spouses, then pursuant to Article 169 § 2 FGC the court should exempt one of them from performing the function[25]. The issue of exempting a guardian from exercising the custody will be discussed in paragraph III of this study.

Where both spouses are appointed the guardians, a separate guardianship relationship arises between each of them and the child[26]. In accordance with Article 155 § 2 FGC, to the exercise of guardianship shall apply *mutatis mutandis* the provisions on parental responsibility, and therefore, pursuant to Article 97 § 1 FGC, each spouse is both obliged and entitled to exercise it on their own. The Supreme Court's Directional Recommendations of 9 June 1976 (thesis XIV point 2)[27] stipulated that the guardianship court should seek to entrust guardianship to both spouses in order to ensure that the child has natural conditions of development. However, this is not an absolute principle and depends on a specific case. One-person care will be more desirable when a single person, having strong emotional ties with the child, most often due to kinship, wants to take care of the minor.

The provision of Article 148 §§ 1 and 1a FGC lists negative conditions excluding the possibility of exercising the guardianship. The guardian may not be appointed those who have no full capacity to perform acts in law, deprived of public rights or deprived of parental responsibility. Moreover, the list includes a person convicted of a crime against sexual freedom or morality, an intentional offence committed with violence against a minor or an offence committed to the detriment of or in cooperation with a minor. The exclusion concerns also people against whom a prohibition was ruled with regard to the pursuit of activities related to the upbringing, medical treatment, education of minors or care of them; the obligation to refrain from being in certain environments or places; prohibition on contacting with certain persons and leaving a particular place of residence without the consent of the court. Thus, that provision delimits the circle of persons excluded *ex lege* from being able to take up the function of guardian[28].

The prevailing scholarly opinion states that the provision of Article 148 § 1a FGC must be interpreted in a strict manner. Therefore, one cannot derive from it additional circumstances preventing the function of guardian from being assumed[29]. However, such a detailed list of offences that exclude a person from the circle of candidates to take up that function, may raise doubts. In the literature on the subject, there is a lot of criticism about the catalogue contained in the provision as too

[25] J. Sadomski, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, red. J. Wierciński, Warszawa 2014, pp. 998–999; L. Kociucki, [in:] *Kodeks rodzinny i opiekuńczy…*, p. 1650; H. Haak, A. Haak-Trzuskawska, *op. cit.*, p. 217.

[26] H. Haak, A. Haak-Trzuskawska, *op. cit.*, p. 12.

[27] Resolution of the Supreme Court of 9 June 1976, III CZP 46/75, Legalis No. 19477.

[28] J. Gajda, *op. cit.*, p. 1060; J. Ignatowicz, M. Nazar, *op. cit.*, p. 636.

[29] G. Jędrejek, *op. cit.*, p. 991; J. Sadomski, *op. cit.*, p. 1002.

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detailed. It is claimed that the commission of other offences (e.g. drug trafficking) is also a disqualifying criterion while not mentioned in that provision[30]. It can, therefore, be assumed that the catalogue contained in Article 148 FGC should be regarded as an example list since it is the child's welfare which should be necessary and at the same time sufficient for the assessment of the qualifications of the candidate guardian. In any event, a person with regard to whom there is a likelihood that they will not properly fulfil their duties as guardian may not be appointed the guardian (Article 148 § 2 FGC). The assessment of the candidate, taking into account the criterion referred to in Article 148 § 2 FGC, is the court's responsibility and depends on the circumstances of a particular case. The reasons justifying the exclusion of a given person may be either of a culpable or unculpable nature. It is being pointed out, e.g., that these obstacles include alcohol addiction, reprehensible lifestyle, job evasion or reluctant attitude towards the minor (culpable reasons) as well as poor health condition, old age, excessive load of professional or family duties (unculpable causes)[31].

It should be noted that the listed conditions for assuming the guardianship do not contain the issues of Polish citizenship and permanent residence in Poland. Thus, foreign citizens or persons residing abroad are not excluded from the group of candidates for guardians[32]. Poland's accession to the European Union and, as a consequence, the opening of borders caused an increase in the migration of Polish nationals. It seems, therefore, that the lack of restrictions on taking up the function of a guardian by the above-mentioned persons is absolutely correct. It should be noted, however, that the guardianship should be granted with utmost caution, taking into account the possibility of actual supervision over exercising the custody[33]. The court, when entrusting guardianship to foreign citizens or persons residing abroad, should first and foremost be guided by the overriding principle of the child's best interests, including the child's need to preserve national and cultural identity.

The provision of Article 149 FGC sets out the preferential guidelines for the selection of a guardian[34]. It outlines the circle of persons to be considered by the guardianship court when selecting a candidate for a guardian. First of all, the provision requires that the person indicated by the father or mother of the child be included, if they were not deprived of parental responsibility (Article 149 § 1 FGC). The manner and form of indication of the candidate by the parents is not explicitly regulated by law. Therefore, it should be recognized that it can be done through any

[30] L. Kociucki, [in:] *Kodeks rodzinny i opiekuńczy*..., pp. 1657–1658; S. Kalus, *op. cit.*, p. 1020.

[31] Decision of the Supreme Court of 17 February 1999, II CKN 184/99, LEX No. 1212960.

[32] T. Smyczyński, *op. cit.*, p. 367; S. Kalus, *op. cit.*, p. 1022.

[33] S. Kalus, *op. cit*., p. 1023; J. Strzebinczyk, [in:] *System Prawa Prywatnego*, t. 12: *Prawo rodzinne i opiekuńcze*, red. T. Smyczyński, Warszawa 2011, p. 854.

[34] J. Gajda, *op. cit.*, p. 1060; J. Ignatowicz, M. Nazar, *op. cit.*, p. 636.

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behaviour which manifests the will of the minor's father or mother[35]. The parents of a child, acting separately or jointly, may point to one or several candidates for the guardian. However, pointing to different candidates by the father and mother may turn out to be problematic. Most scholars in the field are of the opinion that in this situation one should take into account the opinion of the one who died later[36]. However, this position is debatable. As a consequence of supporting this view, the indication of different candidates by each parent would cease to be relevant at the moment of death of one of them. However, it cannot be ruled out that the parent who died earlier could have indicated a candidate with better qualifications as a guardian for the minor than the person proposed by the father or mother who lived longer. Therefore, one should agree with the thesis that in the event of disagreement of parents' opinions regarding a candidate for the guardian, the dispute should be settled by the guardianship court, taking into account the best interests of the child and the qualifications of the persons proposed by both parents[37].

If the parents' proposals are not accepted, the court shall consider the candidacy of relatives or other persons that are close to the ward or ward's parents (Article 149 § 2 FGC). One can mention as close persons those who are linked with the ward with a personal relationship resulting from emotional ties or the fact that they are the actual guardians of the ward[38]. The jurisprudence indicates that the provision of Article 149 § 2 does not set out priorities as regards closer or further kinship of certain persons interested in becoming the guardian. The choice of the candidate is ultimately determined by their suitability for performing the function[39]. For this purpose, the court may order to carry out a background survey by a professional family custodian[40]. In the absence of relatives or persons close to the child or his/her parents, the guardianship court is obliged to ask a competent social assistance unit or a social organization dealing with minor custody matters for proposing a person to whom the guardianship could be entrusted. However, if the person under guardianship stays at a care and educational institution or other similar institution, a juvenile detention centre or a youth emergency shelter, the court has the option to contact this institution, centre or shelter (Article 149 § 3 FGC).

The above-mentioned order of choosing a guardian is not binding on the court. The principle of welfare of the ward expressed in Article 149 § 1 FGC is the decisive

[35] J. Sadomski, *op. cit.*, pp. 1005–1006; L. Kociucki, [in:] *Kodeks rodzinny i opiekuńczy…*, p. 1662; H. Haak, A. Haak-Trzuskawska, *op. cit.*, p. 28.

[36] J. Gajda, *op. cit.*, p. 1063; H. Haak, A. Haak-Trzuskawska, *op. cit.*, p. 28.

[37] G. Jędrejek, *op. cit.*, p. 994; J. Strzebinczyk, [in:] *System Prawa Prywatnego*, pp. 847–848.

[38] H. Haak, A. Haak-Trzuskawska, *op. cit*., p. 31.

[39] Decision of the Supreme Court of 25 October 2000, IV CKN 1628/00, LEX No. 52619.

[40] H. Ciepła, *op. cit*., p. 780; H. Haak, A. Haak-Trzuskawska, *op. cit*., p. 31.

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criterion when choosing a candidate for the guardian[41]. In the Directional Recommendations (thesis XIV point 3), the Supreme Court stressed that the appointment of the appropriate person as a guardian is of particular importance for the proper conduct of guardianship. Of essential importance here is to provide the child with proper education. Therefore, the guardianship court should collect data specifying the subjective qualifications of the candidates for a guardian[42]. The scholars in the field list them as follows: moral qualifications, educational predisposition, attitude towards the minor, age, health condition, occupation/profession performed[43]. The obligation to examine the subjective qualifications of each participant is absolute[44].

For a child in foster care, the choice of the guardian depends on the form of foster care[45]. In the case of placing a child in a foster family, the court entrusts the guardianship predominantly to foster parents (Article 149 § 4 (1) FGC). If the child resides in a family orphanage or family-type care facility, the guardianship should be entrusted primarily to persons running that home or facility (Article 149 § 4 (2) and (3) FGC). However, when a child stays in a care and educational facility, socialization facility, specialist and therapeutic facility, intervention or regional care and therapeutic institution, the court entrusts the guardianship to the relatives of that child in the first place (Article 149 § 4 (4) FGC). The appointment of a guardian in these cases should take place within 7 days of the decision on deprivation of parental responsibility becoming final (Article 149 § 4 *in fine* FGC).

In the case of so-called anonymous adoption, in accordance with Article 149 § 5 FGC, the rules set out in §§ 1, 2 and 4 (4) of the discussed Article do not apply. The provision of Article 119[1] § 1 FGC stipulates that parents may express their consent before the guardianship court to the adoption of their child in the future without specifying the adopting person, which results in the loss of parental responsibility and the right to contact the child[46]. In the event of the consent to anonymous adoption, the court, when choosing the guardian, will not consider the candidate proposed by the child's father or mother. Also, a person designated from among relatives or other close people of the ward or ward's parents will not be appointed the guardian[47]. A different view is presented by J. Sadomski, who has pointed out that the provision of Article 149 § 5 FGC rules out the application of priority for the choice of a child's relative, a person close to the child or a person close to

[41] J. Gajda, *op. cit.*, p. 1059, 1062; H. Haak, A. Haak-Trzuskawska, *op. cit*., p. 25; J. Marciniak, *Treść i sprawowanie opieki nad małoletnim*, Warszawa 1975, p. 21.

[42] Resolution of the Supreme Court of 9 June 1976, III CZP 46/75, Legalis No. 19477.

[43] J. Gajda, *op. cit*., p. 1063; J. Ignatowicz, M. Nazar, *op. cit*., p. 638; T. Smyczyński, *op. cit.*, p. 368.

[44] J. Gajda, *op. cit*., p. 1063.

[45] J. Strzebinczyk, *Prawo rodzinne*, Warszawa 2016, p. 395.

[46] J. Sadomski, *op. cit*., p. 1007; S. Kalus, *op. cit*., p. 1027.

[47] J. Gajda, *op. cit*., p. 1064; L. Kociucki, [in:] *Kodeks rodzinny i opiekuńczy…*, p. 1664.

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the child's parents, but it does not constitute a prohibition on their appointment. However, the author rightly stresses that in practice such situations can occur quite exceptionally[48].

Pursuant to Article 151 FGC, the guardianship court may appoint one guardian for several persons in a situation where there is no conflict between their interests. Whenever possible, the guardianship for siblings should be entrusted to one person. Whether the court will use the option of appointing one guardian for several wards will primarily be determined by the welfare of these persons. The appointment of one guardian for several people does not have to take place simultaneously[49].

III.

In the light of Article 152 FGC, the legislature creates the obligation to assume the guardianship by anyone whom the guardianship court appoints a guardian. As pointed out in the established scholarly opinion, assuming the guardianship is a civic, social and public duty, but also a legal obligation[50]. The assumption of guardianship takes place by making a promise (Article 153 FGC). Its content is formulated by Article 590 CCP ("I promise to perform the duties of guardian entrusted to me with all diligence and in accordance with the social interest, always bearing in mind the good of the person under my custody"). The promise is made orally, in person, to the guardianship court. It has a solemn character, and to emphasize this character, the chair of the panel should instruct the guardian about the essence and nature of the duties assumed, as well as legal and moral responsibility arising from the function being performed[51]. The promise is made and received without undue delay after the announcement of the decision on the establishment of guardianship, and when there was no such announcement – after its issuance[52].

It should be noted that the establishment of guardianship introducing a child custody system is of a constitutive nature, while the making of the promise by the guardian is a declarative act confirming the fact that a specific person has assumed the function of guardian[53]. This act should be documented in the minutes of the hearing. From this moment, the guardian obtains full legitimacy and power to ex-

[48] J. Sadomski, *op. cit*., pp. 1007–1008. Cf. other view: J. Ignatowicz, M. Nazar, *op. cit.*, pp. 637–638.

[49] H. Haak, A. Haak-Trzuskawska, *op. cit*., p. 40.

[50] J. Gajda, *op. cit*., p. 1066.

[51] H. Dolecki, [in:] *Kodeks postępowania cywilnego. Komentarz*, red. H. Dolecki, T. Wiśniewski, Warszawa 2013, s. 247; J. Gudowski, [in:] *Kodeks postępowania cywilnego. Komentarz*, red. T. Ereciński, t. 4, Warszawa 2016, p. 324; P. Pruś, [in:] *Kodeks postępowania cywilnego. Komentarz*, red. M. Manowska, t. 2, Warszawa 2015, p. 178; A. Zieliński, *op. cit.*, p. 1117.

[52] A. Zieliński, *op. cit*., p. 1117.

[53] J. Bodio, *op. cit*., p. 973; J. Gudowski, *op. cit*., p. 324.

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ercise the guardianship[54]. Whoever evades his duty to assume guardianship, fails to fulfil his obligation and may be liable for damage caused thereby[55]. Evasion of assuming the guardianship and refusal to make the promise may also result in a fine being imposed pursuant to Article 598 § 1 CCP. This provision does not specify the amount of the fine that may be imposed by a court, therefore Article 163 § 1 in conjunction with Article 13 § 2 CCP is to be applied here. It provides for the maximum amount of − PLN 3,000. The decision imposing a fine on a person who refrains from assuming guardianship may be appealed against under Article 394 § 1 (5) in conjunction with Article 13 § 2 CCP. The literature aptly points out that a person forced to be a guardian usually will not properly fulfil their duties as a guardian. Rather, the likelihood of occurrence of the conduct in question should lead to the exclusion of such a person from the group of candidates for the guardian[56].

However, the guardianship court may, pursuant to Article 152 *in fine* FGC, exempt for important reasons the appointed guardian from the guardianship obligation. The term "important reasons" is a vague concept and creates the possibility for the court to act within the so-called discretion margin[57]. The assessment of these reasons depends on the circumstances of the particular case and is subject to discretion of the court. This discretion is obviously not arbitrary, and before issuing the ruling, the guardianship court should carefully examine the circumstances justifying the exemption from the guardianship duty[58].

Two concepts can be seen in the literature. According to the first one, important reasons can justify dismissal of the guardian from the function only if they occur after the establishment of guardianship, but before it is assumed by the guardian. For example, important reasons include an abrupt health deterioration, a sudden trip abroad or an accident. In addition, the reluctance of the person designated to be the guardian raises doubts as to whether that person would be able to properly perform the obligations imposed and therefore is also considered an important reason[59]. These circumstances may occur only after the appointment of a candidate for guardian, because their earlier existence is a negative condition for the appointment of such a guardian. According to the previously discussed Article 148 § 2 FGC, the court first assesses the candidate for guardian and examines the premises justifying the probability of his or her failure to comply with the imposed obligations. If the negative conditions are met, the person is eliminated from the group of candidates for a guardian. Therefore, if important reasons were raised at the stage of the

[54] J. Bodio, *op. cit*., p. 973; T. Żyznowski, [in:] *Kodeks postępowania cywilnego. Komentarz*, red. A. Marciniak, K. Piasecki, t. 2, Warszawa 2016, p. 852.

[55] J. Gajda, *op. cit*., p. 1066; H. Ciepła, *op. cit.*, p. 784; T. Smyczyński, *op. cit*., p. 368.

[56] J. Ignatowicz, M. Nazar, *op. cit*., p. 643; J. Marciniak, *op. cit*., p. 26.

[57] J. Strzebinczyk, *Prawo…*, p. 398.

[58] J. Bodio, *op. cit*., p. 974; H. Dolecki, *op. cit*., p. 248; J. Gudowski, *op. cit*., p. 325.

[59] H. Dolecki, *op. cit*., p. 248; J. Strzebinczyk, *Prawo…*, p. 398; S. Kalus, *op. cit*., pp. 1028–1029.

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proceedings for the appointment of a guardian, then, assuming that the court acts correctly, their repeated notification in the procedure for exemption from the duty of guardianship should not take place[60].

On the other hand, the second concept allows the possibility of emergence of important reasons justifying the exemption from the duty of guardianship at an earlier stage of the proceedings. Therefore, important reasons include, in addition to those mentioned above, poor health, old age or excessive load of professional or social obligations. It should be assumed as admissible to invoke these reasons where the applicant did not present them earlier, i.e. at the stage of qualifying the applicant as a guardian and if omitting them would put at risk the correct exercise of guardianship and at the same time the welfare of the child[61].

The exemption resulting from Article 152 FGC is an exemption from the obligation to assume guardianship, not a dismissal of the guardian under Article 169 FGC (i.e. from function already performed). In the first case, no guardian is appointed, while when applying Article 169 § 1 FGC, the court may release an already appointed guardian at his or her request for important reasons. Moreover, if due to factual or legal obstacles the guardian is incapable of exercising the guardianship or commits acts or omissions to the detriment of the welfare of the ward, the guardianship court acting *ex officio* exempts the guardian from performing this function (Article 169 § 2 FGC). Factual reasons include the same reasons that justify the dismissal of the guardian at his or her request (e.g. due to deteriorating health, new professional obligations, change in family situation). Legal reasons are the circumstances justifying the inadmissibility of appointing a specific person the guardian (i.a. lack of full capacity to perform acts in law or deprivation of public rights)[62]. As an example of guardian's acts or omissions that breach the welfare of the ward, one can mention a situation in which the guardian behaves in such a way that if the parents behaved in the same way towards the child, it could be the basis for depriving them of parental responsibility[63]. However, the very existence of the above-mentioned circumstances does not cause the expiry the function of a guardian. For this to happen, a respective order of the guardianship court is required[64].

Pursuant to Article 155 § 1 FGC, the guardian cares of the ward and the ward's property. The provisions on parental responsibility apply *mutatis mutandis* to the exercise of guardianship, subject to the provisions governing guardianship (Article 155 § 2 FGC). Therefore, guardianship includes the custody of the person,

[60] G. Jędrejek, *op. cit*., pp. 1000–1001.
[61] L. Kociucki, [in:] *Kodeks rodzinny i opiekuńczy*..., p. 1672; G. Jędrejek, *op. cit*., pp. 1000–1001.
[62] M. Andrzejewski, *op. cit*., p. 250; T. Smyczyński, *op. cit.*, p. 376.
[63] M. Andrzejewski, *op. cit*., p. 250.
[64] T. Smyczyński, *op. cit*., p. 376.

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property management and representation of the ward[65]. The custody of the person covers the entirety of endeavours of the guardian about personal affairs of the ward. These affairs include: the educational duty, care for the physical and spiritual development, guidance of the ward, care for the ward's health[66]. The custody of the ward's property covers both the assets and liabilities. Therefore, the guardian's responsibilities include taking care of good condition of the ward's property[67]. The ward is represented by the guardian through guardian's own actions. This power is subject to limitation under Article 159 § 1 FGC, which stipulates that the guardian may not represent persons under his or her care in legal transactions between these persons and in legal transactions between one of these persons and the guardian or his or her spouse, lineal descendants, ancestors or siblings, unless the legal act is a gratuitous benefit for the ward. The above-mentioned rules apply accordingly in proceedings before a court or other state authority (Article 159 § 2 FGC). In the decision of 19 September 1967, the Supreme Court stated that the rationale of the provision of Article 159 FGC is to avoid adverse effects on the ward resulting from actions in which there may be a conflict of interest between the ward and the guardian. Furthermore, it is about eliminating situations where there would be a risk that the guardian is not completely objective and does not strive only towards the benefit of the ward[68].

Pursuant to Article 154 FGC, the guardian is obliged to perform the activities covered by the guardianship with due diligence, taking into account the welfare of the ward and the social interest. In the decision of the Supreme Court of 6 January 1975, it was noted that the assessment of due diligence in duties performed by the guardian solely in terms of satisfying the current needs of the minor (in particular in terms of sustenance) is insufficient. It does not take into account all aspects of the child's development and does not include all the circumstances of their situation, apart from the moments of the guardian's educational influence on the ward[69].

Upon assuming the guardianship, a number of obligations arise on the part of the guardian regarding the minor's property[70]. The responsibilities of the guardian include drafting an inventory of the ward's property and presenting it to the guardianship court (Article 160 § 1 FGC). As a rule, pursuant to Article 161 § 1 FGC the ward's valuables, securities and other documents are generally kept by the guardian. The court may, however, oblige the guardian to store them as a court

[65] J. Ignatowicz, M. Nazar, *op. cit*., p. 639.

[66] *Ibidem*, p. 640; T. Smyczyński, *op. cit*., p. 369; T. Sokołowski, *Prawo rodzinne. Zarys wykładu*, Poznań 2013, pp. 274–275; M. Andrzejewski, *op. cit.*, p. 245.

[67] T. Smyczyński, *op. cit*., p. 371.

[68] Decision of the Supreme Court of 19 September 1967, III CR 177/67, LEX No. 677.

[69] Decision of the Supreme Court of 6 January 1975, III CRN 440/74, LEX No. 7636.

[70] A. Głowacka, *Odpowiedzialność opiekuna za szkody wyrządzone małoletniemu wskutek nienależytego sprawowania opieki*, „Przegląd Sądowy" 2016, nr 1, s. 109.

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deposit, and in such a situation these items cannot be taken away without the prior permission of the guardianship court[71]. On the other hand, if the ward's cash is not needed to meet ward's legitimate needs, it should be deposited by the guardian with a banking institution (Article 161 § 2 FGC). The provision of Article 161 FGC is closely related to Article 594 CCP, according to which the minister competent for public finances, in consultation with the Minister of Justice, established by way of an regulation[72] the rules and procedure for depositing cash by guardians at banking institutions, taking into account the safeguarding of the ward's interests. In accordance with Article 174 FGC, the guardian is obliged to return, immediately upon guardian's dismissal or termination of guardianship, the ward's property managed by him or her, either to the ward's statutory representative or heirs[73].

IV.

Another element directly resulting from legal provisions and affecting the shape of the relationship of guardianship is the obligation to obtain court authorisation in all important matters concerning the minor. These issues, due to their scope, may be the subject of a separate study. In further remarks, it was signalled to a limited extent, taking into account the most important problems.

Pursuant to the provision of Article 155 § 1 FGC, the guardian takes care of the person and property of the ward, subject to the supervision by the guardianship court. In § 2 of the provision in question, the legislature indicates that the provisions on parental responsibility shall apply *mutatis mutandis* subject to separate provisions arising from the provisions on guardianship. However, there are differences between the responsibilities and rights of the guardian and parents. These include the degree of independence when making decisions regarding affairs of the child and supervision of the guardianship court[74].

The provision of Article 156 FGC provides for that the guardian should obtain permission from the guardianship court in all important matters that relate to the person or property of the minor. However, parents may not, without the permission of the guardianship court, perform activities that exceed the scope of ordinary

[71] J. Bodio, *op. cit.*, p. 976; H. Dolecki, *op. cit.*, p. 250; J. Gudowski, *op. cit*., p. 328.

[72] Regulation of the Minister of Finance of 5 June 2001 on the rules and procedure of depositing the ward's cash in a banking institution by the guardian (Journal of Laws 2001, No. 64, item 649 as amended).

[73] It is pointed to in the literature and judicature that Article 174 FGC regarding the obligation to release the ward's property is the basis for the general claim to release the property as a whole. For more details, see J. Ignatowicz, M. Nazar, *op. cit*., p. 648; resolution of the seven judges of the Supreme Court of 20 April 1964, III CO 63/63, Legalis No. 109788.

[74] M. Grudziński, *op. cit*., p. 839.

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management or consent to such activities by the child (Article 101 § 3 FGC). As it results from the cited provisions, a significant difference between exercising parental responsibility and exercising guardianship is the scope of matters for which it is necessary to obtain permission from the court. The guardian, unlike parents when exercising parental responsibility, may not take decisions on important matters concerning the ward. In addition, the guardian is obliged to obtain a permission not only in cases exceeding the scope of ordinary management of the property of the ward, but in all important matters concerning the property of the minor[75]. However, it may be difficult to identify the most important matters concerning the minor, the settlement of which requires obtaining permission from the guardianship court. These include matters that could significantly affect the education, physical and spiritual development, and the financial status of the minor[76].

The established scholarly opinion rightly emphasizes that when identifying matters as important for the minor in the sphere of property, one should refer to the category of actions exceeding the ordinary management of the child's property (Article 101 § 3 FGC). On the basis of the Family Code of 1950, the Supreme Court in its resolution of 24 June 1961 pointed to the convergence of both concepts[77]. The position presented in the resolution should also be accepted currently, under the provisions of the Family and Guardianship Code. Therefore, any activity that exceeds the scope of ordinary management of the child's property is an important matter related to the property of the child[78]. However, it is impossible to list all activities exceeding the scope of ordinary management. Inclusion in this category will depend on, among other things, the value of the asset to which the act relates, the value of the child's property as a whole or the relationship between these two values[79]. The phrases "activities that exceed the scope of ordinary management" and "important matters" are described by the established scholarly opinion as similar. However, there is a noticeable trend towards approaching the limitations on the guardian more broadly than those of parents[80]. For example, it is assumed that giving the minor more valuable assets from his or her property to freely use is an act that parents may do independently and for which the guardian should obtain permission from the court[81].

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[75] J. Gajda, *op. cit.*, p. 1071; J. Ignatowicz, M. Nazar, *op. cit*., p. 641; T. Smyczyński, *op. cit*., p. 371.

[76] M. Grudziński, *op. cit*., p. 851; A. Głowacka, *op. cit.*, p. 107.

[77] Resolution of the Supreme Court of 24 June 1961, I CO 16/61, LEX No. 105905.

[78] J. Sadomski, *op. cit*., p. 1019; J. Gajda, *op. cit.*, p. 1071.

[79] M. Grudziński, *op. cit*., p. 676; judgement of the Supreme Court of 16 November 1982, I CR 234/82, LEX No. 8486.

[80] H. Haak, A. Haak-Trzuskawska, *op. cit*., p. 90; J. Gajda, *op. cit.*, pp. 1071–1072.

[81] J. Gajda, *op. cit*., pp. 1071–1072; J. Strzebinczyk, [in:] *System Prawa Prywatnego*, p. 867; H. Haak, A. Haak-Trzuskawska, *op. cit*., p. 90.

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It is worth noting that the phrase "important matters" occurs not only in the provisions on guardianship (Article 156 FGC), but also in the provisions governing parental responsibility. Pursuant to Article 95 § 4 FGC, before making decisions on important matters relating to the person or property of the child, the parents should hear the child if the child's mental development, health condition and maturity allow this, and they should take into account his or her reasonable wish if possible. It seems obvious that such matters include activities exceeding the scope of the ordinary management of the child's property. Therefore, Article 95 § 4 FGC should be interpreted in conjunction with Article 101 § 3 FGC. One should also keep in mind the content of the provision of Article 97 § 2 *in principio* FGC, which provides for that the parents acting jointly decide on important matters of the child. The established scholarly opinion assumes that the scope of the phrases "important matters" and "significant matters" should be interpreted in the same manner[82].

Based on the above-mentioned provisions, the following should be distinguished important matters related to the minor and important matters related to the minor's property, covering activities exceeding the scope of ordinary property management. The parents jointly decide on the most important matters concerning the child's person after hearing the minor and taking into account, if possible, his or her reasonable wishes. On the other hand, property transactions exceeding the scope of ordinary management are to be carried out with the permission of the court, also having heard the child and, if possible, taking into account his or her reasonable wishes[83].

As it has already been mentioned, the expression "important matters" appears in the provisions governing both parental and guardianship responsibility. In accordance with the principles of linguistic and logical interpretation, the same meaning should be given to homonymous (the same) phrases and terms used in a legal act[84]. In view of the appropriate application of the provisions on parental responsibility to guardianship, the guardian, before carrying out activities in important matters concerning the minor or minor's property in the way parents do, should hear the ward and, if possible, take into account his or her reasonable wish (Article 95 § 4 FGC in conjunction with Article 155 § 2 FGC), but also should obtain the permission from the guardianship court to perform such activities (Article 156 FGC). In the case of guardianship exercised by both spouses, they should decide jointly about the significant matters related to the ward. In the absence of agreement between them, the guardianship court decides (Article 97 FGC in conjunction with Article 155 § 2 FGC). If the lack of agreement between the spouses is permanent and causes that the guardianship is not properly exercised, the guardianship court, pursuant to

[82] J. Gajda, *op. cit*., p. 786.
[83] *Ibidem*.
[84] T. Chauvin, T. Stawecki, P. Winczorek, *Wstęp do prawoznawstwa*, Warszawa 2018, p. 248.

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Article 168 FGC, issues appropriate orders. Moreover, if there are actual or legal obstacles resulting in the inability to exercise guardianship, or where the guardian commits acts or negligence that violates the welfare of the ward, the court, by applying Article 169 § 2 FGC, dismisses one of the guardians from this function[85].

Pursuant to Article 168 FGC, the guardian may also be required to obtain permission in certain matters that do not belong to the category of important matters within the meaning of Article 156 FGC[86]. It is one of the forms of supervision over guardianship exercised by the guardian. Furthermore, when supervising, the court learns about the guardian's activities on an ongoing basis and gives him or her guidelines and instructions (Article 165 § 1 FGC). The court may request the guardian to clarify all matters related to the guardianship and to present documents related to its exercise (Article 165 § 2 FGC). The supervision also covers activities for which the guardian has obtained the permission from the guardianship court. Therefore, the court verifies whether the conditions of the permission have been met in important matters related to the ward, and if despite the fact that it was granted, the activities were not carried out, it assesses whether the withdrawal from the implementation thereof was reasonable[87].

The provision of Article 593 CCP is connected with the substantive law norm resulting from Article 156 FGC[88]. Pursuant to it, a permission in all important matters that relate to the ward or ward's property shall be granted by the guardianship court at the guardian's request. The decision in this respect shall become effective upon its becoming final and may not be amended or repealed if, on the basis of this permit, legal effects to third parties have arisen.

The issue of guardianship of minors is rarely addressed in separate scientific publications. As it results from the review of selected issues, in the current state, in principle, there is no need to amend the provisions on the guardianship of minors. Nevertheless, due to the occurring discrepancies in interpretation, one could postulate the correction of some regulations.

A modification of the provision of Article 148 § 1a FGC, specifying persons excluded from the circle of candidates for a guardian, would consist in adding the phrase "in particular", which would give an exemplary character to the list of exclusions. It seems that the current regulation defines too narrowly the catalogue of criminal offences which rule out the possibility of assuming guardianship.

The issue of admissibility of exercising the guardianship jointly by spouses in court-imposed separation is a matter of further consideration. As a general rule, a court decision on separation results in the same effects as divorce. Therefore,

[85] L. Kociucki, [in:] *Kodeks rodzinny i opiekuńczy*..., pp. 1649–1650.
[86] M. Grudziński, *op. cit*., p. 851.
[87] H. Haak, A. Haak-Trzuskawska, *op. cit*., p. 168.
[88] J. Gudowski, *op. cit*., p. 326; A. Zieliński, *op. cit*., p. 1118.

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it can be concluded that in the case of separation the same criteria for assessing the admissibility of entrusting guardianship should be adopted as in the case of divorced spouses. However, in exceptional cases, the situation of the spouses after separation does not have to prevent them from proper exercise of the guardianship. As previously pointed out, it is about a circumstance in which, despite the decision on separation, the spouses live together and their relations are not characterised by conflict. Moreover, the exercise of guardianship by spouses in a state of actual separation, characterised by the complete or even permanent breakdown of the marriage. Such a situation may hinder or even exclude proper guardianship of minors. Therefore, it could be considered to specify the negative premises for performing the function of guardians by spouses who remain in legal and actual separation.

Although the emergence of the obligation to establish guardianship in the event of suspension of parental responsibility should not raise doubts, one could also consider supplementing the provision of Article 94 § 3 FGC with a clear provision that the guardianship shall be established both when parents are not entitled to parental responsibility and when it has been suspended.

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STRESZCZENIE

W niniejszym artykule przedstawiono wybrane zagadnienia dotyczące opieki prawnej nad małoletnim. W opracowaniu zwrócono uwagę na szczególny charakter opieki oraz cel, ze względu na który jest ustanawiana. Opieka prawna wynika ze zobowiązującego do tego tytułu prawnego i polega na sprawowaniu pieczy nad osobą, dla której została ustanowiona. Swym zakresem obejmuje pieczę nad osobą, zarząd majątkiem oraz reprezentację podopiecznego. Od ustanowienia opieki należy odróżnić ustanowienie opiekuna, będące powołaniem oznaczonej osoby do sprawowania pieczy. Przy wyborze przez sąd opiekuńczy osoby opiekuna decydujące znaczenie ma dobro dziecka. Jest to kryterium nadrzędne i wysuwa się na pierwszy plan toczącego się postępowania. Zasada dobra dziecka ma zastosowanie również w przypadku innych wydawanych przez sąd opiekuńczy rozstrzygnięć w toku trwania opieki. W artykule w szczególności omówiono zagadnienia, których rozstrzygnięcie może nasuwać wątpliwości interpretacyjne. Należą do nich m.in. wspólne sprawowanie opieki przez małżonków, katalog negatywnych przesłanek wyłączających możliwość sprawowania pieczy nad małoletnim oraz obowiązek uzyskiwania zezwolenia przez opiekuna we wszystkich ważniejszych sprawach dotyczących podopiecznego.

Słowa kluczowe: opieka prawna; opiekun; małoletni; dziecko