

DECIDING UPON THE FORM OF CONTACT WITH A CHILD
AFTER PARENTS' DIVORCE BY MEANS OF MEDIATION
IN THE POLISH LAW

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Article 58 § of the Family and Guardianship Code concerning a divorce decree imposes an obligation on court to decide upon parental authority over an underage child, parental contact with the child, and the rules of participation in the costs of educating the child. Strong conflict between the divorcing parties makes it often impossible for them to reach an agreement concerning their contact with their child. The institution of mediation may serve to settle such disputes in a consensual way.

The object if this article is to show the specificity and role of mediation on the level of deciding upon keeping contact with a child after parents get divorced. The practice of mediation in the Polish law system shows that it is both practical and important. It enables the disputants to focus on the material aspects of divorce, allowing them to settle the ways of keeping contact with a child.

1. SPECIFICITY OF FAMILY MEDIATION

The institution of mediation was introduced to the Code of Civil Procedure by the amendment as of 28th July 2005. Since the day the amendment came into force, it has been possible by court to mediate all cases which are subject to in-court settlement¹. In family law cases it is indicated that the

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object of mediation could be reconciliation of spouses, meeting the family's needs, alimony, forms of exercising parental authority, and property and affairs of spouses. In particular, it is the question of guardianship over children after parents' divorce that constitutes the crucial case where mediation could be of assistance to the family as well as the court, by reducing its workload. The legal act which indirectly indicates the need for mediation as a way of assisting parents with decisions concerning the guardianship over children is the amended Family and Guardianship Code as of 2009. Article 58 § of the Family and Guardianship Code imposes an obligation on court to decide upon parental authority over an underage child, parental contact with the child, and the rules of participation in the costs of educating the child. The obligatory part of a divorce decree was extended to adjudicate on the contact with children, which is aimed at guaranteeing continuity in relations of both parents with children after divorce. Practice shows that despite an unquestionable need to introduce solutions in the guardianship sphere after divorce, a strong conflict between parents may often hinder the consensus concerning mutual parental rules. It should be supposed that in many cases reaching such a consensus would be impossible. It is justifiable then to promote mediation so that parents could make use of it by mutual agreement before the proceedings are initiated. During the legal proceedings it is advisable for both parties to obtain information concerning mediation, and to proceed with mediation if the parties mutually agree to it. The sooner the parents start mediating the lesser the conflict, and the more probable it is to settle the dispute, the brunt of which is borne mostly by children. What is more, practice shows that participants of mediation are usually satisfied with this form of settling the dispute. Even if reaching an agreement is impossible, it is of great importance for the parties to express their stance, their feelings and objectives, and to participate actively in creating the content of the agreement.

Family mediation is “a procedure of problem solving, in which a neutral, impartial third party accompanies family members in the negotiation process, helping them to define contentious points, define their needs and interests, and if there is such a need, to reach a satisfactory and conscious

¹ M. Strzelecka, *Mediacja w procesie rozwodowym*, Edukacja Prawnicza (2013), no 1, p. 10.

agreement”². Family mediation differs from other types of mediation in civil law cases as far as the family dispute itself is different from other types of disputes concerning people not tied with family bonds. The specificity of a family dispute, especially connected with family breakup, influences the shape of mediation, requires specific knowledge and skills from a mediator. Family dispute differs from other types of disputes in intensity of emotions felt by the parties, in consequences that follow, in its multi-layered character and complexity. Another characteristic feature of family disputes is the overlapping of open and hidden, often unconscious for the parties, needs, motivations, and intentions. They form a common ground for discussion which is complex and negotiation-proof³. Additionally, each of the spouses, regardless of the fact whether he/she is the initiator of the divorce, or the passive participant, has to manage with an overwhelming feeling of loss. The breakup is accompanied with feelings of anger at the partner, reluctance, a sense of guilt. The self-esteem decreases, a fear of loneliness, of facing life on one’s own, and uncertainty about the future appear⁴.

Family mediation is specific, just as specific is the nature of relations between the parties. It is a relation which will last despite the divorce, especially if there are children involved. The role of a mediator in such mediations is especially difficult, as various dimensions of conflict overlap. The parties find it difficult to establish a hierarchy of their needs as they change depending on the stage of divorce and dispute, and depending on the intensification of emotions felt by the parties. The complexity of the situation stems also from the fact that the parties, although in conflict, need to cooperate with each other, bearing in mind their relationship of parents to their children⁵.

In divorce proceedings, mediation substituted obligatory conciliatory sittings, the aim of which was to conciliate the spouses in conflict, bearing

² A. Gójska, *Mediacja rodzinna-ogólne założenia*, in: *Mediacja w rozwiązywaniu konfliktów rodzinnych*, A. Gójska, V. Huryn (eds.), Warszawa 2007, p. 23.

³ K. Czayka-Chelmińska, M. Glegoła-Szczap, *Mediacje w sprawach rodzinnych*, in: *Mediacja*, L. Mazowiecka (ed.), Warszawa 2009, p. 272.

⁴ A. Gójska, *Mediacja w sprawach rodzinnych*, in: *Czy tylko sąd rozstrzygnie w sporze? Mediacja i sądownictwo polubowne*. A. Rękas (ed.), Warszawa 2010, p. 39.

⁵ A. Gójska, R. Boch, *Obligatoryjna mediacja w sprawach rodzinnych – refleksje praktyków*, *Mediator* (2006), no 37, p. 54.

in mind the welfare of their underage children, and social importance of the principle of marriage durability. The rules regulating the institution of obligatory conciliatory sittings were aimed at limiting the number of divorces and making marriages last in the cases of not complete or not durable sex life⁶. Mediation is an institution which allows the parties involved to reach an agreement with the assistance of an impartial mediator. Mediation may lead to reach a settlement accepted by the both parties. Its features and potential benefits make mediation a viable solution in settling family disputes full of emotional load⁷.

2. LEGAL BASIS OF FAMILY MEDIATION

Mediation in divorce cases conducted in a lawsuit is regulated especially by Article 436 and 445 of the Code of Civil Procedure⁸. Mediation in divorce cases is not obligatory, which is formulated in Article 436 § 1 of the Code of Civil Procedure, indicating that the court may refer the sides to mediation. The court initiates mediation in divorce cases if, on the basis of the given circumstances, it is sure that there are premises not to break up marriage. The circumstances may be revealed as early as the initial stages of the lawsuit or determined during court proceedings⁹. In Article 436 of the Code of Civil Procedure, the chances not to break up marriage are held as the basis for mediation by the legislator. It should be concluded that the requirement to make use of mediation in divorce cases are the objective premises that justify assumptions that the bond between spouses can be maintained. The premises may be concluded from acts and statements

⁶ U. Dąbrowska, *Mediacja w postępowaniu o orzeczenie rozwodu lub separacji*, in: *Rozwód i separacja, Komentarz*, J. Ignaczewski (ed.), Warszawa 2010, p. 261.

⁷ A. Gójska, R. Boch, *Obligatoryjna mediacja w sprawach rodzinnych*, p. 53.

⁸ According to article 183¹ there is a pretrial mediation conducted before court proceedings starts.

⁹ U. Dąbrowska, *Mediacja w postępowaniu o orzeczenie rozwodu lub separacji*, s. 262.

made by spouses¹⁰. When the court sees no chances for maintaining such a bond, it shall proceed with cognizance of the case.

According to Article 436 § 2 of the Code of Civil Procedure, divorce cases are subject to rules of mediation, which means that mediation proceedings are brought at the request of the party, included in the suit, by parties' contract, or by order of the court. The party may file a petition for mediation, which may be realized after the second party's consent to mediation, and a mediator receiving a file to conduct such proceedings. Article 183¹ § 2 of the Code of Civil Procedure allows for a concluding form of a mediation contract. Doctrine of law assumes that it should be realized by the start of mediation. If parties concluded a mediation contract before court proceedings started, according to Article 202¹ of the Code of Civil Procedure, the court is obliged to refer them to mediation over the charges made against the respondent, before starting to settle the dispute. However, practice shows that mediation is hardly ever initiated by at the request of the party, or by parties' contract. Mostly, divorce mediation is initiated by order of the court. The available literature offers a thesis that the court should refer the parties to mediation if, and only if, there were no previous attempts for mediation made on the basis of the parties' contract¹¹.

Article 436 of the Code of Civil Procedure allows the court to refer the parties to mediation, if there are chances not to break up marriage, with no limitations of 183⁸ § 1, which indicate that the court may refer the parties to mediation only before the first sitting of the court, and then only by the parties' contract. In divorce cases the reference to mediation may take place both before the first sitting is scheduled, and during the proceedings. Before the trial is scheduled, the court refers the parties to mediation if the lawsuit content, the statement of case, and other pleadings filed by the parties offer chances to keep the marriage. The court may refer the parties to mediation until the dispute is settled, whereas according to Article 455²

¹⁰ See: *Orzeczenie Sądu Najwyższego* (Supreme Court Ruling) as of 22 April 1954, I C 1257/53, OSN 1954, no 4, point 95 and *Orzeczenie Sądu Najwyższego* as of 31 December 1951, C 1803/51, OSN 1952, no 3, point 88.

¹¹ M. Pazdan, *O mediacji i projekcie jej unormowania w Polsce*, Rejent (2004), no 2, p. 18.

of the Code of Civil Procedure, it may do so until the dispute is settled by the Court of second instance.

It shall be concluded that Article 436 § 2 of the Code of Civil Procedure is *lex specialis* to Article 183¹ § 4, which entails that to refer the parties to mediation, the parties' consent is not needed¹². In such cases, the rule of voluntary character of mediation should hold, which is guaranteed by Article 183¹ § 1 the Code of Civil Procedure. Mediation, and most of all, its realization in the form of a compromise is dependent on the parties' will to participate therein. It does not lose its voluntary character even if it is initiated by the court. The parties are not obliged by a mediator to reach an agreement. Since mediation is voluntary, even though the parties are referred to mediation, they are not obliged to participate. In the case of mediation refusal, the party does not bear any trial consequences, unless it agreed to mediation beforehand¹³. Voluntary character is the basic element of mediation, which differentiates it from court proceedings and is supposed to deem it successful.

Mediation in divorce cases is not easy. The rules expressed in Article 183⁴ § 2 and § 3, which pledge the mediator to secrecy concerning all the mediation facts shall be applied. A mediator may be revealed them only under the parties' consent. Additionally, when mediation fails and leads to the court's settling of the dispute, it is ineffective for the parties to invoke settlement proposals, mutual concessions, or other statements made during mediation proceedings.

A mediation sitting is voluntary, confidential, and informalized. It shall be flexible and customized in line with the parties' needs. The mediation shall be recorded in writing, with the settlement attached, if reached. The settlement allows to make mutual concessions within the scope of the existing legal relation between the parties. The content of the settlement shall define precisely the scope of benefits and the form of their realization. It

¹² U. Dąbrowska, *Mediacja w postępowaniu o orzeczenie rozwodu lub separacji*, p. 267.

¹³ See: A. Zieliński, *Część pierwsza. Postępowanie rozpoznawcze*, in: *Kodeks postępowania cywilnego. Komentarz*, A. Zieliński (ed.), Warszawa 2010, s. 784.

shall be concluded according to the letter of law, principle of community life, and not go against justified interest of any party¹⁴.

Divorce cases show some specificity, especially owing to the specific category of subjects legible to conclude mediation, and to objectives of such mediation. In all civil cases mediation is supposed to lead to a settlement, yet in divorce cases it is supposed to reconcile spouses. Another objective of mediation is to establish the forms of keeping contact with children.

3. RULES OF REGULATING THE FORMS OF KEEPING CONTACT WITH CHILDREN

According to Article 113 § 2 of the Family and Guardianship Code forms of keeping contact with children may be as follows: spending time with children, direct communication, keeping up a correspondence, and making use of means to telecommunicate. The rule of law does not provide a closed catalogue, but rather lists the significant forms of keeping contact with children. Apart from the statutory catalogue, the legitimate party and a child have the right for information about the other person¹⁵.

According to Article 113¹ of the Family and Guardianship Code, there are three rules of regulating the forms of keeping contact with children. Among them there is priority of parental mutual consent over the rulings of guardianship court, child welfare, and respecting the reasonable wishes of a child. Mutual parental consent as the basis for regulating contact with children could be based on the concept of “educational plan”. The idea for its implementation on the Polish legal ground was met with acceptance by the doctrine.

In a case when children stay with one of their parents, the forms of keeping contact with the other parent shall be negotiated by both parents, with no intervention from guardianship court. It is the first rule of regu-

¹⁴ V. Huryn, *Prawne aspekty mediacji w sprawach rodzinnych*, in: *Mediacja w rozwiązywaniu konfliktów rodzinnych*, eds. A. Gójska, V. Huryn, Warszawa 2007, pp. 308-309.

¹⁵ J. Strzebińczyk, *Władza rodzicielska. Treść władzy rodzicielskiej*, in: *System prawa prywatnego*, vol. 12, *Prawo rodzinne i opiekuńcze*, T. Smoczyński (ed.), Warszawa 2003, p. 274.

lating the forms of having contact with children. In accordance with this rule, parents have priority in this matter, and only if they fail to reach an agreement, guardianship court shall intervene. It indicates that it is mutual parental consent, in line with child welfare, that should be given priority over guardianship institution. This rule assumes the priority of mediation proceedings over evidence proceedings¹⁶.

The requirement for parents to produce a written settlement while adjudicating upon the forms of parental authority and keeping contact with an underage child was introduced by an amendment to the Family and Guardianship Code as of 6 November 2008. The court shall acknowledge the settlement made by parents on the condition that it is not against child welfare¹⁷.

The judicial opinion of the amendment of 6 November 2008 refers to “educational plan” functioning in other legislations as a model for the introduced settlement¹⁸. The objectives of educational plan are, for instance, taking care of a child, especially in the sphere of feelings and needs changing with time, protecting a child from harmful parents’ behaviour, encouraging parents to decide about a child by referring to the provisions of the educational plan in order to avoid legal disputes and to protect child welfare¹⁹.

The plan is supposed to fulfill four basic functions. First of all, it helps the parties to regulate the post-divorce situation. The educational plan is supposed to encourage the parties to consider various possibilities of regulating the educational process of a child and to rethink the parties’ rights and obligations. Another function of the educational plan is the normative function with detailed provisions concerning parental custody over a child.

¹⁶ Ignaczewski J., *Pochodzenie dziecka i władza rodzicielska po nowelizacji. Art. 61⁹-113⁶ KRO. Komentarz*, Warszawa 2009, p. 261.

¹⁷ W. Stojanowska, *Komentarz do Rekomendacji nr R (84) 4 w sprawie odpowiedzialności rodzicielskiej*, in: *Standardy prawne Rady Europy. Teksty i komentarze*, vol. 1, M. Safjan (ed.), Warszawa 1994, pp. 202-203.

¹⁸ B. Czech, *Ustanie małżeństwa*, w: *Kodeks Rodzinny i Opiekuńczy. Komentarz*, K. Piasecki (ed.), Warszawa 2009, p 473.

¹⁹ W. Stojanowska, *Postulat przeniesienia amerykańskiej koncepcji „planu wychowawczego” rozwodzących się rodziców na grunt prawa polskiego*, *Zeszyty Prawnicze (UKSW)* 2007, no 7.2, pp. 14-15.

The educative function aims at helping parents to understand their post-divorce rights and obligations, which reflect their parental functions, even in the process of designing the plan. The preventive function is aimed at preventing conflicts between parents both during divorce proceedings and after a divorce decree, and aims at preventing a child from being involved into the parents' conflict. An analysis of potential areas of conflict is needed while designing the plan, and an agreement on future forms of dispute solving related to conflict of interest which may appear. The forms of potential dispute solving shall be decided by the parents themselves and their advocates, not by the court²⁰.

The plan shall include regulations concerning the place of child's residence, concerning the right for making decisions and forms of settling potential disputes. Forms such as mediation, counseling, or other out-of-court settlements involving specialists, legal agencies, or court, are advisable while settling disputes. Parents have a legal duty to participate in mediation. The right for making decisions shall be defined in the educational plan in relation to one or two parents as far as child's education, health, and religion are concerned, as well as other issues initiated by parents. In emergency, in health hazard, each of parents has a right to make a decision. Making decisions is conditioned by the current place of child's residence, and parental dispute is settled in mediation proceedings²¹. Decisions concerning a child may be made only by one of the parents or by both parents under mutual agreement. Mutual decision making will be defined in the educational plan only if parents show the willingness and ability to cooperate within the scope provided by the rules of the plan, and their place of living allows them to contact each other regularly²².

Elements of the educational plan shall reflect the structure of parental authority. They could be divided into two categories: obligatory and optional elements²³. Obligatory elements would be taken into consideration in every educational plan if it was applicable to a given case. Should they be

²⁰ Ibid, pp. 19-20.

²¹ T. Sokołowski, *Skutki prawne rozwodu*, Poznań 1996, p. 78.

²² W. Stojanowska, *Postulat przeniesienia amerykańskiej koncepcji „planu wychowawczego”*, p. 15.

²³ T. Sokołowski, *Skutki prawne rozwodu*, p. 96.

not regulated by the parents' agreement, the court would have to regulate that matter. Regulation would boil down to accepting or modifying the suggestions agreed by parents. The reasons for a lack of regulations on obligatory elements, for instance due to impossibility of their realization, should be specified in the judicial opinion. Optional elements, however, would be decided by parents and only in the case of no decision being made, the court would be obliged to regulate them or not to examine them further. In this matter parents would have relative freedom to choose, the court would only supervise if the parental agreements are in accordance with the law²⁴.

The educational plan shall be concluded in the form of a questionnaire on the basis of which the parties could, especially with the involvement of attorneys and other specialists, discuss the selected elements of parental authority and forms of dispute settling. A special emphasis should be put in the educational plan on the obligation to point out institutions of assistance in order to settle the disputes²⁵.

Another rule taken into account when regulating contacts with children is "child welfare". The concept of "child welfare", determined by the binding Polish law, is tantamount to "superior child's interest" in accordance with the provisions of the Convention on the Rights of the Child. The provisions of the Convention may be used to define the concept of child welfare in a more precise way. Of significance are especially those provisions of the Convention which indicate that a child, in order to develop fully and harmoniously, shall be brought up in a family environment, in the atmosphere of happiness, love, and understanding. A child should be fully prepared to live in a society as an individually shaped person, brought up in the spirit of peace, dignity, tolerance, liberty, equality, and solidarity with

²⁴ Ibid, pp. 96-99. The author is of the opinion that the structure of the educational plan shall acknowledge all the attributes of parental authority, which include also being in charge of child's property, and questions of child representation. According to the author, an obligatory element in the educational plan is to show forms of dispute settling in such a way that it does not lead to court proceedings. In particular, specialist institutions and other subjects shall be indicated so that they could perform a counseling or mediating function.

²⁵ W. Stojanowska, *Ochrona dziecka przed negatywnymi skutkami konfliktu między jego rodzicami*, Warszawa 1997, pp. 106-107.

the reservation that both tradition and cultural values of each nation should be taken into account to protect a child and guarantee his/her harmonious development. Article 5 of the Convention suggests that taking care of a child should be fulfilled in a way suitable to his/her abilities, providing the appropriate conditions to live and to develop oneself²⁶.

The court, adjudicating on the contact with children shall take child welfare into account and give it priority over parent welfare²⁷. Such a stance of the Supreme Court, although expressed in the context of parental authority, could be also applied to the cases, the subject of which is contact with children²⁸. It is in accordance with the premise that child welfare is in full harmony with parents' interests. However, there may be discrepancies between these values. Although the basic premise of family law is the pursuit to provide child welfare, it cannot be synonymous to the disregard of parents' interests. The premise entails that parents' interests could not be decisive to settle a dispute when its lack of consideration is the necessary condition to protect child welfare. However, if child welfare could be reconciled with parents' interests, even under the premise that the settlement could have some temporary negative consequences for a child, the court should acknowledge parents' interests²⁹. Parents' interests should not be acknowledged if they cannot be reconciled with child welfare³⁰.

The amendment of 6 November 2008 accepted the need for a reasonable partnership of parents and children in their mutual relations. This premise is in line with the rule proclaiming the acknowledgment of reasonable wishes of a child when adjudicating on the forms of having contact with a child. The confirmation of this rule is found in Article 72 act 3 of the

²⁶ See: Resolution of the Supreme Court as of 12 June 1992, III CZP 48/92, OSNC 1992, No 10, point 179.

²⁷ See: Ruling of the Supreme Court as of 25 August 1981, III CRN 155/81, not published.

²⁸ J. Ignaczewski, *Kontakty z dzieckiem. B. Część opisowa. Zasady regulowania kontaktów z dziećmi*, in: *Władza rodzicielska i kontakty z dzieckiem*, J. Ignaczewski (ed.), Warszawa 2010, p. 206.

²⁹ See: Ruling of the Supreme Court as of 5 May 2000, II CKN 765/00, not published.

³⁰ Resolution of the Supreme Court as of 9 June 1976, III CZP 46/75, OSNC 1976, No 9, point 184.

Constitution of the Republic of Poland, according to which, during the court proceedings aimed to establish the child's rights, the public authorities and child's guardians are supposed to hear and fulfill child's wishes³¹. It should be remembered that a child is an active subject cooperating with parents exercising their authority. On the one hand, according to Article 95 § 4 of the Family and Guardianship Code, parents should listen to a child, as long as the child's mentality, health and maturity allow it, and acknowledge child's reasonable wishes, before making decisions on significant matters concerning the child and his/her property. On the other hand, Article 95 § 2 of the Family and Guardianship Code stipulates that children, in cases where they can make decisions on their own and issue declarations of intent and have limited competency, should follow parental opinions and recommendations, for the sake of their welfare. Completion to such cooperation is the respect for child's dignity and rights, and mutual respect of both children and parents, which is indicated by Article 87 of the Family and Guardianship Code. The natural consequence of such a premise on mutual partnership is the rule of Article 113¹ § 1 of the Family and Guardianship Code, which adjudicates on acknowledging child's reasonable wishes when deciding upon the forms of having contact with a child. It is a directive for parents as well as the court³².

To conclude, it should be highlighted that keeping contact with children is both the right and obligation of parents and also children. Regulation of the forms of keeping contact with children is conducted in line with certain rules. The priority over court ruling is given to parents' settlement concerning convenient forms of contact. However, if it is against child welfare or parents cannot reach an agreement, it is the court that settles the dispute. In the first place, the court takes child welfare into account. What is more,

³¹ The Code of Civil Procedure, pursuant to the amendment as of 6 November 2008, Article 216¹ was added, according to which the court shall hear a child in a given case as long as the child's mentality, health and maturity allow it. Hearing is conducted out of board room. What is more, the court, suitably to circumstances and child's mentality, health, and maturity may acknowledge child's opinions and reasonable wishes. The amendment also brought changes to Article 576 § 2 of the Code of Civil Procedure. Its current form highlights the obligation to hear an underage child and to acknowledge his/her reasonable wishes in the cases concerning his/her person and property.

³² J. Ignaczewski, *Kontakty z dzieckiem. B. Część opisowa, Zasady*, p. 207.

if the child's mentality, health and maturity allow it, a child's reasonable wishes should be acknowledged.

SUMMARY

Mediation is an institution introduced to the Polish Code of Civil Procedure by the law of the amendment of 28 July 2005. As an informalized institution, aiming at conciliatory settlement of a dispute, it is applicable in a wide category of cases. It can have a significant role in settling family disputes, giving divorcing parents a possibility to regulate and choose the forms of keeping contact with children.

